UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 2:19-cv-00037

BILLY JOE BREWSTER, JR.; LARRY E. NORMAN; and THOMAS L. HILL, on behalf of themselves and others similarly situated.	)
Plaintiffs,	)
v.	)
PHILLIP E. BERGER, in his official capacity as Speaker Pro Tempore of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; DAMON CIRCOSTA, STELLA ANDERSON, JEFF CARMON III, DAVID C. BLACK, KEN RAYMOND and KAREN BRINSON BELL, in their official capacities as officers or members of the North Carolina State Board of Elections.	)
Defendants.	)

STATE BOARD'S OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Defendants Damon Circosta, Stella E. Anderson, David C. Black, Ken Raymond, and Jefferson Carmon III, in their official capacities as members of the North Carolina State Board of Elections, and Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections (collectively, the State Board), oppose Plaintiffs' motion for preliminary injunction asking this Court to strike down the injunction entered in the case *Harper v. Lewis*, No. 19 CVS 012667 by the Superior Court of Wake County and require the State Board to administer the 2020 elections under the 2016 congressional maps.

INTRODUCTION

Plaintiffs ask this Court to effectively overturn a state-court order involving the state constitutional rights of millions of North Carolina voters because that state-court order would inconvenience them. But inconvenience alone does not give rise to constitutional harm. Nor does it justify the extraordinary remedy that Plaintiffs seek here. In fact, Supreme Court precedent squarely forecloses Plaintiffs' federal collateral attack against state adjudication of election administration procedures. *Growe v. Emison*, 507 U.S. 25 (1993). Adherence to this precedent is especially important where, as here, the remedy Plaintiffs seek would lead to greater public confusion and hinder the State Board's ability to educate voters and fairly and efficiently administer the 2020 elections.

In September, a group of individual voters (the *Harper* plaintiffs) brought a challenge in state court based on the North Carolina Constitution against the use in the 2020 elections of the congressional redistricting plan passed in 2016. A group of current congressional representatives later intervened as defendants in the state-court action. On October 28, after briefing and a hearing on the *Harper* plaintiffs' motion, the state court issued an injunction against the use of

the 2016 Plan in the 2020 elections. The General Assembly has since enacted new congressional districts in response to the state-court injunction.

Three days later, a group of voters and a potential congressional candidate filed this lawsuit, alleging violations of the U.S. Constitution and asking this Court to undo the state-court order and require that the 2016 Plan, which the state court has held likely violates the North Carolina Constitution, nevertheless be used in the 2020 elections. Even though the candidate filing period has not even begun, Plaintiffs claim that their rights will be infringed if any plan other than the 2016 Plan is used to administer the 2020 elections.

This Court should deny Plaintiffs' extraordinary motion. First, this Court should decline to exercise jurisdiction over this matter. The state-court proceedings involve the same issues raised by substantially similar parties and are in a much more procedurally advanced than this case. This case also presents the potential for competing and contradictory findings and rulings, resulting in greater confusion as the State Board attempts to prepare to administer the 2020 elections.

But even if this Court were to exercise jurisdiction over this case, it should still deny Plaintiffs' motion. Neither the Supreme Court nor other federal courts require that the court turn a blind eye to constitutional violations simply because there is an upcoming election. Indeed, the history of the 2016 Plan itself proves this—the 2016 Plan was finalized *after ballots had already been printed using a constitutionally invalid plan*. And yet, federal courts—including the U.S. Supreme Court—required the use of the 2016 Plan after the campaign season was already underway because the importance of correcting constitutional violations outweighed the inconvenience of plans changing.

Nor have Plaintiffs provided sufficient evidence that the state court's adjudication of state constitutional claims will significantly impact Plaintiffs here or North Carolina voters more broadly. The State Board has consistently informed the state court of the parameters for administration of elections and the state court's orders have taken these parameters into account. On the other hand, Plaintiffs' claims of voter confusion and administration difficulty resulting from the state court's adjudication are based on assumptions.

Moreover, while there may be some inconvenience to Plaintiffs if a new plan were enacted, such inconvenience is greatly outweighed by the harm that would result by this Court's intervention in the state-court proceedings. The state-court proceedings involve important issues of North Carolina constitutional law that affect every voter in North Carolina. In addition, duplicative and contradictory orders from this state's federal and state courts will likely result in the same confusion Plaintiffs here claim to want to avoid.

For all of these reasons, this Court should stay its hand and deny Plaintiffs' motion for preliminary injunction.

STATEMENT OF FACTS

This case is a collateral attack against a state-court proceeding.

On September 27, a group of voters filed a complaint in the Superior Court of Wake County seeking a declaration that the 2016 Plan violates the rights of the voters under various provisions of the North Carolina Constitution. Ex. A at 1-2. The *Harper* plaintiffs then moved for a preliminary injunction seeking to bar the State Board from administering the 2020 elections using the 2016 Plan. *Id.* at 2. On October 9, three incumbent congressional representatives and prospective candidates filed a motion to intervene to defend the 2016 Plan, and that motion was granted. *Id.* at 2, 3. In their responses to the *Harper* plaintiffs' motion for preliminary

injunction, the Legislative Defendants and Intervenor Defendants opposed the motion on, *inter alia*, two grounds: (1) that *Purcell v. Gonzales*, 549 U.S 1 (2006), prohibits suspension of the use of the 2016 Plan because any changes to election procedures at this time would lead to voter confusion and the inefficient administration of elections; and (2) that their constitutional rights as the General Assembly, voters, and congressional candidates would be infringed as a result of any injunction against the use of the 2016 Plan. *Harper v. Lewis*, No. 19-cv-452, Dkt. 32 (E.D.N.C.); Ex. B.

On October 28, the state court granted the *Harper* plaintiffs' motion and enjoined the use of the 2016 Plan in the 2020 elections. [D.E. 1-1 at 18.] The state court held that the "Plaintiffs' and all North Carolinians' fundamental rights guaranteed by the North Carolina Constitution will be irreparably lost . . . if the injunction is not granted." "Simply put, the people of our State will lose the opportunity to participate in congressional districts conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. The Court finds that this specific harm to Plaintiffs absent issuance of the injunction outweighs the potential harm to Legislative Defendants if the injunction is granted." Ex. A at 15.

Particularly, in response to Legislative Defendants' and Intervenor Defendants' argument that "the issuance of the injunction will result in disruption, confusion, and uncertainty in the electoral process," the court held that "such a proffered harm does not outweigh the specific harm to Plaintiffs form the irreparable loss of their fundamental rights guaranteed by the North Carolina Constitution." *Id.* Finally, the state court invited the General Assembly to remedy the 2016 Plan's likely constitutional defects by enacting new districts. *Id.* at 17.

On November 15, the General Assembly enacted new congressional districts (2019 Plan). N.C. Sess. Law 2019-249. Concurrently, the parties have briefed motions for summary

judgment and those motions are scheduled to be heard on December 2, along with the *Harper* plaintiffs' objections to the 2019 Plan. Ex. C.

Three days after the state court issued its injunction, Plaintiffs in this case—individual voters and one prospective congressional candidate—filed this action. They raise allegations that any change to the 2016 Plan at this point will violate their constitutional rights by sowing confusion in the 2020 congressional elections [D.E. 23 at 1]—the same arguments raised by the Legislative Defendants and the Intervenor Defendants in the state-court case. Plaintiffs in this case also moved for a preliminary injunction, asking this Court to enjoin any changes to the 2016 Plan, [D.E. 22], which, at this point, would require the Court to (1) enjoin Session Law 2019-246 that enacted the 2019 Plan, (2) overrule the state court's injunction barring the use of the 2016 Plan, and (3) order the State Board to administer the 2020 elections under the 2016 Plan.

LEGAL STANDARD

"A preliminary injunction is 'an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief' and may never be awarded 'as of right.'" *Mt. Valley Pipeline, LLC v. W. Pocahontas Props. Ltd. P'ship*, 918 F.3d 353, 366 (4th Cir. 2019) (citing *Winter v. NRDC, Inc.*, 555 U.S. 7 at 22, 24 (2008)). The test for the issuance of a preliminary injunction turns on the balance of the four *Winter* factors: likelihood of success on the merits, irreparable harm in the absence of an injunction, equities to the parties, and the public interest. *Winter*, 555 U.S. at 20. A plaintiff must successfully show that she is likely to succeed on the merits, "regardless of whether the balance of hardships weighs in his favor." *The Real Truth About Obama, Inc. v. F.E.C.*, 575 F.3d 342, 346 (4th Cir. 2010), *vacated on other grounds*, 559 U.S. 1089 (2010). Plaintiffs bear the burden of proof on each factor. *Winter*, 555 U.S. at 20.

ARGUMENT

I. Plaintiffs Are Unlikely to Succeed in Their Collateral Attack on the State Court Injunction.

Plaintiffs' claim hinges on one premise: That this Court should strike down an injunction ordered by a state court because the United States Supreme Court forbids "last minute changes [to elections administration] . . . regardless of what the underlying merits of the election procedures used in the election might be." [D.E. 23 at 14.] This premise fails on two grounds: (1) federal district courts ordinarily should not interfere with state-court decisions on redistricting and (2) neither the Supreme Court, nor other federal courts, have ever articulated a rule that requires the continued administration of elections laws that would otherwise violate the constitutional rights of voters.

A. This Court Should Not Strike Down the Injunction Ordered by the State Court.

Plaintiffs invite this Court to enjoin state-court proceedings by reversing an injunction entered by the state court and ordering the State Board to administer the 2020 elections under the congressional map that the state court has enjoined. This Court should not interfere with the state-court proceedings in this manner.

1. This Court should "stay its hand" and decline to interfere in the state-court proceedings.

Because the state court is already adjudicating the *Harper* plaintiffs' claims, as well as the same substantive challenges that Plaintiffs in this case bring, this Court should "stay its hand" and allow the state court to fully adjudicate the state-constitutional claims in *Harper*. *Scott v. Germano*, 381 U.S. 407, 409 (1965). This restraint is particularly important where, as here, redistricting claims—which are traditionally the province of states—are at issue. *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Mahoney v. Burkhardt*, 299 F. Supp. 787, 789 (D.N.J.

1969) (holding that "abstention under general equitable considerations in this instance is truly in the interest of all the people" because the state court had already begun adjudicating the constitutionality of the state's congressional apportionment); *Otto v. Kusper*, No. 81 C 4103, 1981 U.S. Dist. LEXIS 18449, at *4-5 (N.D. Ill. Aug. 21, 1981) (holding that the state-court challenge to congressional districts should be permitted to proceed without interference from the federal court).

In *Growe*, a group of voters filed a lawsuit in state court alleging that the state's congressional and legislative districts were malapportioned. 507 U.S. at 27. While this case made its way through the state courts, a second group of plaintiffs filed an action in federal court against the same defendants, raising substantially the same challenges to the redistricting plan. *Id.* at 28. The state court determined that the challenged plan was unconstitutional and indicated that it would release a final remedial redistricting plan. *Id.* at 29-30. But before it did so, the federal court stayed all proceedings in state court and enjoined the parties from taking any action to implement a different plan. *Id.* at 30. The Supreme Court held that the federal court was wrong to interfere in the state-court proceeding because in "the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Id.* at 33. Because "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court," "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34 (internal citations and quotation marks omitted). The Court explained that the state "can have

only one set of legislative districts, and the primacy of the State in designing those districts compels a federal court to defer." *Id.* at 35.

Growe is directly on point. Like the federal plaintiffs in *Growe*, Plaintiffs here ask this Court to stay all proceedings in state court by enjoining Defendants from taking any action to implement any plan other than the 2016 Plan. And like in *Growe*, here a North Carolina court "has begun to address" a redistricting dispute before the federal court was invited to intervene. *Id*. at 33. In fact, the North Carolina legislature has also been involved in remedying the dispute by enacting new districts. Under *Growe*, this Court "must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it," which is precisely what Plaintiffs invite here. *Id.* at 34.

Because the state court is in the middle of adjudicating the *Harper* plaintiffs' constitutional challenge to the 2016 Plan, this Court should defer to the state court to determine the appropriate redistricting plan for the 2020 elections.

2. Efficient judicial administration and conservation of judicial resources counsel in favor of this Court declining to enjoin the state-court proceedings.

Federal courts also abstain from exercising jurisdiction over cases in deference to parallel state-court proceedings where abstention will promote judicial administration, conserve judicial resources, and provide comprehensive disposition of litigation. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). While abstention "is the exception, not the rule," and "federal courts have a virtually unflagging obligation to exercise the jurisdiction given them," *New Beckley Mining Corp. v. Intl. Union*, 946 F.2d 1072, 1073 (4th Cir. 1991), where there is a declaratory-judgment action in which a potential parallel state-court action already exists, federal courts will more likely abstain from adjudication. *Hartford Fire*

Ins. Co. v. Kinston Plumbing & Heating Co., Inc., 868 F. Supp. 120, 121-22 (E.D.N.C. 1994). This case presents precisely one of those instances in which this Court should abstain from adjudicating a declaratory-judgment action in which there is a parallel state-court proceeding.

Determining whether abstention is warranted under *Colorado River* requires a two-step process. First, the concurrent state and federal actions must actually be parallel. *Vulcan Chem. Techs. Inc. v. Barker*, 297 F.3d 332, 341 (4th Cir. 2002). Suits are parallel if "substantially the same parties litigate substantially the same issues in different forums." *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 232 (4th Cir. 2000).

The parties in this action raise the same issues as the parties in the state-court action. In the state-court action, the *Harper* plaintiffs challenge the constitutionality of the 2016 Plan and raise only state constitutional issues. In defending the 2016 Plan, the Legislative Defendants argued that *Purcell* precluded the court from implementing a new redistricting plan at that time. *Harper v. Lewis*, No. 19-cv-00452, Dkt. 32 at 19-23 (E.D.N.C.). This is, in fact, the same argument that Plaintiffs in this case make to collaterally attack the state-court injunction. To the extent that Plaintiffs in this case characterize their *Purcell* challenge as allegations that the state-court case infringes on the rights of voters and candidates, this was also an argument that was raised by the Legislative Defendants and Intervenor Defendants—and considered and rejected by the state court—in the state-court proceeding. *Id.* at 2 ("It is, quite simply, impossible through a judicial remedial process for a new plan to be created, enacted, approved, and implemented before candidate qualification begins, and the campaign season is already underway. And, because the harms to the Defendants (and all congressional candidates and voters, alike) overwhelmingly outweigh the harm to Plaintiffs, the equities alone bar relief."); Ex. C at 7-8, 28-

31 (arguing that striking down the 2016 Plan will substantially harm candidates and citizens' rights to vote for candidates of their choosing).

Plaintiffs in this action have merely converted these defenses into claims in this federal action. The parties in the state-court action are therefore litigating the same issues in state court as they would be asked to litigate in this matter. And, in fact, the defendants in the state court action have already raised the same arguments raised by Plaintiffs here—only to have the state court consider and reject them. *See supra* pp. 3-4.

The State Board acknowledges that Plaintiffs here are not participants in the state-court litigation. But this fact does not defeat the parallelism between the state-court action and this case. While courts in this Circuit have "strictly construed the requirement of parallel federal and state suits, requiring that the parties involved be almost identical," *Chase Brexton Health Services v. Maryland*, 411 F.3d 457, 464 (4th Cir. 2005), courts have not interpreted this to require total and complete overlap. Indeed, "[i]dentical parties are not required in order for the two actions to be parallel. *Flanders Filters, Inc. v. Intel Corp.*, 93 F. Supp. 2d 669, 672 (E.D.N.C. 2000); *see also Talecris Plasma Res., Inc. v. G&M Crandall Family Ltd. P'ship*, No. 5:08-cv-583-FL, 2009 U.S. Dist. LEXIS 78911, at *8 (E.D.N.C. July 27, 2009) (finding sufficiently similar parties when interests are aligned); *Poston v. John Bell Co. Inc.*, No. 5:07-cv-00757, 2008 U.S. Dist. LEXIS 65706, at *9-10 (S.D.W.V. Aug. 27, 2008) (finding that parties are sufficiently similar when the unique federal party could have intervened in the state-court action and when the unique federal party's claims are raised in both proceedings); *Hunt v. Mortg. Elec. Registration*, 522 F. Supp. 2d 749, 753 (D.S.C. 2007) (finding sufficiently similar parties when all of the factual allegations and claims in the federal-court lawsuit were raised in state

court); *Beck v. CKD Praha Holding, A.S.*, 999 F. Supp. 652, 656 (D. Md. 1998) (finding that the proceedings were parallel because the defendants in each lawsuit were substantially the same).

Moreover, federal courts are accorded "a great deal of latitude and discretion in determining whether one action is duplicative of another, but generally, a suit is duplicative if the claims, parties, and available relief do not significantly differ between the two actions." *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993). If the parties "represent the same interests," the actions may be duplicative. *Rivera v. Bowen*, 664 F. Supp. 708, 710 (S.D.N.Y. 1987) (citing *The Haytian Republic*, 154 U.S. 118, 124 (1894)). As long as the "same rights [are] asserted and the same relief prayed for," with the relief "founded upon the same facts," a federal court may find that an action is parallel to a state-court action. *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F. Supp. 654, 664 (S.D.N.Y. 1997).

Plaintiffs in this case have the same interests as the Legislative Defendants and Intervenor Defendants in the state-court case. They are voters and candidates who claim that any changes to the 2016 Plan will violate their constitutional rights and wreak havoc to the orderly administration of elections. This is precisely the same arguments that are made by the Legislative Defendants and Intervenor Defendants in the state-court case. *See supra* 3-4.

Moreover, the circumstances of this case give this Court practical reasons to not require total overlap of parties. This action involves the prospect of the courts of different sovereigns providing conflicting interpretations of the North Carolina Constitution as well conflicting instructions to an agency of the State on the conduct of upcoming statewide elections. Many of the cases in this Circuit requiring complete overlap of parties, on the other hand, involved private litigants and circumstances where the prospect of parallel litigation, even arriving at conflicting results, would have limited consequence. Here, however, federal-court intervention would have

far-reaching and immediate implications that would not just conflict with ongoing state-court proceedings, but would completely nullify them. Such a result would also contradict the Supreme Court's direction to district courts earlier this year to not intervene in partisan gerrymandering claims. *Rucho v. Common Cause*, 139 S. Ct. 2482, 2506-07 (2019) ("We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts."). The Court held, instead, that those claims properly belong in state courts. *Id.* at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for *state courts to apply*.") (emphasis added). Accordingly, while the parties do not overlap exactly, this case and the state-court case are parallel actions.

Since the state-court and federal-court actions are parallel, the court must next consider six factors in determining whether to abstain from the current lawsuit: (1) whether the subject matter of the litigation involves property on which the first court may assume jurisdiction to the exclusion of others, (2) whether the federal forum is an inconvenient one, (3) the desirability to avoid piecemeal litigation, (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action, (5) whether state law or federal law provides the rule of decision on the merits, and (6) the adequacy of the state proceeding to protect the parties' rights. *Vulcan Chem. Techs. Inc.*, 297 F.3d at 341 (4th Cir. 2002). These factors are not a checklist, but matters to be weighed by the court in considering whether to abstain. *Id.*

While this Court is not inconvenient to the parties and neither action involves property, the other factors weigh in favor of this Court's abstention from this action. The *Harper* plaintiffs have asked the state court to strike down the 2016 Plan as an unconstitutional partisan gerrymander under the North Carolina Constitution and to require the use of a new plan that adheres to the state's constitutional principles in the 2020 elections. Plaintiffs in this case ask

this Court to do the exact opposite: *require* that the State Board administer the 2020 elections under the 2016 Plan. This, alone, results in potential for conflicting injunctions and declarations from the courts. Moreover, because the state-court case was filed nearly two months before this case was filed, the state-court action has advanced considerably. On October 28, the state court issued an injunction forbidding the State Board from administering the 2020 election under the 2016 Plan. This case was filed on October 31, with an amended complaint filed on November 15. Moreover, motions for summary judgment have been briefed in the state court action and the state court intends to have a hearing on those motions on December 2. And finally, the General Assembly has passed new remedial plans for use in the 2020 elections. The *Harper* plaintiffs have moved the state court to review these plans to ensure that they are constitutionally compliant. The state court has scheduled that motion to be heard as well on December 2. For this Court to consider intervening now—after the state court has already enjoined the use of the 2016 Plan, the General Assembly has already passed remedial plans, motions for summary judgment have been briefed, and the state court has scheduled a hearing on both the remedial plans and motions for summary judgment—would require piecemeal litigation.

In addition, given the subject matter, it is most appropriate for this Court to abstain and allow the state court to adjudicate the claims raised in both actions. The *Harper* plaintiffs raise constitutional claims under the North Carolina Constitution—claims which state courts are uniquely suited to adjudicate. *See, e.g.*, *Kelbe Corp. v. Hall*, 789 F. Supp. 241, 242-43 (S.D. Ohio 1992) (holding that abstention is appropriate because a challenge to an election is "per se a matter that should be considered by state courts."). Plaintiffs here raise federal constitutional claims that are being raised and have been raised by defendants in the state-court action and that the state court is willing and able to adjudicate. *See supra* 3-4. Therefore, it is preferable for the

state court to continue to adjudicate the federal-law arguments raised by Plaintiffs here within the context of the state constitutional challenge.

To avoid duplicative, contradictory, and piecemeal litigation and to allow the state court to continue to exercise its unique expertise over issues involving state constitutional law, this Court should abstain from adjudicating the claims raised by Plaintiffs here.

B. Federal Courts Do Not Require That Elections Be Administered Under Unconstitutional Maps.

Even if this Court were to determine that it should review the state-court injunction, Plaintiffs still would not prevail. Plaintiffs first suggest that it is too late for the state court to consider the challenge under the North Carolina Constitution because it would disrupt the election process and promote too much voter confusion. But the facts and evidence available squarely contradict this assumption. And even if this Court were to give credence to Plaintiffs' assertion that any remedial orders by the state court would be late-breaking, Plaintiffs' reliance on *Purcell v. Gonzales*, 549 U.S. 1 (2006), is misplaced.

1. There Is No Substantial Risk of Voter Confusion or Election Disruption.

Plaintiffs insist that "it is abundantly clear" that the state court's adjudication of challenges to the 2016 Plan under the North Carolina Constitution will cause "disruption to the orderly election process." [D.E. 23 at 14.] They recount harms that include depressed voter turnout, voter confusion, and candidate confusion, all affecting the ability of the State to administer a "transparent and efficient election." *Id.* at 8.

Plaintiffs' assumptions are unfounded.

The State Board is a bipartisan body comprised of five members that is entrusted with administering elections in North Carolina. N.C. Gen. Stat. §§ 163-19, -22.[1] As part of that duty, the State Board implements the operative redistricting plan and works with all of North Carolina's county boards of elections to prepare and proof ballots, assign voters to the correct districts in the elections IT system for the distribution of ballots, and administer the election. *See* Ex. D at 1-2. In light of the important responsibility the State Board has in ensuring the fair administration of elections, the State Board's interests in both the state-court matter and this case are in ensuring that every North Carolinian who is eligible to vote and chooses to vote has her vote counted. The State Board also has unique expertise in knowing how best to administer fair and efficient elections.

It is this unique expertise that federal courts routinely rely on when deciding whether changes to election administration would take place too late to avoid confusion and disruption. In *Personhuballah v. Alcorn*, the Virginia Board of Elections explained to the court that it could not "provide a precise date at which implementation [of a new redistricting plan] would be impossible," but that "it would be critical to have a plan in place by late March," even though candidates were scheduled to file their candidacy forms on January 2 of that year. 155 F. Supp. 3d 552, 557 (E.D.V.A. 2016). This representation informed the court's decision to adopt a remedial redistricting plan for Virginia's congressional districts in advance of the Virginia Board

[1] Plaintiffs have, in their opposition to the *Harper* plaintiffs' motion to intervene, asserted that the Board has taken "partisan" positions in the state-court matter, to the detriment of "bipartisan or nonpartisan administration of election law in the state." [D.E. 34 at 4.] As counsel to Plaintiffs, who used to serve on the Board, well knows, this is a baseless accusation. Plaintiffs appear to confuse partisanship with the Board's right and obligation, as agents of the State, to take litigation positions consistent with the law—which is what the State Board did in the state-court matter. That Plaintiffs view the State Board's articulation of state law as "partisan" is unfortunate.

of Elections's March deadline. *Id.* at 565. Similarly, in *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, the Second Circuit turned to the County and its representations of the feasibility of administering new election procedures when it ordered a special primary that would implement an approved, revised redistricting plan. 357 F.3d 260, 263 (2d Cir. 2004).

The state court in *Harper* similarly relied on the State Board's representations about the feasibility of administering new election procedures when it entered the preliminary injunction. In *Harper*, the state court considered an affidavit of the State Board's Executive Director, Karen Brinson Bell, which had been filed months earlier in another state-court case challenging legislative districts. Ex. D. Bell informed the state court that the State Board expected it would need finality on the redistricting maps by December 15, 2019, at the latest, if the State Board were to administer primary elections using those districts in March 2020. *Id.* at ¶ 10. Bell also informed the state court about other timing-related parameters that would have to be taken into account if the court were to order a separate or later primary. *Id.* at ¶¶ 14-18. Taking this information into account, [D.E. 1-1 at 2], the state court enjoined the use of the 2016 Plan in the 2020 congressional elections and retained jurisdiction to move the primary date for the congressional elections if it became necessary to do so.[2] Ex. A at 18.

[2] It did so, however, only after observing that any disruptions that would result from the adjustment of the schedule for the 2020 congressional primary elections "need not occur" if the General Assembly enacted a new plan as it had "recently shown it has the capacity [to do] in a short amount of time in a transparent and bipartisan manner," that would be approved by the Court and "are more likely to achieve the constitutional objective of allowing for elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* at 17.

Moreover, this State's past experience in election administration bears this out. Indeed, the General Assembly continued to make changes to the original redistricting plan this decade as late as November 2011. *See, e.g.*, N.C. Sess. Laws 2011-411, 2011-416. These changes were made absent litigation challenges—during regular redistricting after the decennial census, the General Assembly had not finalized the 2011 redistricting plans until at least November 2011. And the legislature enacted the 2016 Plan on February 19, 2016, following the successful challenge of the original plan, and that map was used in the 2016 primary and general election. Plaintiffs provide no evidence for why changes made to the 2016 Plan now to correct constitutional violations would engender confusion that did not result in 2012 or 2016.

The State Board has informed the state court, based on its expertise in administering elections, of the parameters that would, in its estimation, have to be met to fairly and efficiently administer the 2020 elections. The state court, in turn—and like many courts before it—has relied on the information that the State Court has provided to adjudicate the constitutional claims before it in a manner that will not result in substantial voter or candidate confusion and will ensure the fair and efficient administration of elections. Plaintiffs' *Purcell*-related objections are therefore unfounded.

2. *Purcell* Does Not Require This Court's Intervention Here.

Plaintiffs assert that the Supreme Court's decision in *Purcell v. Gonzales*, 549 U.S. 1 (2006), prohibits the state court from enjoining the use of the unconstitutional 2016 congressional map and requiring that the State Board administer elections under a new, constitutionally compliant map. [D.E. 23 at 6, 14 n.1.] *Purcell* does no such thing. Nor do Plaintiffs cite any federal case that supports their position. In fact, federal courts have routinely

entertained constitutional challenges to elections-related laws specifically because of the weighty interests at stake for voters.

First, Plaintiffs misread *Purcell*. In *Purcell*, the Supreme Court was not articulating a per se bar against late-breaking changes to elections procedures. Rather, *Purcell* is a case about what is required to effect late-breaking changes through judicial actions. In *Purcell*, the Supreme Court reviewed the Ninth Circuit's divided "four-sentence order enjoining Arizona from enforcing Proposition 200's provisions pending disposition, after full briefing, of the appeals of the denial of a preliminary injunction." *Purcell v. Gonzales*, 549 U.S. 1, 3 (2006). The Court noted that the Ninth Circuit "offered no explanation or justification for its order. Four days later, the court denied a motion for reconsideration. The order denying the motion likewise gave no rationale for the court's decision." *Id.*

Plaintiffs' citation to the Court's notice of the "impending election" and the "necessity for clear guidance" is taken out-of-context. Plaintiffs fail to note the Court's explicit observation that there "has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and *our conclusion regarding the Court of Appeals' issuance of the order*, we vacate the order of the Court of Appeals." *Id.* (emphasis added).

The Court never suggested in *Purcell* that an impending election, alone, would provide a federal court with sufficient grounds to ignore constitutional violations. And the proof is in the pudding: The Court has cited to *Purcell* in a handful of other cases and in none does the Court cite *Purcell* for a proposition that a federal court is powerless to correct constitutional violations because there is an impending election. *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) (citing *Purcell* to hold that a district court has a duty to cure illegally gerrymandered

districts in advance of elections); *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (citing *Purcell* to support a district court's discretion to deny a preliminary injunction and stay proceedings); *Doe v. Reed*, 561 U.S. 186, 197 (2010) (citing *Purcell* and holding that states have an interest in rooting out fraud from elections processes).[3] *Purcell* does not require this Court to strike down an injunction entered by a state court because the state court is adjudicating state constitutional claims that will affect an upcoming election.

Second, even other federal courts have not read *Purcell* to require a hands-off approach to all constitutional challenges to election administration because of an upcoming election. Indeed, in many cases, federal courts have adopted remedial redistricting plans that cure constitutional violations before impending elections, and some at times much closer to the election than the state-court injunction in *Harper*:

- In *North Carolina v. Covington*, the district court adopted a remedial plan for state legislative districts seven weeks before the end of the candidate filing period. *Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018). The district court's remedial redistricting plan was not affirmed by the U.S. Supreme Court until June 2018—seven weeks *after* the State had held primaries, and just four months before the general election. *Covington*, 138 S. Ct. at 2555.
- In *Bethune-Hill v. Virginia State Board of Elections*, the district court adopted a remedial plan for the Virginia House of Delegates in February 2019—more than

[3] In *Riley v. Kennedy*, the Court did recognize "that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges." 553 U.S. 406, 426 (2008). But in *Riley*, the Alabama Supreme Court was not able to render a decision until after an election took place. Here, the Board has informed the state court of the timing considerations for proper administration of elections and the state court has taken those considerations into account in its adjudication of the matter. *See* Ex. A.

six weeks after the candidate-filing period had begun and six weeks before the end of the candidate filing period. 368 F. Supp. 3d 872 (E.D.V.A. 2019). The redistricting plan was not final until a subsequent appeal was dismissed for lack of jurisdiction in June—weeks *after* the primary election and just four months before the general election. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 2715 (2019).

- In *NAACP-Greensboro Branch v. Guilford County Board of Elections*, the district court for the Middle District of North Carolina ordered the election of a new commissioner for one district of the Guilford County Commissioners, just four months before the primary election. 585 F. Supp. 2d 516 (M.D.N.C. 2012).
- In *Arbor Hill Concerned Citizens Neighborhood Association v. County of Albany*, the Second Circuit reversed the district court's denial of the parties' request to order a special election for the Albany County Legislature and ordered that a special primary be held on the same date as the national primary elections—fewer than five weeks later. 357 F.3d 260 (2d Cir. 2004).
- In *Personhuballah v. Alcorn*, the district court adopted a remedial redistricting plan for Virginia's congressional districts in January 2016—even though the candidate filing period had already begun. 155 F. Supp. 3d 552 (E.D.V.A. 2016).
- In *Martin v. Augusta-Richmond County*, the district court adopted a remedial plan for the County Commission and the Board of Education in June 2012—almost a month after the original deadlines for candidate filing. No. CV 112-058, 2012 WL 2339499, at *16 (S.D. Ga. June 19, 2012). To accommodate the

implementation of the remedial plan, the court set new deadlines for candidate filing for August—fewer than seven weeks from the date of the order. *Id.*

- In *Straw v. Barbour County*, the district court adopted a remedial redistricting plan for the Barbour County Commission on September 13, 1994—two weeks before the end of candidate filing and less than a month before the primary election. 864 F. Supp. 1148 (M.D. Ala. 1994).

Not only is the case law replete with examples of federal courts correcting constitutional defects in redistricting plans before an election, none of the cases Plaintiffs cite confirms the theory that *Purcell* requires—or even supports—the injunction Plaintiffs seek here. Indeed, the Supreme Court's orders in *North Carolina v. League of Women Voters*, 574 U.S. 927 (2014), *Husted v. Ohio State Conference of the NAACP*, 573 U.S. 988 (2014), and *Frank v. Walker*, 574 U.S. 929 (2014) make *no statements at all* about the timing of the relief sought. They do not mention *Purcell*, its principles, or the compressed nature of upcoming elections. And the Fifth Circuit in *Veasey v. Abbott*, which Plaintiffs also cite, undertook a comprehensive analysis of the merits of the constitutional challenge, found that there was insufficient evidence of discriminatory intent to warrant relief, and instructed the district court to reevaluate the evidence before enacting a remedy. 830 F.3d 216, 243 (5th Cir. 2016). This comprehensive analysis proves just the opposite of Plaintiffs' presumption that *Purcell* requires rejection of constitutional claims "regardless of [their] underlying merits." [D.E. 23 at 14.]

Third, neither the history of North Carolina redistricting litigation nor the history of the redistricting litigation *in this case* supports Plaintiffs' request for this Court's intervention. Plaintiffs in this case ask this Court to strike down the 2019 Plan, strike down the state-court injunction in *Harper*, and resurrect the 2016 Plan—all under the guise of a preliminary

injunction—because Plaintiffs read *Purcell* to prohibit changes to a redistricting plan nearly four months before the State's primary election. [D.E. 23 at 22.] But Plaintiffs ignore the fact that the very plan they seek to resurrect is the product of late-breaking changes to a redistricting plan that were adopted *after ballots had been printed* and well after four months before the State's primary election.

In *Harris v. McCrory*, the district court struck down the 2011 congressional redistricting plan as unconstitutional racial gerrymanders on February 5, 2016—seven weeks before the deadline for candidate filing and four months before the State's primaries. 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). The State Board, in concert with county boards of elections across the State, had already printed and approved the ballots—and had, in fact, already made them available for absentee voters. Ex. E at 3-4, 13-14. The General Assembly then enacted the 2016 Plan—the same plan Plaintiffs here ask this Court to resurrect—on February 19, roughly four weeks before the deadline for candidate filing. *Id.* Surely, if *Purcell* bars the state court from adjudicating the state-constitutional challenge to the 2016 Plan, it would have also barred the 2016 Plan from even coming into existence. But neither the Middle District of North Carolina nor the U.S. Supreme Court objected to the 2016 Plan on *Purcell* grounds.[4]

Indeed, the 2016 Plan was not the first time in North Carolina's recent history that a court ordered the implementation of remedial districting plans in the face of impending elections. On

[4] Because the 2016 election was already underway, with absentee ballots having been distributed to voters—hundreds of which had already been returned—the State Board sought a stay from the U.S. Supreme Court of the district court's order requiring the adoption of a new redistricting plan and based its request on the fear that a new redistricting plan would result in "voter confusion and consequent incentive to remain away from the polls." Ex. E at 3-4, 13-14 (citing *Purcell*, 549 U.S. at 4-5). The Supreme Court subsequently denied the application for stay.

February 20, 2002, the state trial court struck down the 2001 state legislative districting plans and the North Carolina Supreme Court affirmed the trial court's order, enjoining the use of the 2001 plans. *Stephenson v. Bartlett*, 582 S.E.2d 247, 248-49 (N.C. 2003). The state Supreme Court ordered that the 2002 elections be conducted under a court-drawn remedial plan. *Id.*

There is no basis—either in the case law governing redistricting maps in this State, or in other jurisdictions—for Plaintiffs' claim that *Purcell* requires this Court to enjoin the use of the 2019 Plan, strike down the state-court injunction in *Harper*, and issue a mandatory injunction requiring that the State Board administer the 2020 elections under the 2016 Plan.[5] Plaintiffs cannot succeed on the merits of their claim.

II. Plaintiffs Would Suffer Little Irreparable Harm if Their Request Were Denied.

Plaintiffs suggest that potential candidates and voters would suffer irreparable harm because their "past electioneering [will be] nullified and future electioneering infringed." [D.E. 23 at 16.] These are not legally cognizable harms.

There is no constitutional right for potential candidates to identify voters in their district and target them with campaign advertisements and solicitations at a certain time before primary elections. And Plaintiffs cite no case that grants candidates this right.[6] Indeed, if such a right

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[5] Plaintiffs' counsel in this case argued precisely the opposite position and urged a state court to enjoin the use of the current judicial redistricting maps and adopt new maps as recently as November 18, 2019. In that case, plaintiffs' counsel argued that "it's not too much change" to enjoin the use of the current judicial redistricting map and use a different map instead. Plaintiffs' counsel also did not acknowledge any reliance interests for judicial candidates based on the current judicial redistricting map in that case either. *See* Ex. F at 47-48.

[6] All of the cases cited by Plaintiffs to support their claim of irreparable harm are inapposite. They involve the publication of allegedly obscene material, *see, e.g.*, *Connection Distribution Company v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), or a challenge to dismissal from employment based on the employee's political allegiance, *see, e.g.*, *Elrod v. Burns*, 427

existed, the Supreme Court would not have allowed the 2016 Plan to go into effect at a time after absentee ballots were already printed, distributed, and returned and ballots had already been printed. *See supra* pp. 22 n.4.

While voters have a constitutional right to assemble and campaign for candidates, Plaintiffs provide no support for the assertion that this right extends to campaigning for individuals who are not yet candidates. Candidate filing has not yet begun in North Carolina and is stayed pending the state court's review of pending motions. Ex. C. Therefore, Plaintiffs have not shown that the voters suffer irreparable harm by the state court's adjudication of the constitutionality of the 2016 Plan either. Moreover, any alleged harm to voters related to electioneering must be weighed against the state court's determination that moving forward with the 2016 Plan would likely violate the rights of voters to participate in elections whose results are not preordained for partisan motives. [D.E. 1-1 at 15.]

Plaintiffs' claim that future electioneering will be infringed by the state-court action is nonsensical. The state-court action does not enjoin any member of the public from engaging in political discussion. Potential candidates and their supporters may continue to participate in public debate. The choices that potential candidates make after the state court adjudicates the constitutional challenges presented about whether to run, for what office, and in what district are all choices that remain unimpeded. Neither voters nor potential candidates suffer any future harm because of the state court's adjudication of the claims presented.

III. The Balance of the Equities Counsels Denying the Injunction.

U.S. 347, 373 (1976). The irreparable harm discussed by these cases is dissimilar to the irreparable harm alleged by Plaintiffs here.

Plaintiffs' articulation of their harm centers on the fact that potential candidates and voters have used certain data and information based on the 2016 Plan to target campaign advertisements and solicitations and that these efforts may be rendered moot if district lines are changed. [D.E. 23 at 17-19.] The State Board does not deny that a potential candidate who is redistricted into a different district as a result of the state court's determination that the 2016 Plan is unconstitutional would be inconvenienced. First, Plaintiffs provide no evidence that any of Plaintiffs in this lawsuit would be affected by redistricting.

But even if Plaintiffs could provide that evidence, the balance of the equities counsels against granting this injunction. The defendants in the state-court action raised the same arguments in state court opposing the preliminary injunction and the state court considered and rejected these objections. Indeed, the state court noted that the defendants "contend the issuance of the injunction will result in disruption, confusion, and uncertainty in the electoral process for them, candidates, election officials, and the voting public." Ex. A at 14-15. But the state court held that "such a proffered harm does not outweigh the specific harm to Plaintiffs from the irreparable loss of their fundamental rights guaranteed by the North Carolina Constitution." *Id.* at 15. The state court also held that, "Plaintiffs' and all North Carolinians' fundamental rights guaranteed by the North Carolina Constitution will be irreparably lost, as discussed above, if the injunction is not granted. Simply put, the people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Id.* Accordingly, the state court found "that this specific harm to Plaintiffs absent issuance of the injunction outweighs the potential harm to Legislative Defendants if the injunction is granted." *Id.*

The considerations in this case are no different. Allowing the state-court case to proceed, as it has, will help ensure that the rights of all North Carolina voters are protected. The importance of fair and free elections outweighs the inconvenience of any electioneering delay that Plaintiffs complain of.

IV. The Public Interest Weighs in Favor of Denying the Injunction.

The public interest counsels against the requested injunction. The State Board's interests in this matter involve—as they always do—the fair, efficient, and lawful administration of elections. The state court is already adjudicating serious and important questions of state constitutional law as applied to the 2016 Plan. It has already enjoined the use of the 2016 Plan and is in the middle of adjudicating motions for summary judgment and objections to the remedial plan passed by the General Assembly. And it has already suspended candidate filing while it decides pending motions. Ex. C. For this Court to contradict the findings and proceedings of the state court and reverse the orderly disposition of the state-law claims—which were filed nearly two months before this case was filed—would create the very confusion that Plaintiffs here claim to seek to avoid. It would also short-circuit the state court's consideration of important questions arising out of the state constitution and deprive the state court of the right to interpret issues of state law that affect every voter in North Carolina. These considerations weigh in favor of this Court denying Plaintiffs' motion.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' request for preliminary injunction.

Respectfully submitted, this the 22nd day of November 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

This 22nd of November, 2019.

/s/ Stephanie A. Brennan
Stephanie A. Brennan
Special Deputy Attorney General

EXHIBIT A

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 19 CVS 012667
REBECCA HARPER, *et al.* *Plaintiffs,* v. Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Standing Committee on Redistricting, *et al.*, *Defendants.*	ORDER ON INJUNCTIVE RELIEF

THIS MATTER came on for hearing on October 24, 2019, before the undersigned three-judge panel upon Plaintiffs' Motion for Preliminary Injunction, filed September 30, 2019. All adverse parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure.

Procedural History

On February 19, 2016, the current North Carolina congressional districts (hereinafter "2016 congressional districts") were established by an act of the General Assembly, N.C. Sess. Laws 2016-1 (hereinafter "S.L. 2016-1"), as a result of litigation in federal court over the congressional districts originally drawn in 2011. On September 27, 2019, Plaintiffs filed a verified complaint in Superior Court, Wake County, seeking a declaration that the 2016 congressional districts violate the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14. Plaintiffs seek to enjoin the future use of the 2016 congressional districts. On September 30, 2019, this action was assigned to the undersigned panel by the Chief Justice of the Supreme Court of North Carolina.

On September 30, 2019, Plaintiffs filed a motion for a preliminary injunction seeking to bar Defendants from administering, preparing for, or moving forward with the 2020 primary and general elections in North Carolina for the United States House of Representatives using the 2016 congressional districts. Plaintiffs also filed a motion for expedited briefing and resolution of Plaintiffs' motion for a preliminary injunction. On October 2, 2019, Defendants North Carolina State Board of Elections and its members (collectively hereinafter "State Defendants") notified the Court that, among other things, candidate filing for congressional primaries is set to begin on December 2, 2019. On October 9, 2019, a motion to intervene was filed by three incumbent Congressional Representatives seeking to intervene in this action in both their capacity as Representatives and as residents and voters in three of the congressional districts challenged in Plaintiffs' verified complaint.

On October 10, 2019, the Court granted in part Plaintiffs' motion for expedited briefing, establishing a briefing schedule on Plaintiff's motion for preliminary injunction and setting for hearing Plaintiffs' motion for preliminary injunction and the motion to intervene.

On October 14, 2019, Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker Timothy K. Moore, President Pro Tempore Philip E. Berger, Senator Warren Daniel, and Senator Paul Newton (hereinafter "Legislative Defendants") removed this case to the United States District Court for the Eastern District of North Carolina. On October 21, 2019, State Defendants and Legislative Defendants each filed in federal court a brief in response to Plaintiffs' motion for preliminary injunction in accordance with the Court's October 10, 2019 order. Plaintiffs notified and provided to the Court the

Defendants' briefs on October 22, 2019, and, on the same date, the federal court remanded this case to state court.

On October 22, 2019, the Congressional Representatives seeking to intervene in this case submitted a brief in response to Plaintiffs' motion for preliminary injunction. On October 23, 2019, Plaintiffs filed a motion to strike the Congressional Representatives' response brief, the Congressional Representatives submitted a response brief to Plaintiffs' motion, and Plaintiffs submitted a brief in reply to that response brief. Additionally, on October 23, 2019, Plaintiffs submitted a brief in reply to Legislative Defendants' brief in response to Plaintiffs' motion for preliminary injunction.

These matters came on to be heard on October 24, 2019, during which time the Court granted the Congressional Representatives (hereinafter "Intervenor-Defendants") permissive intervention and notified the parties that Intervenor-Defendants' response brief would be considered by the Court in its discretion. Plaintiffs' motion for preliminary injunction was taken under advisement.

The Court, having considered the pleadings, motions, briefs and arguments of the parties, supplemental materials submitted by the parties, pertinent case law, and the record proper and court file, hereby finds and concludes, for the purposes of this Order, as follows.

Political Question Doctrine

Legislative Defendants contend Plaintiffs' claims—challenges to the validity of an act of the General Assembly that apportions or redistricts the congressional districts of this State—present non-justiciable political questions. Such claims are within the statutorily-provided jurisdiction of this three-judge panel, N.C.G.S. § 1-267.1, and the Court concludes that partisan gerrymandering claims specifically present justiciable issues, as

distinguished from non-justiciable political questions. Such claims fall within the broad, default category of constitutional cases our courts are empowered and obliged to decide on the merits, and not within the narrow category of exceptional cases covered by the political question doctrine. Indeed, as the Supreme Court of the United States recently explained, partisan gerrymandering claims are not "condemn[ed] . . . to echo in the void," because although the federal courthouse doors may be closed, "state constitutions can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).[1]

Standing of Plaintiffs

Legislative Defendants and Intervenor-Defendants contend that Plaintiffs lack standing to pursue their claims in this action. The North Carolina Constitution, however, provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. "[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our State's standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 811 S.E.2d 725, 727 (N.C. Ct. App. 2018) (quotation marks omitted); *accord Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) ("While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.").

[1] Likewise, Legislative Defendants' and Intervenor-Defendants' contentions that federal law—*i.e.*, the Elections clause and Supremacy clause of the United States Constitution—serves as a bar in state court to Plaintiffs' action seeking to enjoin the 2016 congressional districts on state constitutional grounds is equally unavailing. Our state courts have jurisdiction to hear and decide claims that acts of the General Assembly apportioning or redistricting the congressional districts of this State run afoul of the North Carolina Constitution.

The North Carolina Supreme Court has broadly interpreted Article I, § 18 to mean that "[a]s a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008). The "gist of the question of standing" under North Carolina law is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Although the North Carolina Supreme Court "has declined to set out specific criteria necessary to show standing in every case, [it] has emphasized two factors in its cases examining standing: (1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury." *Davis*, 811 S.E.2d at 727-28.

Plaintiffs in this case have standing to challenge the congressional districts at issue because Plaintiffs have shown a likelihood of "a personal stake in the outcome of the controversy," *Goldston*, 361 N.C. at 30, 637 S.E.2d at 879, and a likelihood that the 2016 congressional districts cause them to "suffer harm," *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281.

Applicable Legal Standards

At its most basic level, partisan gerrymandering is defined as: "the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (U.S. 2016). Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to

"pack" and "crack" voters likely to support the disfavored party. *See generally Gill v. Whitford*, 138 S. Ct. 1916 (2018).

Plaintiffs claim the 2016 congressional districts are partisan gerrymanders that violate the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14. Extreme partisan gerrymandering violates each of these provisions of the North Carolina Constitution. *See Common Cause v. Lewis*, 18-CVS-014001, slip. op. at 298-331 (N.C. Sup. Ct. Sept. 3, 2019).

Free Elections Clause

The North Carolina Constitution, in the Declaration of Rights, Article I, § 10, declares that "[a]ll elections shall be free." Our Supreme Court has long recognized the fundamental role of the will of the people in our democratic government: "Our government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875). In particular, our Supreme Court has directed that in construing provisions of the Constitution, "we should keep in mind that this is a government of the people, in which the will of the people--the majority--legally expressed, must govern." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) (citing N.C. Const. art. I, § 2). Therefore, our Supreme Court continued, because elections should express the will of the people, it follows that "all acts providing for elections, should be liberally construed, that tend to promote a fair election or expression of this popular will." *Id.* "[F]air and honest elections are to prevail in this state." *McDonald v. Morrow*, 119 N.C. 666, 673, 26 S.E. 132, 134 (1896). Moreover, in giving meaning to the Free Elections Clause, this Court's construction of the words contained therein must

therefore be broad to comport with the following Supreme Court mandate: "We think the object of all elections is to ascertain, fairly and truthfully, the will of the people--the qualified voters." *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915) (quoting *R. R. v. Comrs.*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895)).

As such, the meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. In contrast, extreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of North Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Common Cause*, 18-CVS-014001, slip. op. at 298-307.

Equal Protection Clause

The Equal Protection Clause of the North Carolina Constitution guarantees to all North Carolinians that "[n]o person shall be denied the equal protection of the laws." N.C. Const., art. I, § 19. Our Supreme Court has held that North Carolina's Equal Protection Clause protects "the fundamental right of each North Carolinian to *substantially equal voting power*." *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002) (emphasis added). "It is well settled in this State that 'the right to vote *on equal terms* is a fundamental right.'" *Id.* at 378, 562 S.E.2d at 393 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added)).

Although the North Carolina Constitution provides greater protection for voting rights than the federal Equal Protection Clause, our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal

protection analysis. *Duggins v. N.C. State Bd. of Certified Pub. Accountant Exam'rs*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978); *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). Generally, this test has three parts: (1) intent, (2) effects, and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing district lines was to "entrench [their party] in power" by diluting the votes of citizens favoring their rival. *Ariz. State Legis.*, 135 S. Ct. at 2658. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). Finally, if the plaintiffs make those showings, the State must provide a legitimate, non-partisan justification (*i.e.*, that the impermissible intent did not cause the effect) to preserve its map. *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting).

Generally, partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party. *Cf. Lehr v. Robertson*, 463 U.S. 248, 265, 103 S. Ct. 2985 (1983) ("The concept of equal justice under law requires the State to govern impartially.")

As such, extreme partisan gerrymandering runs afoul of the North Carolina Constitution's guarantee that no person shall be denied the equal protection of the laws. *See Common Cause*, 18-CVS-014001, slip. op. at 307-17.

Freedom of Speech and Freedom of Assembly Clauses

The Freedom of Speech Clause in Article I, § 14 of the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." The Freedom of Assembly Clause in Article I, § 12

provides, in relevant part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances."

"There is no right more basic in our democracy than the right to participate in electing our political leaders"—including, of course, the right to "vote." *McCutcheon v. FEC*, 572 U.S. 185, 191, 134 S. Ct. 1434, 1440 (2014) (plurality op.). "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356, 96 S. Ct. 2673, 2681 (1976). In North Carolina, the right to assembly encompasses the right of association. *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (2014). Moreover, "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204-05 (2011). And "for elections to express the popular will, the right to assemble and consult for the common good must be guaranteed." John V. Orth, *The North Carolina State Constitution* 48 (1995).

It is "axiomatic" that the government may not infringe on protected activity based on the individual's viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516 (1995). The guarantee of free expression "stands against attempts to disfavor certain subjects or viewpoints." *Citizens United v. FEC*, 558 U.S. 310, 340, 130 S. Ct. 876, 898 (2010). Viewpoint discrimination is *most* insidious where the targeted speech is political; "in the context of political speech, . . . [b]oth history and logic" demonstrate the perils of permitting the government to "identif[y] certain preferred speakers" while burdening the speech of "disfavored speakers." *Id.* at 340-41, 130 S. Ct. at 899.

The government may not burden the "speech of some elements of our society in order to enhance the relative voice of others" in electing officials. *McCutcheon*, 572 U.S. at 207, 134 S. Ct. at 1450; *see also Winborne v. Easley*, 136 N.C. App. 191, 198, 523 S.E.2d 149, 154 (1999) ("political speech" has "such a high status" that free speech protections have their "fullest and most urgent application" in this context (quotations marks omitted)). The government also may not retaliate based on protected speech and expression. *See McLaughlin*, 240 N.C. App. at 172, 771 S.E.2d at 579-80. Courts carefully guard against retaliation by the party in power. *See Elrod*, 427 U.S. at 356, 96 S. Ct. at 2681; *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287 (1980); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S. Ct. 2729 (1990). When patronage or retaliation restrains citizens' freedoms of belief and association, it is "at war with the deeper traditions of democracy embodied in the First Amendment." *Elrod*, 427 U.S. at 357, 96 S. Ct. at 2682 (quotation marks omitted).

When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g. Republican voters) while targeting certain disfavored speakers (e.g. Democratic voters) because of disagreement with the views they express when they vote. Then, disfavored speakers are packed and cracked into legislative districts with the aim of diluting their votes and, in cracked districts, ensuring that these voters are significantly less likely, in comparison to favored voters, to be able to elect a candidate who shares their views. Moreover, a legislature that engages in extreme partisan gerrymandering burdens the associational rights of disfavored voters to "instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12. As such, extreme partisan gerrymandering runs afoul of these important guarantees in the North Carolina Constitution of the freedom of speech and the right of the people of our State to assemble together to consult for their common good, to instruct their

representatives, and to apply to the General Assembly for redress of grievances. *See Common Cause*, 18-CVS-014001, slip. op. at 317-31.

Injunctive Relief

"It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people." *City of Asheville v. State*, 369 N.C. 80, 87-88, 794 S.E.2d 759, 766 (2016) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989).

"The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); *see also* N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a

standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

Status Quo

The 2011 congressional districts, enacted by the General Assembly on July 28, 2011, were struck down as unconstitutional racial gerrymanders and ordered to be redrawn on February 5, 2016. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). As a result, the 2016 congressional districts were then enacted by the General Assembly on February 19, 2016. N.C. Sess. Laws 2016-1. Plaintiffs' challenge to the 2016 congressional districts is a challenge to S.L. 2016-1 as enacted; hence, the status quo which Plaintiffs desire to preserve is the existing state of affairs prior to the enactment of S.L. 2016-1. Therefore, the existing state of affairs—*i.e.*, the status quo—prior to the enactment of S.L. 2016-1 was the period in which no lawful congressional district map for North Carolina existed absent the enactment of a remedial map by the General Assembly.

Plaintiffs are Likely to Succeed on the Merits

Quite notably in this case, the 2016 congressional districts have already been the subject of years-long litigation in federal court arising from challenges to the districts on partisan gerrymandering grounds. *See Rucho*, 318 F. Supp. 3d 777. As such, there is a detailed record of both the partisan intent and the intended partisan effects of the 2016 congressional districts drawn with the aid of Dr. Thomas Hofeller and enacted by the General Assembly. *See Rucho*, 318 F. Supp. 3d at 803-10 (detailing the history of the drawing and enactment of the 2016 congressional districts); *see also* Declaration of Elisabeth S. Theodore (attaching as exhibits a number of documents from the record in federal court); *Rucho*, 139 S. Ct. at 2491-93.

For instance, Dr. Hofeller was directed by legislators "to use political data — precinct-level election results from all statewide elections, excluding presidential elections, dating back to January 1, 2008 — in drawing the remedial plan," and was further instructed to "use that political data to draw a map that would maintain the existing partisan makeup of the state's congressional delegation, which, as elected under the racially gerrymandered plan, included 10 Republicans and 3 Democrats." *Rucho*, 318 F. Supp. 3d at 805 (internal citations omitted).

As another example, the redistricting committee approved several criteria for the map-drawing process, including the use of past election data (*i.e.*, "Political Data") and another labeled "Partisan Advantage," which was defined as: "The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation." *Id.* at 807. In explaining these two criteria, Representative David Lewis "'acknowledged freely that this would be a political gerrymander,' which he maintained was 'not against the law,'" *id.* at 808 (citation omitted), while also going on to state that he "propose[d] that [the Committee] draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because [he] d[id] not believe it[would be] possible to draw a map with 11 Republicans and 2 Democrats," *id.* (alterations in original).

Moreover, when drawing the 2016 congressional districts, Dr. Hofeller used "an aggregate variable he created to predict partisan performance" all while "constantly aware of the partisan characteristics of each county, precinct, and VTD." *Id.* at 805-06.

Finally, the redistricting committee, and ultimately the General Assembly as a whole, approved the 2016 congressional districts by party-line vote. *Id.* at 809.

In light of the above, this Court agrees with Plaintiffs and finds there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14.

Plaintiffs Will Suffer Irreparable Loss Unless the Injunction is Issued

The loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional elections are allowed to proceed under the 2016 congressional districts. As discussed above, Plaintiffs' have shown a likelihood of succeeding on the merits of their claims that these districts violate multiple fundamental rights guaranteed by the North Carolina Constitution. And as Defendants have emphasized, the 2020 primary elections for these congressional districts—the final congressional elections of this decade before the 2020 census and subsequent decennial redistricting—are set to be held in March of 2020 with the filing period beginning December 2, 2019.

As such, this Court finds that Plaintiffs are likely to sustain irreparable loss to their fundamental rights guaranteed by the North Carolina Constitution unless the injunction is issued, and likewise, issuance is necessary for the continued protection of Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution during the course of the litigation.

A Balancing of the Equities Weighs in Favor of Plaintiffs

On one hand, Legislative Defendants contend a general harm to them will result from issuing the injunction because the General Assembly will be prevented from

effectuating an act of the General Assembly. On the other hand, Plaintiffs' and all North Carolinians' fundamental rights guaranteed by the North Carolina Constitution will be irreparably lost, as discussed above, if the injunction is not granted. Simply put, the people of our State will lose the opportunity to participate in congressional elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. The Court finds that this specific harm to Plaintiffs absent issuance of the injunction outweighs the potential harm to Legislative Defendants if the injunction is granted.

Legislative Defendants and Intervenor Defendants also contend the issuance of the injunction will result in disruption, confusion, and uncertainty in the electoral process for them, candidates, election officials, and the voting public. But, again, such a proffered harm does not outweigh the specific harm to Plaintiffs from the irreparable loss of their fundamental rights guaranteed by the North Carolina Constitution. Moreover, while State Defendants would prefer not to move elections or otherwise change the current schedule for the 2020 congressional primary election, they recognize that proceeding under the 2016 congressional districts "would require the Board to administer an election that violates the constitutional rights of North Carolina voters" and acknowledge that the election schedule can be changed if necessary. State Defs. Response Brief at 2. In that vein, State Defendants agree with Plaintiffs that "it would be appropriate for this Court to issue an injunction that relieves the Board of any duty to administer elections using an unconstitutionally gerrymandered congressional redistricting plan." *Id.*

Finally, Legislative Defendants and Intervenor-Defendants contend Plaintiffs simply waited too long to bring their challenge to the 2016 congressional districts in state court. Plaintiffs, however, filed this action in state court only a matter of months after litigation reached its conclusion in federal court, at a time still prior to the candidate filing

period. While the timing of Plaintiffs' action does weigh against Plaintiffs, the Court does not find that the timing of Plaintiffs' filing of this action should bar them from seeking equitable relief in the form of the requested preliminary injunction.

Consequently, after weighing the potential harm to Plaintiffs if the injunction is not issued against the potential harm to Defendants if injunctive relief is granted, this Court concludes the balance of the equities weighs in Plaintiffs' favor. Indeed, the harm alleged by Plaintiffs is both substantial and irreparable should congressional elections in North Carolina proceed under the 2016 congressional districts.

Conclusion

Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regard to the 2016 congressional districts. The Court further concludes that security is required of Plaintiffs pursuant to Rule 65(c) of the North Carolina Rules of Civil Procedure to secure the payment of costs and damages in the event it is later determined this relief has been improvidently granted.

This Court recognizes the significance and the urgency of the issues presented by this litigation, particularly when considering the impending 2020 congressional primary elections and all accompanying deadlines, details, and logistics. This Court also is mindful of its responsibility not to disturb an act of the General Assembly unless it plainly and clearly, without any reasonable doubt, runs counter to a constitutional limitation or prohibition. For these reasons, the Court will, upon the forthcoming filing of Plaintiffs' motion for summary judgment, provide for an expedited schedule so that Plaintiffs' dispositive motion may be heard prior to the close of the filing period for the 2020 primary election.

This Court observes that the consequences, as argued by Legislative Defendants and Intervenor-Defendants, resulting from a delay in the congressional primary—*e.g.*, decreased voter turnout, additional costs and labor for the State Board of Elections—would be both serious and probable should the primary schedule be adjusted as a result of this Order and Plaintiffs' ultimate success on the merits of this action. But as discussed above, should Plaintiffs prevail through motion or trial, these consequences pale in comparison to voters of our State proceeding to the polls to vote, yet again, in congressional elections administered pursuant to maps drawn in violation of the North Carolina Constitution.

This Court, however, notes that these disruptions to the election process need not occur, nor may an expedited schedule for summary judgment or trial even be needed, should the General Assembly, on its own initiative, act immediately and with all due haste to enact new congressional districts. This Court does not presume, at this early stage of this litigation, to have any authority to compel the General Assembly to commence a process of enacting new Congressional districts, and this Court recognizes that such a decision is wholly within the discretion of a co-equal branch of government. The General Assembly, however, has recently shown it has the capacity to enact new legislative districts in a short amount of time in a transparent and bipartisan manner, and that the resulting legislative districts, having been approved by this Court, are districts that are more likely to achieve the constitutional objective of allowing for elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people. *See Common Cause v. Lewis*, 18-CVS-014001 (N.C. Sup. Ct., October 28, 2019). The Court respectfully urges the General Assembly to adopt an expeditious process, as it did in response to this Court's mandate in the September 3, 2019, Judgment in *Common Cause v. Lewis,* that ensures full transparency and allows for bipartisan participation and consensus to create new

congressional districts that likewise seek to achieve this fundamental constitutional objective.

Accordingly, the Court, in its discretion and for good cause shown, hereby ORDERS that Plaintiffs' motion for preliminary injunction is GRANTED as follows:

1. Legislative Defendants and State Defendants, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing for or administering the 2020 primary and general elections for congressional districts under the 2016 congressional districts established by S.L. 2016-1.
2. Security in an amount of $1,000 shall be required of Plaintiffs pursuant to Rule 65.
3. The Court retains jurisdiction to move the primary date for the congressional elections, or all of the State's 2020 primaries, including for offices other than Congressional Representatives, should doing so become necessary to provide effective relief in this case.

SO ORDERED, this the 28th day of October, 2019.

/s/ Paul C. Ridgeway
Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite
Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton
Alma L. Hinton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties by emailing a copy thereof to the address below, in accordance with the October 10, 2019 Case Management Order:

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This the 28th day of October, 2019.

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**Admitted Pro Hac Vice*

EXHIBIT B

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

This is yet the latest in a nearly decade-long series of cases challenging North Carolina's Congressional District maps. After being unsatisfied with the remedial maps achieved in 2016 through federal court litigation alleging racial gerrymandering, the Democratic Party and its allies backed partisan gerrymandering litigation over this very map, losing after two trips to the United States Supreme Court.

The hypocrisy of the Democratic Party and its allies in bringing yet another partisan gerrymandering lawsuit in North Carolina is remarkable. It was maps drawn by the Democratic Party during the nearly 180 years of Democratic partisan control of the North Carolina General Assembly that created some of the greatest exemplars of partisan gerrymandering in the history of the United States. Even so, after it lost control of the General Assembly for the first time in almost two centuries, the Democratic Party and its allies brought lawsuit after lawsuit seeking court orders compelling the General Assembly

to draw district lines which favor their preferred candidates—and which harm Republican candidates—or else have the state's judiciary usurp the legislature's authority and redraw the maps itself.

The relief sought in this lawsuit is even more stunning than those sought in the previous cases. Not content with seeking a court order compelling the General Assembly to redraw the Congressional District lines, Plaintiffs here—because of their own delay in filing the lawsuit, for which there is no explanation other than their own strategic decision to wait until after the three-judge panel's decision in *Common Cause v. Lewis*—contend that the Court must order, ***at the preliminary injunction stage***, that use of the current Congressional District maps be suspended and that the Court draw its own maps for use in the upcoming 2020 elections.

There is simply no precedent for the relief Plaintiffs seek pursuant to their Motion for Preliminary Injunction; rather, it is contrary to statutory and case law. The Democratic Party and its allies are back asking this court – at the last minute – to ignore the direct delegation of authority for drawing Congressional Districts lines from the United States Constitution to the Legislature of North Carolina. *See* U.S. CONST. art. I, § 4. Instead, the Plaintiffs here want this court, on an expedited basis at the preliminary stage, to ignore this constitutional delegation, and impose requirements created out of whole cloth to invalidate the otherwise duly enacted Congressional districting map for the State of North Carolina. As such, Plaintiffs' Motion for Preliminary Injunction should be denied.

FACTUAL BACKGROUND

North Carolina's Congressional districts have been involved in a significant amount of litigation since the 2010 census; rather than recount the history of which the Court is aware, Intervenor-Applicants note that many of the Plaintiffs here were parties in *Common Cause v. Lewis*, Wake County Case No. 18-CVS-14001, filed on November 13, 2018. Like in

that case, they claim to be registered Democrats who have consistently voted for Democratic candidates, this time for the U.S. House of Representatives as opposed to the North Carolina General Assembly. *See generally* Complaint ("Compl."); *see also* Compl. ¶¶ 6–19. This case, brought by many of the same Plaintiffs as *Common Cause v. Lewis* and including the same legal claims, was intentionally brought almost a year thereafter, likely in an effort for the Plaintiffs to see how the *Common Cause v. Lewis* claims fared before filing the lawsuit. Due to Plaintiffs' strategic delays, they now ask the Court to expedite the judicial process and to, by preliminary injunction, develop and impose a "remedial plan" for use by North Carolina voters in the primary election for 2020. This emergency, and unprecedented, relief should be denied, as not only is it contrary to the United States Constitution and state law but the emergency posture of this case is a result of Plaintiffs' own delay.

ARGUMENT

I. PLAINTIFFS LACK STANDING.

For all their bluster, Plaintiffs fail to establish that they have standing to bring their claims. While "the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine," *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006) (citations omitted), that does not mean that Plaintiffs need not suffer a cognizable injury, *id*, nor does it mean that they need not present some factual matter that there is some possible remedy to Plaintiffs alleged harms, *see Marriott v. Chatham County*, 187 N.C. App. 491, 495, 654 S.E.2d 13, 16–17 (2007). While the requirements to assert standing may be different in North Carolina than in the federal courts, the elements for standing in North Carolina are the same. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. As such, Plaintiffs have the burden of showing (1) injury in fact; (2) traceability; and (3)

redressability. *Id.* Plaintiffs have failed to carry this burden.

A. Plaintiffs Have Not Suffered an Injury in Fact.

It is true in North Carolina State court, just as it is in federal court, that "[o]nly those persons may call into question the validity of a statue who have been *injuriously affected* thereby in their persons, property or constitutional rights." *Goldston*, 361 N.C. at 35, 637 S.E.2d at 882 (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) (emphasis added)). Thus, federal standing decisions under Article III are "instructive", *see id.*, especially in the context of gerrymandering claims, which have been argued *ad nauseum* in federal court. *See, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1929–31 (2018) (addressing standing for partisan gerrymandering claims); *see also Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The injury-in-fact requirement exists so that "only one with a genuine grievance, one *personally injured* by a statute, can be trusted to battle the issue." *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (emphasis added) (quoting *Stanley v. Dept. of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). Put another way, "the North Carolina Constitution confers standing on those who suffer harm, and that one must have suffered some injury in fact to have standing to sue." *Comm. to Elect Dan Forest v. Emples. Political Action Comm.*, __ N.C. App. __, __, 817 S.E.2d 738, 742 (2018) (internal quotations omitted) (citing *Magnum*, 362 N.C. at 642, 817 S.E.2d at 281; *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993)). In the voting rights context, only persons "who allege facts showing disadvantage to themselves as individuals have standing to sue" because "the right to vote is individual and personal in nature." *Gill*, 138 S. Ct. at 1929 (quoting *Baker v. Carr*, 369 U.S. 186, 206, 82 S. Ct. 691, 704 (1962)). "Standing is not dispensed in gross." *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110,

117, 574 S.E.2d 48, 53 (2002) (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6, (1996)). Vote dilution claims—the packing and cracking of voters—are district specific.[1] *Gill*, 138 S. Ct. at 1930. The harm in gerrymandering cases "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight that it would carry in another, hypothetical district." *Id.* at 1930. Importantly, it is Plaintiffs' burden to prove standing exists. *Neuse River Found.,* 155 N.C. App. at 113, 574 S.E.2d at 51 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). However, in the context of a mandatory injunction, Plaintiffs burden is heightened as they must "clearly establish[]" their injury.[2] *See Carroll v. Warrenton Tobacco Bd. of Trade, Inc.*, 259 N.C. 692, 696, 131 S.E.2d 483, 486 (1963); *Auto. Dealer Res.., Inc. v. Occidental Life Ins. Co. of N.C.,* 15 N.C. App. 634, 639, 190 S.E.2d 729, 732 (1972) (citations omitted).

1. Plaintiffs in the First and Twelfth Congressional Districts have not Suffered an Injury in Fact.

Plaintiffs Oseroff and Brien, from First and Twelfth respectively, have suffered no harm. Plaintiff Oseroff is a registered Democrat who votes for Democratic candidates. Compl. at ¶ 6. Similarly, Plaintiff Brien is a voter who consistently votes for Democratic candidates for Congress. *Id.* at ¶ 18. Importantly, both Plaintiffs have voted for, and are currently represented by, Democrats. Therefore, the only harm that they allege is that Democrats in *other* districts are not being elected at the rate they would prefer. Generalized

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[1] While each of Plaintiffs claims are different in form, they are nearly identical in substance. Each of Plaintiffs' causes of action are vote dilution claims. *Compare* Compl. at ¶ 126 (stating that Free Elections clause claims are vote dilution claims) *with* Compl. at ¶ 135 (stating that Equal Protection clause claims are vote dilution claims) *and with* Compl. at ¶ 143 (stating that claims under the Freedom of Speech and Freedom of Association clauses result from packing and cracking votes, which is the dilutionary harm).

[2] Plaintiffs wish to minimize this burden, *see* Mot. for Prelim. Inj. at 44, which is no surprise as they cannot meet the heightened standard that North Carolina law requires in the mandatory injunction context. *See, e.g., Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. This standard is of specific importance where, as here, a mandatory injunction would function as a *de facto* final judgment.

partisan grievances, and the coordinate desire to transform "the legislature as a whole," is a "collective political interest" which courts cannot, and should not, entertain.[3] *Gill*, 138 S. Ct. at 1929, 1932. As such, Plaintiffs Oseroff and Brien lack standing because they have suffered no injury specific to themselves as voters in their districts.

2. Dr. Chen's Simulations Demonstrate the Remaining Plaintiffs' Lack of Injury.

The remaining Plaintiffs lack standing because, according to their own expert, Plaintiffs have suffered no injury specific to themselves. In other words, Plaintiffs attempts at district specific evidence fails by their own terms. Dr. Chen's simulations purport to show a "district specific analysis" that "strictly adhere to nonpartisan traditional districting criteria." *See* Pls.' Mot. for Prelim. Inj. at 44. Even assuming that statement is true, which it is not,[4] Plaintiffs have not suffered a cognizable injury.

Dr. Chen's simulations purport to show that eight of fourteen Plaintiffs live in districts that "randomly" occur using his "nonpartisan traditional districting criteria." *See* Decl. of Chen, Simulation Set 2 (CDs 3–9, 13). Using Simulation Set 1, the figure rises to nine of fourteen. If the Plaintiffs' enacted district falls within the grey area on the chart, then the Plaintiff lives in a district that could have been created through a so-called non-partisan districting process. *See* Decl. of Chen at ¶ 8, Simulation Set 2. If Plaintiffs live in districts that can occur with no partisan bias, according to Chen's own criteria, then the

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[3] Finding that two Democratic voters have standing because they would prefer that the Congressional delegation on the whole be more Democrats means that *any* voter from *any* state can have standing to challenge *any* district in North Carolina. Creating a system wherein any aggrieved partisan who desires to have more influence on the national legislature when they themselves have suffered no individual harm simply does not comport with established principles of federalism and separation of powers.

[4] Intervenors injury-in-fact arguments will assume, *arguendo*, that Dr. Chen's simulations are both methodologically and technically sound. However, there are significant reasons to doubt Dr. Chen's results both methodologically, *see infra* Section I.B.2, and technically, *see, e.g.*, Mot. *in Limine*, *League of Women Voters of Mich. v. Benson*, No. 2:17-cv-14148 (E.D. Mich. Dec. 4, 2018) (ECF No.

simulations fail as evidence of that same partisan bias because, by Plaintiffs own definition, they have neither been "packed" nor "cracked." The crux of dilatory harm "arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight that it would carry in another, hypothetical district." *Gill*, 138 S. Ct. at 1931. Dr. Chen's simulations, at least for these Plaintiffs, merely confirm that they "carry" the same weight as they "would carry in another, hypothetical district." *Id.*

Another three Plaintiffs currently live in, and will continue to live in, a Republican district under any of Chen's 1,000 simulations. *See* Decl. of Chen at Simulation Set 2 (CDs 10, 11). Under these simulations, even if they are as neutral as Dr. Chen claims, each Plaintiff in CD 10-11 will still reside in a district that will be "more favorable to Republican candidates." *See* Compl. at ¶¶ 15, 16, 17. They vote for Democrats now and those Democrats lose. If Chen's simulations are taken as accurate, and they continue to vote for Democrats, those Democrats will also continue to lose. If his simulations are accurate, then Plaintiffs Gates, Barnes, and Brien have suffered no injury.

B. Plaintiffs Have Not Shown a Remedy Is Likely.

The third standing requirement is redressability. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. Redressability requires Plaintiffs to prove that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* Far from having proof that a remedy is "likely", Plaintiffs have failed to show that a remedy is possible.

Plaintiffs time and again plead that it is *feasible* for the Court to fashion a remedy in the *time allotted* before the election. This is a dubious assertion at best. *See infra* Section

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147 at 21–26) (arguing that the evidence is that Dr. Chen's actual computer code for his simulations

III.B.1. However, what Plaintiffs fail to allege anywhere in their complaint is that there may exist some remedial map—some collection of lines comprising thirteen congressional districts—that will remedy the harms to each or any individual Plaintiff. From within the thousands of simulations Dr. Chen has run, the Plaintiffs produce no map they claim remedies the harms of all plaintiffs—even by their own recitation of the alleged facts. Without any such allegation in the complaint, supported by facts or not, Plaintiffs have failed their burden of proving standing. All Plaintiffs have done is assert that the Court has the *means* to fashion a remedy, not that a remedy exists that can, in fact, remedy Plaintiffs' individual harms.[5]

It is of little import that there *could* be a plan drawn with a different overall partisan balance; the proof that Plaintiffs must advance for the purposes of standing is that *each* individual Plaintiffs' harm be remedied. *See Gill*, 138 S. Ct. at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). For example, if, based on the political geography of the state and the unique addresses of Plaintiffs, only two remedial districts could be drawn specific to two of the plaintiffs, then the remaining plaintiffs lack standing. That said, it is simply neither the Court's nor the Defendants' duty to provide proof and pleading that such a map is possible. That is Plaintiffs' duty and burden, *Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16, and it is one that they have wholly disregarded.

1. Plaintiffs' Expert Presents No Evidence on Redressability.

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differ from what his stated instructions were).

[5] While it is questionable that the Court has the power to enact a remedy by judicial fiat, *see In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 332–33 (1963), the Court's remedial power is of no import if the Court, due to a failure of pleading and proof by Plaintiffs, has no subject matter jurisdiction in the first instance. *See Marriott*, 187 N.C. App. at 494, 654 S.E.2d at 16. In fact, N.C. CONST. art. I, § 6 confines state courts much in the same way as Article III confines federal courts. *Compare* N.C. CONST. art. I, § 6 ("the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other") *with Gill*, 138 S. Ct. at 1923 ("the threshold requirement" of standing exists so "'that [the Court] act[s] as judges, and do not

Dr. Chen's simulations are merely an attempt to "invalidate[] a map based on unfair results that would occur in a hypothetical state of affairs." *Rucho*, 139 S. Ct. at 2503 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006) (opinion of Kennedy, J.)). This presents a severe flaw for standing purposes. Dr. Chen's simulations do nothing to show if the harm to any Plaintiff could be remedied under any constitutional norm. Dr. Chen's simulations present aggregate data and do nothing to show whether each Plaintiff's harm, if any, can be remedied. For instance, if Dr. Chen were to draw a map that remedied that harm for Plaintiff Oseroff in CD 1, could that same map remedy the harm for any, or every, other Plaintiff? It is impossible to know under what Dr. Chen has presented at this stage of the case and, in any event, it is Plaintiffs' burden to provide such pleading and proof. Furthermore, Chen claims simulations do not reflect even a modicum of partisanship, which is fully permissible under both federal and state law. Therefore, Dr. Chen's simulations do not reflect what any remedial map may or may not look like.

2. Plaintiffs' Expert Analysis Is Methodologically Flawed.[6]

Dr. Chen's analysis is flawed for an additional fatal reason. His simulations completely ignore partisanship, which has, prior to 2019, never been a requirement applicable to maps under North Carolina or federal law. In fact, under both federal and North Carolina precedent, partisanship is expected and normal in redistricting. *See, e.g., Dickson v. Rucho*, 368 N.C. 481, 493, 781 S.E.2d 404, 415 (2015) ("Redistricting in North

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engage in policymaking properly left to elected representatives.'" (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013)).

[6] It is also of vital importance to mention that Congressional Intervenor's have had no opportunity in here, or in any of the recent litigation over the congressional districts to question Dr. Chen's methods to probe if they actually comport with his declaration. *See Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56 (Sept. 3, 2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018). This issue further highlights why a mandatory injunction is inappropriate here.

Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers.") *vacated* 137 S. Ct. 2186 (2017); *Rucho*, 139 S. Ct. at 2497 (redistricting "is intended to have substantial political consequences") (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)). Even assuming Plaintiffs' causes of action are valid, "[t]he 'central problem' is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is 'determining when political gerrymandering has gone too far.'" *Rucho*, 139 S. Ct. at 2497 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)). Assuming, *arguendo*, that the North Carolina General Assembly engaged in *excessive* partisanship when engaged in Congressional redistricting, that does not necessarily require that there be *no* partisanship when engaged in Congressional redistricting.[7] Because at least some level of partisanship must be allowed when redistricting. This is even more true in this case because the impetus for drawing the 2016 plan was to absolve any liability arising from the improper use of race under the Fourteenth Amendment of the U.S. Constitution. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017).

"To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities." *Rucho*, 139 S. Ct. at 2497. The "political entities" to which the Framers constitutionally entrusted Congressional redistricting decisions are the state legislatures, in the first instance, and Congress should it wish to intervene. *See* U.S. CONST. art. I, § 4 ("The Times, Places, and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time

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[7] *Common Cause v. Lewis* has limited the consideration of political considerations in drawing state legislative maps, but that case has no occasion to address the import of the direct delegation of

by Law make of alter such Regulations . . . ."). It is hardly surprising then that the North Carolina General Assembly implemented purely political criteria into their adopted criteria. *See* Joint Select Committee on Congressional Redistricting.[8] Dr. Chen's simulations wholly ignore the fundamental truth of redistricting, it "inevitably has and is intended to have substantial political consequences." *Rucho*, 139 S. Ct. at 2497 (quoting *Gaffney*, 412 U.S. at 753). Because Dr. Chen's simulations wholly ignore the simple fact that partisanship is permissible and expected—as noted by the United States Supreme Court—when drawing Congressional districts in North Carolina, his simulations are of limited value and are, in fact, evidence of nothing at all.

II. PLAINTIFFS DO NOT MEET THE STANDARDS FOR PRELIMINARY INJUNTIVE RELIEF.

Under Rule 65 of the North Carolina Rules of Civil Procedure ("Rule(s)"), the Court has discretion to issue a preliminary injunction. *See* N.C. Gen. Stat. § 1A-1, Rule 65(a)–(b) and cmt. "The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation and quotation marks omitted). The issuance of a preliminary injunction, "is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is appropriate only where "a plaintiff is able to show a likelihood of success on the merits of his case" and "is likely to sustain irreparable loss in the absence of an injunction, or if, in the opinion of the Court,

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authority to the state legislature for drawing Congressional maps in Article I, Section 4 of the United States Constitution.

[8] Available at: https://www.ncleg.gov/documentsites/committees/JointSelectCommitteeonCongressionalRedistricting//2016%20Contingent%20Congressional%20Plan%20Committee%20Adopted%20Criteria%202%2016%2016.pdf.

issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759–60 (emphasis omitted) (citations and quotation marks omitted).

However, "[t]he law recognizes a distinction, however, between prohibitory and mandatory injunctions." *Auto. Dealer Res.*, 15 N.C. App. at 639, 190 S.E.2d at 732. "A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts." *Id.* (citing *Clinard v. Lambeth*, 234 N.C. 410, 418, 67 S.E.2d 452, 458 (1951)). In contrast, "[a] mandatory injunction is intended to restore a status quo and to that end requires a party to perform a positive act." *Id.* A mandatory injunction "will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established." *Id.* (citing *State Highway & Pub. Works Comm'n. v. Brown*, 238 N.C. 293, 296, 77 S.E.2d 483, 782 (1953)). "[T]he court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear[.]" *Id.* (citation and quotation marks omitted). There is no such clear right or urgency present in this case.

III. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CLAIMS.

For the reasons set forth below, Plaintiffs are unlikely to succeed on the merits of their claims. They are, therefore, not entitled to a preliminary injunction.

A. This Court Lacks the Authority to Grant the Requested Relief.

To remedy the alleged violations of North Carolina's state constitution, Plaintiffs request that this Court issue an order declaring the 2016 Plan unconstitutional and invalid, enjoining Defendants from preparing for and administering the 2020 U.S. House elections using the 2016 Plan, and affording the General Assembly two weeks to create a remedial plan.

Plaintiffs' requested remedial order violates the federal Constitution in two ways. *First*, Plaintiffs request an order that the General Assembly draw a remedial map that is subjected to criteria specified by the Court. *Second*, Plaintiffs' requested order seeks to grant authority for the Court to appoint a referee to develop a remedial map for the Court if necessary. *See* Compl. at ¶¶ 43–44; Pl. Proposed Order on Mot. for Prelim. Inj.

These two pieces of Plaintiffs' requested remedial order offend the same provision of the U.S. Constitution, because the order siphons power from the legislature to the Court to dictate the times, places, and manner of holding the congressional elections in violation of Article I, Section 4 of the United States Constitution (the "Elections Clause"). By invalidating the North Carolina General Assembly's duly enacted redistricting plan, dictating the substance of a remedial plan, and potentially supplanting the Legislature's plan altogether with its own, this Court would be usurping the redistricting authority exclusively delegated to the General Assembly by the Elections Clause. Accordingly, the Court does not have the authority to grant Plaintiffs the relief they request.

1. The Elections Clause Grants the North Carolina's Legislature Exclusive Authority Over Congressional Redistricting.

The Elections Clause mandates that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the *Legislature* thereof" unless "Congress" should "make or alter such Regulations." U.S. CONST. art. I, § 4 (emphasis added). By its plain terms, the Elections Clause vests authority exclusively in (1) the state "Legislature" and (2) Congress.[9]

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[9] The reference to "Times, Places and Manner" is derived from the "methods of proceeding" as to the "time and place of election" to the House of Commons in English Parliamentary law. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES, 158-59, 170–74. These "methods" were completely under parliamentary control and beyond the reach of "the Common-Law" and "the Judges." Heorge Petyt, Lex Parliamentaria 9, 36–37, 70, 74–75, 80 (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES, 146–47. By delegating the procedures of congressional elections to legislative bodies, the Elections Clause

The Supreme Court views the term "Legislature" in the Elections Clause as "a limitation upon the state in respect to any attempt to circumscribe the legislative power" over federal elections. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892) (interpreting the substantially similar delegation of authority to the State legislatures in the Electors Clause in U.S. CONST. art. II, § 1, cl. 2). This is because the power to regulate federal elections is not an inherent state power, but rather one that was expressly delegated to the State Legislatures. *See U.S. Term Limits v. Thorton*, 514 U.S. 779, 805 (1995); *Cook v. Gralike*, 531 U.S. 510, 522 (2001). As the Supreme Court noted in *Bush v. Gore*, 531 U.S. 98 (2000), in the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government . . . the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Bush v. Gore*, 531 U.S. at 112–13 (2000) (Rehnquist, C.J., concurring). With respect to redistricting specifically, the U.S. Supreme Court has held that "redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2668 (2015). Notably, the North Carolina Supreme Court is a not a lawmaking body. *See In re Markham*, 259 N.C. 566, 570, 131 S.E.2d 329, 332–33 (1963); *see also* N.C. CONST. art. I, § 6 ("the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other").

This standard provides some room for flexibility for a state entity other than the state legislative body itself to enacts such a plan, as long as the authority for that deviation

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carried forward that English-law tradition of maintaining legislative control and excluding judicial authority over election rules, none of them proposed that other their authority over election rules, none of them proposed that other branches of the state government may exercise a check on such abuse. Rather, Congress was viewed as the exclusive check on the authority granted to the state. *See* THE FEDERALIST No. 59 (Alexander Hamilton).

must always emanate directly from the legislative body itself. Put more simply, by control over such matters. Though the framers appreciated that state legislatures may abuse their delegating exclusive power to regulate congressional districts in each state to "the Legislature thereof," the Constitution denies that power to other state actors (such as state courts) unless those state actors have a separate and explicit grant of authority. This distinction has played out in a number of matters over the years.

In *Smiley v. Holm*, 285 U.S. 355 (1932), the question was whether subjecting legislation redistricting Minnesota's congressional districts to a Governor's veto violated the Legislature's exclusive jurisdiction under the Elections Clause. The Court reversed the Minnesota Supreme Court's holding that the Elections Clause placed redistricting authority exclusively in the hands of the State's legislature, leaving no role for the Governor. *Id.* at 362–63, 375. The Court explained that "Minnesota's legislative authority includes not just the two houses of the legislature; it includes, in addition, a make-or-break role for the Governor." *Arizona State Legislature*, 135 S. Ct. at 2667 *(citing Smiley*, 285 U.S. at 365–66). Thus, the key factor in the Court's ruling was that the Governor's veto *was part of* the state's legislative authority. *Id.* (citing *Smiley*, 285 U.S. at 367).

Similarly, in *Arizona State Legislature*, where the state's use of an independent redistricting commission adopted by voters via a ballot initiative was at issue, the Court held that lawmaking power in Arizona includes the initiative process, and that the Elections Clause permits use of an independent redistricting commission for congressional redistricting in the same way the Commission is used in districting for Arizona's own Legislature. *Id.* at 2660. The Court noted that "[T]he meaning of the word 'legislature,' used several times in the Federal Constitution, differs according to the connection in which it is employed, depend[ent] upon the character of the function which that body in each

instance is called upon to exercise." *Id.* at 2668 (citations omitted)); *but see Arizona State Legislature*, 135 S. Ct. at 2677–2694 (Roberts, C.J., dissenting); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000).

Unlike *Smiley* and *Arizona State Legislature*, here the North Carolina state courts have no separate grant of authority to participate in the legislative redistricting process, and the state court's adjudication of the redistricting process cannot be fairly included in the state's legislative authority. *See Hawke v. Smith*, 253 U.S. 221, 229 (1920) (holding that "ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word"); *cf. Davis v. Hildebrant*, 241 U.S. 565 (1916) (referendum was part of the legislative authority of the State where it involved the *enactment* of legislation). Therefore, any attempt by a state court to intrude upon the authority of the North Carolina General Assembly to fulfill its role in redistricting must be viewed through a proscriptive lens. Accordingly, this Court cannot grant the remedy Plaintiffs' seek because it would require the Court to develop its own criteria that the legislature did not adopt and order the legislature to adopt the Court's criteria.

In contrast and similar to the facts of this case, is *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002) (three-judge court). In *Smith*, a federal three-judge panel held that the adoption of a congressional redistricting plan by a Mississippi chancery court was unconstitutional because it violated the Elections Clause. *Id.* at 549. The three-judge panel explained,

> based on our understanding of the constitutional provision, in the light of its plain language and the case authority when considered as a whole, we hold: Article I, § 4 requires a state to adopt a congressional redistricting plan in a manner that comports with legislative authority as defined by state law.

Id. at 556.

> Although the constitutional provision may not require the state legislature itself to enact the congressional redistricting plan, the state authority that produces the redistricting plan must, in order to comply with Article I, Section 4 of the United States Constitution, find the source of its power to redistrict in some act of the legislature.

Id. at 550. Therefore, the term "Legislature is not confined to the state legislature as an institutional body" but state actors that operate outside of the legislative body must derive the authority for their actions from some source of legislative power provided under state law. *Id.* at 552. In reaching its conclusions, the federal three-judge panel in *Smith* discussed and distinguished *Growe v. Emison*, 507 U.S. 25, 33 (1993) in detail.

Growe is often cited to support deference of state-court authority over redistricting, though such reliance is misplaced. In *Growe*, the state court intervened to create a redistricting plan after the legislature failed to redistrict at the beginning of the decade when new census data rendered the existing state district boundaries a violation of the federal Equal Protection Clause. The Supreme Court held that, where a legislature reaches impasse and fails to redistrict at the beginning of a decade, state courts have priority over federal courts in remedying the resulting federal one-person, one-vote violation. *Growe*, 507 U.S. at 33–34 ("[T]he Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself."). But the three-judge panel in *Smith* found several materially significant distinctions from the facts of *Growe* that led the three-judge panel hold "we cannot conclude that *Growe* stands for the proposition that we may disregard Article I, Section 4." *Smith*, 189 F. Supp. 2d at 556.

First, *Growe* merely addresses the ability of state courts to implement a redistricting plan when the legislature has failed to do so in violation of *federal* law—*Growe* does not address the state court's ability to remedy violations of *state* law and where the state has

already acted to implement a redistricting plan. *Id.* at 555–56. Because the delegation of authority for the state courts to act in *Growe* arose from the legislature's failure to act (a fact that was not present in *Smith*), the three-judge panel in *Smith* held that *Growe*'s holding was inapplicable to the Mississippi Chancery Courts, because the Courts enjoy no legislatively delegated authority. *See id.* at 556–57; *see also Mauldin v. Branch*, 866 So.2d 429, 433–34 (Miss. 2003) (adopting this view). The *Smith* court concluded that such courts have no remedial authority—even to remedy violations of federal law—and it therefore enjoined a state court-drawn map as a violation of the Elections Clause.

Although the Court has held that the word "Legislature" is not so restrictive as to exclude referendums, a Governor's veto, and an independent redistricting commission passed by ballot initiative, no one contends here that the North Carolina courts participate in North Carolina's "prescriptions for lawmaking" or constitutes the "power that makes laws." *See Arizona State Legislature*, 135 S. Ct. at 2671.

It is different, and offensive to the Elections Clause to identify the lawmaking bodies (the legislature) and processes (e.g. legislation) and then empower entirely different and non-legislative bodies (the courts) and processes (litigation) to override otherwise lawful time, place and manner rules—such an act is not emanating from the institution that the state's constitution has identified as its "Legislature." Here, the North Carolina General Assembly fulfilled its duty to redistrict in compliance with its federal obligations, and the General Assembly complied with the "method which the state has prescribed for legislative enactments" when the North Carolina House and Senate voted on and approved the redistricting plan on February 18 and February 19, 2016, respectively. *Smiley*, 285 U.S. at 367. Therefore, if the North Carolina Superior Court were to grant Plaintiffs' requested remedies, it will unlawfully usurp the General Assembly's federally prescribed role by mandating the substance of a remedial plan, and potentially redistricting North Carolina's

congressional districts itself. Thus, as set forth in precedent addressing courts' remedial redistricting authority, any effort by a state body with *no* lawmaking power, such as the North Carolina state court, to override the duly enacted legislation will run afoul of the Elections Clause because it is "the Legislature" that has been granted the authority to engage in redistricting, and not the courts.

2. State Court Attempts to Enforce State Constitutional Law in the Redistricting Runs Afoul of the Supremacy Clause.

To the extent Supreme Court precedent supports judicial review, it only extends to preventing election rules from abridging "fundamental rights" codified in the federal constitution and statutes (e.g., right to vote, freedom of political assoc.). *Tashjian v. Repub. Party*, 479 U.S. 208, 217 (1986). Judicial review is appropriate in those circumstances because the individual rights in the federal Constitution must be afforded equal dignity with the Elections Clause. In contrast, state constitutions do not enjoy that equal status because they are subject to federal supremacy and are plainly subordinate to the Election Clause's prescribed grant of authority.

Any claim to state-law-created authority, including a state's constitution, conflicts with the Elections Clause's mandate that congressional district lines be drawn by "the Legislature," so this state-law-based authority must yield to federal law. As Justice Rehnquist explained:

> In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns. *Cf. Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. *See* U.S. CONST. art. IV, § 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government.

Bush v. Gore, 531 U.S. at 112–13 (2000) (Rehnquist, C.J., concurring) (in the context of the

appointment of electors in a presidential election).

Even if all state courts have the authority *Growe* described in legislative impasse cases, that case addressed the "concurrent jurisdiction" of state and federal courts "over the same subject matter." *Growe*, 507 U.S. at 32. That "concurrent jurisdiction" references state courts' concurrent jurisdiction with federal courts to enjoin violations of *federal* law, because the alleged violation in *Growe* was a one-person, one-vote violation. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Growe*, 507 U.S. at 27–28. In these circumstances, state courts may exercise this authority because they are "subject also to the laws of the United States," and the authority is therefore derivative of federal law. *See Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 137 (1876).

However, the power to remedy federal-law violations with remedial time, place, or manner rules does not imply the power to establish such rules for state-law violations. Indeed, state substantive constitutional law is not analogous to the individual rights guaranteed under federal law because the state constitution is subordinate to the Elections Clause pursuant to the supremacy clause. Subjecting a legislative plan to a state constitution's substantive law not only frustrates the express delegation of the authority contained in the Elections Clause, but it sets up a conflict between the state constitutional policy and the state legislative policy. In such cases, the Elections Clause mandates that the legislature must win to avoid state constitutional law superseding federal law. As discussed above, Sect. III.A.1 *supra*, in *Smiley* the U.S. Supreme Court held that the function of a state legislature in prescribing the time, place, and manner of holding elections for representatives in Congress under the Elections Clause is a lawmaking function in which the veto power of the state governor participate if, under the state constitution, the governor has that power in the making of state laws. *Smiley,* 285 U.S. at

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Furthermore, the Court has severely curtailed the remedial authority of federal courts by holding that it they must implement redistricting plans that "most clearly approximate[] the reapportionment plan of the state legislature," *White v. Weiser*, 412 U.S. 783, 796 (1973), leaving courts no power to create policy, *Upham v. Seamon*, 456 U.S. 37, 41–43 (1982). This doctrine honors the Constitution's delegation of power over time, place, and manner rules to "the Legislature" by ensuring that courts' involvement is narrowly tailored to remedying violations of federal law. U.S. CONST. art. I, § 4. And it expressly disclaims any federal-court authority to establish time, place, or manner rules. It stands to reason then, that this implied federal constitutional basis for such a rule necessitates that state courts be equally bound.

In this case, the Court is not empowered to insert itself into the redistricting process by ordering remedial maps that are drawn with criteria that neither the legislature nor the North Carolina constitution has adopted. Accordingly, this Court cannot grant the remedy Plaintiffs seek.

B. With the 2020 Elections Looming, the Requested Injunction will Substantially Disrupt the Orderly Conduct of Elections, Harming North Carolina's Citizens and Candidates.

To say that the timing of Plaintiffs' requested relief is troublesome would be an understatement, at best. The filing period during which congressional candidates must file their Notice of Candidacy form begins at noon, December 2, 2019 and ends at noon, December 20, 2019. N.C. Gen. Stat. § 163-106.2 (2019). *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020.*[10] Filings submitted before or after this narrow filing period are not accepted. *Id.* The Notice of Candidacy is made

available to potential candidates no more than two weeks prior to the beginning of the filing period. *Id.* Before the end of this filing period, potential candidates must also visit their county board of election in order to receive an affirmation from the chair of the board of elections or the director of elections on the Notice of Candidacy form stating that the candidate has been registered with his or her political party for at least 90 days prior. N.C. Gen. Stat. § 163-106.1. *See also* North Carolina State Board of Elections, *Factsheet: Candidates for U.S. Congress 2020.*[11] In addition to the steps potential candidates must take to file their Notice of Candidacy forms, before this short filing period—which is roughly only one month away—potential candidates must also make the decision to run for office. Those considering running for congress in 2020 must weigh the decision to run, including those involving election chances, finance, and other considerations. The primary elections for congressional candidates in North Carolina are scheduled to take place on March 3, 2020 and early voting is set to begin on February 12, 2020.

1. The Relief Requested Fails to Consider Judicial Intrusions into Elections

In reasonable anticipation of the 2020 election cycle, and in reliance upon the existing congressional maps, congressional candidates in North Carolina have been spending their time, and receiving and expending valuable resources in furtherance of their respective campaigns. *See* **Exhibit 1**, Aff. of Rep. Virginia Foxx; **Exhibit 2**, Aff. of Rep. Richard Hudson; **Exhibit 3**, Aff. of Rep. Ted Budd. Similarly, the citizens of North Carolina have been contributing to and volunteering with congressional campaigns in their current districts. *See* Amicus Brief for George Holding, Walter B. Jones, Jr., Virginia Foxx, Mark

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[10] Available at: https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf.

[11] Available at: https://www.ncsbe.gov/Portals/0/Forms/2020/Filing_factsheet_2020_USCongress_190502.pdf.

Walker, David Rouzer, Richard Hudson, Robert Pittenger, Patrick T. McHenry, Mark Meadows, and Ted Budd as Amici Curiae in Support of Applicants, *Rucho v. Common Cause*, 138 S. Ct. 2679 (mem.) (2018) (No. 17A745). These facts counsel against the issuance of a preliminary injunction because such an eleventh-hour change would both confuse and disenfranchise voters and would place unreasonable demands on state election officials.

Further, state and county election officials also require time prior to elections in order to properly administer those elections. For example, election administrators must provide for the distribution of voting systems, ballots, and pollbooks, training election officials, conducting absentee and in-person voting, and tabulation and canvassing of election results. Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, No. 18-14001.[12] Election officials must also geocode voters, assigning them to relevant voting districts—a process that must be audited by the State Board. *Id.* ¶¶ 3–5. The geocoding process would likely take weeks. *Id.* Election officials must also prepare ballots, which can only occur after geocoding is complete and candidate filing closes. *Id.* ¶ 6. Ballot preparation would also likely take weeks, making the total time needed for geocoding and ballot preparation 34 to 42 days. *Id.* ¶ 10.

Pursuant to N.C. Gen. Stat. § 163-227.10(a), the State Board of Elections must begin mailing absentee ballots 50 days prior to the primary election day. N.C. Gen. Stat. § 163-227.10(a) (2019). The federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") also requires that absentee ballots that include elections for federal office be made available by 45 days before a primary election. 52 U.S.C. § 20302(a)(8)(A) (2018). Based on the scheduled primary date of March 3, 2020 for congressional races, 50 days

before the primary election falls on January 12, 2020, and 45 days before the primary election falls on January 18, 2020. *See* Affidavit of Karen Brinson Bell, *Common Cause v. Lewis*, No. 18-14001.

The United States Supreme Court has repeatedly held that judicial intrusion into elections must take account of "considerations specific to election cases." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). These considerations include the fact that "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. "As an election draws closer, that risk will increase." *Id.* at 5. Courts must therefore weigh such factors as "the harms attendant upon issuance or nonissuance of an injunction," the proximity of the upcoming election, the "possibility that the nonprevailing parties would want to seek" further review, and the risk of "conflicting orders" from such review. *See id.* Other relevant factors that Court must weigh when evaluating whether to grant extraordinary relief affecting impending elections include "the severity and nature of the particular constitutional violation," the "extent of the likely disruption" to the upcoming election, and "the need to act with proper judicial restraint" in light of the General Assembly's heightened interest in creating Congressional districts. *North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

In accordance with this hesitation to intrude into the conduct of elections, the United States Supreme Court has long rejected just the sort of last-minute changes to elections Plaintiffs are requesting here, even when faced with constitutional violations. *See, e.g., Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) (affirming decision of district court permitting election to proceed under map with constitutional infirmities because "primary election was only three months away"); *Kilgarlin v. Martin*, 386 U.S. 120, 121 (1967) (per

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[12] Ms. Bell's Affidavit is attached to Legislative Defendants' Response to Plaintiffs' Motion for

curiam) (affirming district court's action permitting 1966 Texas election to continue under a "constitutionally infirm" plan due to the proximity of the election date). As the United States Supreme Court stated in *Reynolds v. Sims*:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws and should act and rely upon general equitable principles. 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.

In *Purcell*, the United States Supreme Court vacated an injunction issued by the Ninth Circuit prohibiting Arizona from enforcing its voter identification law. 549 U.S. at 3. The *Purcell* Court held that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, [its] action. . . shall of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Id.* at 5–6. Through *Purcell* and *Reynolds v. Sims*, the United States Supreme Court has made clear that, even when faced with constitutional violations, eleventh-hour disruptions to elections must be avoided. Even in *Common Cause v. Rucho*, a case that was later overturned by the United States Supreme Court on the merits, the three-judge district court, after finding that North Carolina's 2016 Plan constituted an unconstitutional partisan gerrymander, concluded that there was "insufficient time for [it] to approve a new districting plan and for the State to conduct an election using that plan prior to the seating of the new Congress in January 2019." *Common Cause v. Rucho*, 2018 U.S. Dist. LEXIS 152428, *3–*4 (M.D.N.C. Sept. 4, 2018) (per curiam). It further found "that imposing a new schedule for North Carolina's

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Preliminary Injunction as Exhibit 2.

congressional elections would, at th[at] late juncture, unduly interfere with the State's electoral machinery and likely confuse voters and depress turnout." *Id.* at *4. Accordingly, that court declined to enjoin use of the 2016 Plan in the November 6, 2018, general election. *Id.*

The North Carolina Supreme Court has adopted the United States Supreme Court's consideration of the proximity of forthcoming elections in withholding immediate relief in cases requiring redistricting. In *Pender Cty. v. Bartlett*, the North Carolina Supreme Court stayed a judicial remedy requiring redistricting, opting to do so only after the following election. 361 N.C. 491, 510, 649 S.E.2d 364, 376 (2007) *aff'd, Bartlett v. Strickland*, 556 U.S. 1 (2009). In that case, the court held that a portion of North Carolina's legislative plan violated the North Carolina Constitution's Whole County Provision, N.C. CONST. art. II, §§ 3(3), 5(3), in August 2007. *Id.* at 510, 649 S.E.2d at 376. Such a violation necessarily required the redrawing of legislative districts. *Id.* However, despite this infirmity, the North Carolina Supreme Court permitted the plan to remain in place until after the 2008 general election. *Id.* In doing so, the North Carolina Supreme Court adopted the United States Supreme Court's reasoning in *Reynolds v. Sims*, staying its remedy under after the next election. *Id.* (citing *Reynolds*, 377 U.S. at 585). The court recognized that upending the political geography of the state in August of the year prior to elections, would cause disruption to the ongoing election cycle in part because "candidates have been preparing for the . . . election in reliance upon the [current] districts . . .". *Id.; see also Beech Mt. v. Genesis Wildlife Sanctuary*, 247 N.C. App. 444, 459, 786 S.E.2d 335, 346 (2016) (acknowledging that North Carolina courts are first and foremost bound by decisions of the United States Supreme Court) (citing *Pender Cty.*, 361 N.C. at 516, 649 S.E.2d at 380).

It is hard to imagine a greater disruption to an election process than what Plaintiffs

demand in this case. They ask the Court to enjoin the 2016 Plan and order that a completely new districting plan be drawn. If this Court cannot accomplish that in time, Plaintiffs ask that this Court delay the March 2020 primaries. In their fever dream of partisan gerrymandering claims, the Plaintiffs severely simplify the electoral and campaign processes.

Modern Congressional campaigns do not begin on the first day for circulating nomination petitions. They require immeasurable preparation, which almost completely relies upon knowing the boundaries of the district in which they will be running in advance. Congressional candidates have long been campaigning in anticipation of the 2020 election. Many candidates challenging North Carolina incumbents for the 2020 election have already announced their campaigns.[13] In addition, media and opposition campaigns have already been unleashed against congressional incumbents by various political groups and activists. The campaign committees of those running for congress in 2020 have already raised significant sums to win the 2020 elections. Accordingly, each Member has invested substantial time, effort, and/or money running in their respective congressional seats.

Congressional candidates' personal efforts, activities, duties, and stakes in their congressional candidacies are well underway. These activities require knowing with certainty the geographic parameters of congressional districts with sufficient lead time to permit candidates to develop a campaign strategy that is tailored to the needs of the unique voters in their district. The decisions to undertake such investment is based in no small part on the existing boundaries of the Members' respective congressional districts. In fact, the district boundaries were a critical factor in making decisions about each candidacy. A

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[13] *See* Ballotpedia.org, United States House of Representatives elections in North Carolina, 2020, Ballotpedia.org, (accessed October 21, 2019)

change in congressional districts before the 2020 elections, including the primary, could, and likely will, threaten some congressional candidacies because candidates may no longer live in their districts, they may be paired with another incumbent, or a new district could geographically or demographically favor a primary opponent. With congressional terms lasting only two years, the next election cycle does not simply begin with the state filing deadline, but rather begins almost immediately after the previous general election. Congressional candidates in the state have been relying on the existing congressional map for over a year in making campaign and election related decisions regarding the 2020 elections.

Now that the 2020 election cycle is well underway, and the primary elections are only months away, prohibiting the use of the 2016 Plan and forcing elections to be held under an entirely new plan would result in the serious disruption of orderly election processes. Not only will candidates have allocated resources directed toward voters who no longer reside in the same district (and therefore may no longer be potential constituents or supporters), they will have to expend additional resources to reach new voters who now reside in the new districts.

2. The Relief Requested Will Substantially Harm Candidates and the Citizens' Right to Vote for Candidates of Their Choosing.

Further, those candidates with fewer resources will be severely and disproportionately disadvantaged by a mid-stream change in electoral maps. Forcing a profound change in North Carolina's political geography only weeks before the primary filing deadline would force congressional candidates to expend significant funds in order to reach new constituents while simultaneously depriving them of the necessary time to raise

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https://ballotpedia.org/United_States_House_of_Representatives_elections_in_North_Carolina,_2020

those funds. This will clearly harm candidates who possess fewer resources than their opponents.

Moreover, given the time constraints and proximity to filing deadlines, more expensive methods of campaign communication will need to be utilized in order to reach voters who are new to their congressional districts. Grassroots efforts such as community organizing, door knocking, volunteer phone banking, canvassing, and "barnstorming" generally require candidates to expend less money but require much more time. Candidates would be forced to utilize more expensive—and less direct—means of voter outreach such as paid phone-banking and advertisement through television, internet, radio, and print. The lack of direct voter contact from campaigns will not only fundamentally undermine the direct constituent involvement in the political process that the district court seeks to remedy in its order but will also place a much greater strain on cash-strapped campaigns than on campaigns with large resources currently at their disposal.

If this Court grants an injunction, the citizens of North Carolina will also suffer harm. Such a late disruption of the political landscape will undoubtedly create substantial uncertainty among voters as to what new district they are in, which candidates are running in those districts, and where their polling places will be. These are districts that have been in place for nearly four years and two congressional election cycles. Much public outreach would be required in order to attempt to educate voters on these changes, which have no guarantee of achieving any kind of success.

The citizens of North Carolina have also been contributing to and volunteering with Congressional candidates in anticipation of the 2020 elections. These citizens have supported these candidates in reliance on the existing congressional map. Much of this support may not have been pledged if the contributor resided in a different district than the candidate or if a candidate was not likely to be successful in the 2020 elections. The

decisions to undertake this support were based in no small part on the existing boundaries of the congressional districts.

Additionally, a complete upheaval of the regularly scheduled election processes of North Carolina at this late date will certainly have a chilling effect on contributors' willingness to engage in the political process. As the United States Supreme Court stated in *Buckley v. Valeo*, "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. 1, 21 (1976). An injunction from this Court is bound to "result in voter [and contributor] confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4–5 (2006). Thus, in addition to the voter confusion that would undoubtedly take place in the event of an injunction, the citizens of North Carolina who are already involved in the political process through contribution and volunteering will be harmed.

Finally, the daunting challenges candidates face will be further exacerbated by the strictures of federal campaign finance law and the application thereof to Congressional elections. Under the Federal Election Campaign Act, limits on contributions to candidates apply on a per-election basis. 52 U.S.C. § 30116(a)(1)(A) (2018). As noted above, several candidates have already expended substantial portions of the primary election funds they have raised for the primary election. If Plaintiffs' requested relief is granted, these candidates will need to recalibrate their campaigns and begin reaching out to entirely new populations of potential voters utilizing that same pool of primary election funds. They will do so with severely diminished resources and limited opportunities to replenish them because, notwithstanding that their election environment has been radically altered by a new map, they will not have refreshed contribution limits under federal law. So, existing

candidates who are cash-strapped will be severely disadvantaged relative to candidates who get into the race later and enjoy fresh contribution limits.

The Federal Election Commission has in the past permitted candidates running in newly redrawn congressional districts to raise additional contributions subject to new limits—but only if special elections have been ordered in those districts. *See, e.g.*, Fed. Election Comm'n, Advisory Ops. 2016-09 (Martins for Congress) & 2016-03 (Holding for Congress). But such relief would be unavailable to current congressional candidates running in newly drawn districts in North Carolina because not even these Plaintiffs are bold enough to request a special election at so late a date. Therefore, there is no new election for the purpose of providing a new contribution limit under FECA. In short, the federal campaign finance-related hardships imposed on candidates militate in favor of denying a preliminary injunction in this case.

Accordingly, the precedent of the United States Supreme Court and the Supreme Court of North Carolina make Plaintiffs' claims unlikely to succeed on the merits at such a late junction and simultaneously counsel against granting a preliminary injunction prohibiting the use of the 2016 Plan in the 2020 elections.

C. Laches Bars the Plaintiffs' Claims

Because Plaintiffs waited nearly four years and two congressional election cycles, and until mere months before the 2020 Election filing deadlines, to bring their claims they are barred by the equitable doctrine of laches. Even if the 2016 Plan is an impermissible partisan gerrymander—which it is not—Plaintiffs could have, and should have, brought their claims much earlier than they did. Plaintiffs' unreasonable delay has significantly prejudiced the parties and therefore will not be permitted to proceed under the doctrine of laches.

"The doctrine of laches is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88–89, 712 S.E.2d 221, 230 (2011) (internal citation and quotation marks omitted).

> To establish the affirmative defense of laches, [North Carolina] case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

Farley v. Holler, 185 N.C. App. 130, 132–33, 647 S.E.2d 675, 678 (2007) (citation omitted).

Plaintiffs here have delayed as much as possible, likely with the purpose of hampering any defense of the 2016 Plan. They have waited until the absolute last minute, demanding *preliminary injunctive* relief for only the last election cycle to be held under the 2016 Plan. The only explanation for this inexcusable delay is that Plaintiffs waited as long as possible in hopes that evidence and witnesses favorable to the defense is lost to time or, just as likely, lost to the exigencies of their supposed "preliminary" relief. *Cf. Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("[A] party requesting a preliminary injunction must generally show reasonable diligence. That is true in election law cases as elsewhere. (internal citation omitted)). Tellingly, they offer no explanation as to why they waited this long to bring these claims.

The Plaintiffs' delay encompasses more than a mere passage of time. They have delayed through two full election cycles since the 2016 map was adopted and bring this action in the middle of a third. *See supra* Section III.B.1. This delay clearly works to the

injury and prejudice of Defendants. As discussed *supra*, voters, candidates, and state elections officials have acted in reliance on the North Carolina's existing congressional districts as they currently stand. *Id.* Delaying for years and multiple election cycles, and until the current 2020 election cycle is well underway, only acts to further concrete that reliance on the 2016 Plan. The prejudice not only extends to the consequences of remedial action but to the process of justice itself. Granting a preliminary mandatory injunction at this late hour will completely circumvent Defendant's rights to a trial on the merits, including all the protections afforded therein. This, in and of itself, is extremely prejudicial.

Finally, Plaintiffs here clearly knew or should have known about the grounds for their claims. Indeed, Plaintiffs indicate that they believe the alleged partisan gerrymander present in the 2016 Plan worked in the very first year it was used—2016. Therefore, by their very words, Plaintiffs knew the full extent of their alleged harm nearly three years ago. Still, they waited years and for yet another congressional election to bring their claims.

Plaintiffs have unreasonably delayed in bringing their claims, prejudicing the other parties in this suit. Accordingly, Plaintiffs claims are barred by laches and therefore not likely to succeed.

D. The 2016 Plan Does Not Violate North Carolina's Free Elections Clause.

Plaintiffs first claim that the 2016 Plan violates the Free Elections Clause of the North Carolina Constitution because it "'unlawfully seek[s] to predetermine election outcomes in specific districts' and across the state as a whole." Compl. at ¶ 127 (citing *Common Cause*, 18-CVS-14001, slip. op. at 305). In making this claim, Plaintiffs cite only to *Common Cause v. Lewis*, the recent decision by a three-judge panel of this Court invalidating North Carolina's state legislative maps. *Common Cause*, however, fails to adequately support its novel interpretation of the Free Elections Clause, nor does Lewis

address the implication of Article I, Section IV of the U.S. Constitution on Congressional districting lines – something that this Court is obligated to address.

Prior to *Common Cause*, judicial interpretations of North Carolina's Free Elections Clause were limited and dealt with issues of electoral procedure rather than substantive issues like redistricting. *See e.g., Swaringen v. Poplin*, 211 N.C. 700, 700, 191 S.E. 746, 747 (1937) (plaintiff stated sufficient facts to constitute a cause of action under the Free Elections Clause where county board of elections fraudulently registered underage voters to vote against him in county commissioner election). In *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), the only substantive case cited by this Court to support its decision in *Common Cause*, the alleged Free Elections violation involved a statute requiring voters seeking to change their party affiliation and vote in the new party's primary to take an oath supporting the party's nominees in all future elections. *Id.* at 141–42, 134 S.E.2d at 169–70. In holding that the oath violated North Carolina's Free Elections clause, the North Carolina Supreme Court focused on the free choice of the voter, explaining that the oath "would certainly be sufficient to operate as a deterrent to his exercising a free choice among available candidates." *Id.* at 142, 134 S.E.2d at 170. The Court continued "[t]he oath to support a future candidate violates the principle of freedom of conscience. It denies a free ballot, one that is cast according to the dictates of the voter's judgment. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary." *Id.* at 143, 134 S.E.2d at 170. *Common Cause*— and no earlier state court case we have been able to locate—addresses U.S. Constitutional issues that are implicated and inherent in Congressional districting.

In *Common Cause*, this Court relied exclusively on *Clark* to support its conclusion

that North Carolina's state redistricting plan violated the North Carolina Elections Clause. *Clark,* this Court said, was an example of "laws that interfere with voters' ability to freely choose their representatives." *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 304. While this characterization focuses on the ultimate outcome of elections, the Court in *Clark* does not actually focus on, or even mention, the outcome of the election in its analysis; rather, it focuses on the individual voter's ability to freely cast his vote for the candidate of his choice. As a result, *Clark* is not at all analogous to the allegations at issue in this matter.

Here, unlike *Clark*, Plaintiffs' claims are based entirely on election outcomes rather than individual votes. As noted above, Plaintiffs allege that the 2016 Plan "'unlawfully seek[s] to predetermine election outcomes in specific districts' and across the state as a whole." Compl. at ¶ 127 (citing *Common Cause,* 18-CVS-014001, slip op. at 305). In determining whether the North Carolina Election Clause was violated, the appropriate inquiry is whether Plaintiffs were denied a "free ballot", i.e., "one that is cast according to the dictates of the voter's judgment." *Clark* at 143, 134 S.E.2d at 170. None of the Individual Plaintiffs had his or her "free choice" or "freedom of conscience" to vote for the candidate of their own choosing hampered or limited in any way. By each of the Plaintiffs' own admission, they voted for their candidates of choice in the elections held under the 2016 Congressional map without any constraints. As set forth in the Complaint, each of the 14 individual Plaintiffs "has consistently voted for Democratic candidates for the U.S. House of Representatives." Compl. ¶¶ 6–19. Moreover, Plaintiffs Amy Clare Osseroff, John Balla, and Virginia Walters Brien live in congressional districts where the Democratic candidate won their district. *See* Compl. ¶¶ 1, 9, and 18. Thus, Plaintiffs have shown no evidence that any of the individual Plaintiffs' ability to vote for the candidate of their own

choosing was impacted by the 2016 Plan. Plaintiffs' Free Elections Clause claim, therefore, has no likelihood of success on the merits.

E. The 2016 Plan Does Not Violate North Carolina's Equal Protection Clause.

Plaintiffs assert that the Equal Protection Clause of the North Carolina Constitution "protects the right to 'substantially equal voting power;' and that the right to vote on equal terms is a fundamental right." Compl. ¶ 132 (citing *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002)). Plaintiffs, citing *Common Cause*, assert that partisan gerrymandering violates North Carolina's Equal Protection Clause as it "runs afoul of the State's obligation to provide all persons with equal protection of law because ... a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who supports candidates of another party." Compl. ¶ 133, (citing *Common Cause v. Lewis*, 18-CVS-014001, slip op. at 307).

The "equal terms" language used by Plaintiffs and relied on in *Common Cause* is from *Stephenson*, 355 N.C. at 378–81, 562 S.E.2d at 393–95. *Stephenson* did not involve partisan gerrymandering and did not involve Congressional elections; it involved the constitutionality of having "both single member and multi-member districts in legislative districting plans. *Stephenson* applied the principle of one-person one-vote, i.e. voting on "equal terms." *Id.* at 378-79, 562 S.E.2d at 394. The only mention the Court made of partisanship in *Stephenson* was to recognize that partisan advantage and incumbency protection are lawful considerations in legislative redistricting. *Id.* at 371, 562 S.E.2d at 390 (allowing Legislature to "consider partisan advantage" when redrawing maps, so long as it complies with the State Constitution's Whole County Provisions, N.C. CONST. art. II, §§ 3(3), 5(3)). Accordingly, *Stephenson* actually undercuts Plaintiffs' Equal Protection Claim, and does not address the U.S. Constitutional issues inherent in Congressional

districting.

In *Common Cause*, this Court applied a strict scrutiny standard to the Equal Protection Claim related to the state redistricting plan, including three parts (1) intent, i.e., a predominant purpose to "entrench [their party] in power" by diluting the votes of citizens favoring their rival"; (2) effects, i.e., the lines in fact have the intended effect by substantially diluting their votes; and (3) causation, i.e., the impermissible intent caused the effect. *Common Cause,* 18-CVS-014001, slip op. at 309 (citing *Arizona State Legislature,* 135 S. Ct. at 2658; *Rucho*, 318 F. Supp. 3d at 861; *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting)). Plaintiffs in this matter attempt to show that these elements are met by alleging that "Republican leaders ... used 'partisan advantage' and 'political data' as criteria in drawing the congressional district lines," and that "the 2016 Adopted Criteria *required* drawing congressional district lines to give Republicans control of 10 of the 13 congressional seats." *Id.* at ¶ 134. Plaintiffs further allege that the "packing and cracking of Democratic voters under the 2016 Plan burdens the representational rights of Democratic voters individually and as a group and discriminates against Democratic candidates and organizations individually and as a group." *Id.* at ¶ 135.

As discussed above, however, Plaintiffs' characterization of the redistricting process is hyperbolic and inaccurate. Though partisan advantage was one criterion, it was balanced among six other criteria including compactness, contiguity, and equal population. Contrary to Plaintiffs' claims, the 2016 Plan effectively utilizes traditional redistricting criteria in developing the congressional district maps. For example, among 87 whole counties, it splits only 12 precincts, which is a lower number than any previous plan. Further, the number of registered Democrats exceeds the number of registered Republicans in all but one of the districts in the 2016 Plan. The "partisan advantage" criteria that Plaintiffs focus on merely states that the Committee "would make reasonable effort to

construct districts in the 2016 contingent plan to maintain the current partisan makeup of North Carolina's congressional delegation." *See* 2016 Contingent Congressional Plan Committee Adopted Criteria, *available at* https://www.ncleg.gov/Files/GIS/ReferenceDocs/2016/CCP16_Adopted_Criteria.pdf. As noted above, such criteria have been consistently found lawful by courts, and this case is no different. *See, e.g., Dickson*, 368 N.C. at 499, 529, 781 S.E.2d at 418, 437 (2015) (affirming partisanship as defense to racial gerrymander claims), *modified on denial of reh'g*, (2016). Thus, contrary to Plaintiffs' claims that the 2016 Plan was designed to maximize partisanship and arrange for pre-determined outcomes that advantaged Republicans, there was never any such overriding or overwhelming intent because of the impact of the other criteria. To the contrary, each of the seven criteria were followed and balanced in the 2016 Plan. Without having shown the necessary intent, the Equal Protection Claim fails.

Nor do Plaintiffs present evidence that the 2016 Plan ultimately had the effect of substantially diluting their votes. Under the 2016 Plan, Republicans won 10 of the Congressional districts. But based on the composition of registered voters by district, in order to accomplish this the Republicans had to win the votes of thousands of registered Democrats or unaffiliated votes. Moreover, the election data shows that the districts in the 2016 Plan are weaker for Republican candidates than under the 2011 plan. Using 2008 election data, most of the districts in the 2016 Plan result in the share of votes for Republican candidates decreasing as compared to prior plans. For these reasons, the Plaintiffs are not likely to succeed on their Equal Protection Claim.

F. The 2016 Plan Does Not Violate North Carolina's Freedom of Speech and Assembly Clauses.

Finally, Plaintiffs claim that their rights to free speech and association are violated by the General Assembly's consideration of politics in the redistricting process because

"[v]oting for the candidate of one's choice and associating with the political party of one's choice are core means of political expression protected by the North Carolina Constitution's Freedom of Speech and Freedom of Assembly Clauses." Compl. ¶ 140, citing *Common Cause*, 18-CVS-14001, slip. op. at 320–21; *see generally* Compl. ¶¶ 136–143 (citations omitted). Plaintiffs again rely primarily on *Common Cause* to support their claim and note that North Carolina's "Free Speech Clause provides broader rights than does federal law." *Id.* at ¶139, citing *Common Cause*, 18-CVS-14001, slip. op. at 318.

Though the North Carolina Constitution does provide a direct cause of action for damages against government officers in their official capacity for speech violations and federal law does not, North Carolina's free speech law on these types of claims is substantively the same as federal First Amendment law. *Corum v. University of North Carolina,* 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992); *Evans v. Cowan*, 122 N.C. App. 181, 468 S.E.2d 575 (1996), *aff'd*, 345 N.C. 177, 477 S.E.2d 926 (1996). In *Evans v. Cowan*, the North Carolina Court of Appeals held that a federal court judgment on First Amendment claims were not *res judicata* as to free speech and association claims under the North Carolina Constitution; however, when the case returned to the North Carolina Court of Appeals, that court engaged in the *same analysis as the federal analysis. Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175–76 (1999) (applying federal *Connick* standard to free speech retaliation claim under North Carolina Constitution); *McLaughlin v. Bailey,* 240 N.C. App. 159, 771 S.E.2d 570 (2015), *aff'd*, 368 N.C. 618, 781 S.E.2d 23 (2016); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993).

Applying the appropriate standard, Plaintiffs' Freedom of Speech and Assembly claims must fail. The U.S. Supreme Court has specifically found that legislative maps do not burden speech or association. *Rucho*, 139 S. Ct. at 2504 ("[T]here are no restrictions on

speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan maybe on their district."). The Court also found that partisan gerrymandering claims are no more justiciable under the First Amendment than they are under any other constitutional provision, because " 'a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,' contrary to our established precedent." *Id.* at 2505 (2019) (quoting *Vieth v. Jubelirer*, 541 U.S. at 294).

Even if not binding on this Court, this opinion should be given "great weight" in its interpretation of the analogous First Amendment. *Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841 (quoting *State v. Hicks*, 333 N.C. 467, 484, 423 S.E.2d 167, 176 (1993)). Moreover, even if the North Carolina standards that Plaintiffs cite are somehow different from federal standards, Plaintiffs' claims still fail. The 2016 Congressional plans do not prevent individuals from voting, and therefore are not a content-based restriction on whatever expression the individual Plaintiff make when casting their votes. The First Amendment does not provide an appropriate or justiciable claim for partisan gerrymandering; neither do the analogous free speech and association provisions contained in Article I, Sections 12 and 14 of the North Carolina Constitution. Though Plaintiffs attempt to argue that the North Carolina Constitution provides broader protections than the United States Constitution, as explained above, those broader protections are merely procedural in nature and do not affect the proper substantive analysis. Therefore, Plaintiffs' Free Speech and Association claims lack merit. In addition, no prior case has addressed the impact of Article I, Section IV's impact on these types of claims in the context of Congressional districting.

IV. PAINTIFFS WILL NOT SUFFER IRREPARABLE HARM ABSENT A PRELIMINARY INJUNCTION.

A preliminary injunction is appropriate only when a plaintiff "is likely to sustain

irreparable loss in the absence of an injunction, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759–60 (emphasis omitted) (citations and quotation marks omitted). Because Plaintiffs seek a mandatory preliminary injunction, they must also prove "the injury is immediate, pressing, irreparable, and clearly established." *Auto. Dealer Res..*, 15 N.C. App. at 639, 190 S.E.2d at 732. Plaintiffs' argument fails because, as discussed above, they have suffered no harm and are, therefore, not entitled to the relief they seek.

Plaintiffs are also unlikely to "sustain irreparable loss." *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856–57 (1990). Although Plaintiffs claim that if this court fails to issue a preliminary injunction, they will be "forced to vote in 2020 in unlawful districts that violate multiple fundamental rights," this claim is not supported by the allegations in this case or the law. *See supra* Section III. Plaintiffs do not allege that the 2016 Plan prevented them from voting. Plaintiffs do not allege that the 2016 Plan prevented them from engaging in other political activities such as donating to campaigns, volunteering with campaigns, or protesting. Fundamentally, the gravamen of Plaintiffs complaint is that their candidate of choice did not win.

Indeed, Plaintiffs sat on their hands for more than three years and two congressional election cycles before bringing their claims. If their harm in the 2016 Plan is truly so immediate and irreparable, one would think that they would have brought their claims in 2016, 2017, 2018, or even earlier this year. Furthermore, the 2020 election is the last election under the 2016 plan that can be held under both state and federal law. U.S. CONST. art. I, § 2. Any harm that Plaintiffs may experience, will be completely illuminated by the 2022 elections in any event. Plaintiffs sitting on their hands and waiting until Defendants have no time to mount a proper defense, must certainly demonstrate to this

Court that Plaintiffs will not suffer irreparable harm if they vote under the 2016 Plan in the 2020 primary elections and General Election.

V. THE BALANCE OF THE EQUITIES STRONGLY WEIGHS AGAINST A PRELIMINARY INJUNCTION.

Through this preliminary injunction, Plaintiffs attempt an end run around this Court's full review on the merits. They seek to completely disrupt the 2020 election cycle through a lesser standard of review—that of preliminary injunction. Granting Plaintiffs' requested relief would not only significantly harm the parties and the voters of North Carolina, but that harm would far outweigh any negligible harm Plaintiffs might possibly suffer by voting under the 2016 Plan for a third and final time.

When presented with requests for injunctive relief, the United States Supreme Court and the North Carolina Supreme Court have acknowledged that court orders affecting election processes, especially those sought in close proximity to an impending election, can result in a significant degree of voter confusion, *see Purcell*, 549 U.S. at 4–5, and disruption of the election process. *Reynolds*, 377 U.S. at 585. *See also Pender Cty.*, 361 N.C. at 510, 649 S.E.2d at 376 (accord). Such orders often have the effect of placing unreasonable demands on the State in adjusting to the new requirements, or of confusing voters to the extent that they opt to stay away from the polls. *See Purcell*, 549 U.S. at 5; *Reynolds*, 377 U.S. at 585; *Pender Cty.*, 361 N.C. at 510, 361 S.E.2d at 376; *see also supra* Section III.B.1.

As discussed *supra*, granting Plaintiffs' preliminary injunction would irreparably harm the members of congress representing North Carolina by changing—or at least calling into question—the composition and boundaries of their districts in the middle of an election cycle. This would occur after their campaigns spent significant funds and after delicate decisions have been made regarding the campaigns. They would be forced to

undertake more expensive and haphazard campaign methods in order to reach new constituencies in time for the primary and general elections. This campaign shift would have to be done quicker and with less money, if it is even possible. This would burden candidates with less cash on hand more than those with large war chests and would therefore have a desperate effect on the ability to campaign.

Further, as discussed *supra*, North Carolina voters would suffer significant harm through confusion. They have been voting under the 2016 Plan and their current congressional districts for more than three years and have surely become familiar with the 2020 candidates since the 2020 election cycle has been underway for roughly a year. To remove these voters from districts they are familiar with only to throw them into an uncertain environment, will certainly cause confusion. *See supra* Section III.B.1. What is worse is this confusion will make many voters stay away from the polls on election day. *Id.*

Moreover, also as discussed supra, election administrators will be forced to expend significant time and resources in order to change North Carolina's districting plan mid-stream. *See id.* They will also need to undertake voter education which will be costly and will likely not address voter confusion completely. *Id.*

All these harms, which would occur if this Court grants Plaintiffs' proposed injunction, would occur regardless of whether this Court finds in Plaintiffs' favor on the merits. If a preliminary injunction is granted, the Court would throw North Carolina's congressional elections into chaos and would cause irreparable harm, even if it eventually finds for Defendants. The uncertainty added costs and efforts, and voter dissuasion would occur not matter what, in the presence of a preliminary injunction. These harms are broad and deep, affecting nearly all aspect of and participants in North Carolina's congressional elections. These harms surely outweigh any minor harms Plaintiffs' may suffer, especially given Plaintiffs' past willingness to tolerate the 2016 Plan for years and multiple elections.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for a preliminary injunction should be denied.

This the 22nd day of October, 2019.

SHANAHAN LAW GROUP, PLLC

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction** upon all parties to this matter by email as follows:

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This the 22nd day of October, 2019.

SHANAHAN LAW GROUP, PLLC

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Attorneys for Intervenor Applicants

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

AFFIDAVIT OF REP. VIRGINIA FOXX

NOW COMES Representative Virginia Foxx and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Fifth Congressional District.

3. I have represented North Carolina's Fifth Congressional District since 2005.

4. For the past 14 years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.

5. I therefore know what I must do as a congresswoman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly,

EXHIBIT
1

developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Fifth Congressional District. I have therefore relied on the contours of this district for the past 14 years, and have relied on the contours of this district for developing my campaign strategy for the 2020 election campaign. Although the district's lines have changed some since I was first elected, its base remains the northwest corner of North Carolina.

6. In serving the constituents of North Carolina's Fifth Congressional District for the past fourteen years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on April 12, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $2,892,872.62 cash on hand. I have spent nearly $ 322,475.11 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Five were a critical factor in my decision to run for congress in that district. While the lines have changed multiple times since I was first elected to the House of Representatives in 2004, District Five has always contained Watauga County (my home county), Ashe County, Alleghany County, Wilkes County, Yadkin County, Alexander County and part or all of Forsyth County. While its eastern and southern boundaries have changed somewhat over the years, District Five has also often included Surry County and Stokes County.

10. Plaintiffs' requested injunction would require me to devclop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs

and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds both to learn the contours of my new district as well as to develop relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be voting in new districts for the 2020 election. They will be confused as to which office seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my constituents in many other ways. Constituents may mistakenly believe that I am no longer the congressional candidate for their district. My office and I actually saw and heard directly from people in 2016 when the district lines changed while the primary was in operation that voters missed voting in the primary that really counted because they had voted in the first primary, assumed that their vote counted and did not vote in the "real" primary established after district lines were

redrawn. I personally had to talk to people multiple times to get them to vote in the "real" primary.

14. Generally, when constituents contact a Congressional office for assistance, it is a true plea for help. The staff in my offices have been with me for very long periods of time and have developed relationships with officials and constituents in the district that help facilitate the serving of the constituents. Forcing constituents to have to build trust with another office and work to get their problems solved would be a burden on them.

15. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts. Approximately 59 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. These individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent constituents and allows any competitor of mine to start with a fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

16. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: Virginia Foxx
Rep. Virginia Foxx

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

NGUYET PALICH
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

AFFIDAVIT OF REP. RICHARD HUDSON

NOW COMES Representative Richard Hudson and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Eighth Congressional District.

3. I have represented North Carolina's Eighth Congressional District since 2013. While the boundaries changed in 2016, both sets of district lines contained all or parts of Rowan, Cabarus, Stanley, and Montgomery Counties.

4. For the past six years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.

EXHIBIT
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5. I therefore know what I must do as a congressman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly, developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Eighth Congressional District. I have therefore relied on the contours of this district for the past six years, and have relied on the contours of this district as drawn in 2016 for developing my campaign strategy for the 2020 election campaign.

6. In serving the constituents of North Carolina's Eighth Congressional District for the past six years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on June 26, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $1,096,422.64 cash on hand. I have spent $584,598.27 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Eight were a critical factor in my decision to run for congress in that district.

10. Plaintiffs' requested injunction would require me to develop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds to both learn the

contours of my new district as well as developing relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence, to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be moved into new districts for the 2020 election. They will be confused as to which office to seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my supporters. My supporters may mistakenly believe that I am no longer the congressional candidate for their district. They will volunteer on other campaigns. The reverse is also a risk. My supporters may volunteer on my campaign despite their district lines changing and residing in a new district.

14. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts and the voters living in those districts. Approximately 80 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. Many of these individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent these individuals, and allows any competitor of mine to start with a

fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

15. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: _____
Rep. Richard Hudson

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

NGUYET PALICH
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 19 CVS 012667

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, *et al.*,

Defendants.

AFFIDAVIT OF REP. TED BUDD

NOW COMES Representative Ted Budd and, first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters set forth herein. The following is true of my own personal knowledge and I otherwise believe it to be true.

2. I am the member of Congress representing North Carolina's Thirteenth Congressional District.

3. I have represented North Carolina's Thirteenth Congressional District since 2017.

4. For the past two years, I have spent countless hours meeting with my constituents, developing relationships with them, understanding their problems and needs.

EXHIBIT
3

5. I therefore know what I must do as a congressman to serve my constituents and what legislation to support that best benefits my constituents. I have, accordingly, developed a campaign strategy that is tailored to appealing to the voters of North Carolina's Thirteenth Congressional District. I have therefore relied on the contours of this district for the past two years, and have relied on the contours of this district for developing my campaign strategy for the 2020 election campaign.

6. In serving the constituents of North Carolina's Thirteenth Congressional District for the past two years, I am familiar with the contours of the district. Knowing these congressional district boundaries was pivotal in making my decision to run for office.

7. Because of the foregoing, granting Plaintiffs' Motion for Preliminary Injunction will necessarily harm the relationship between my constituents and me.

8. I formally submitted my Statement of Candidacy for the 2020 election on April 15, 2019. I am currently campaigning for the 2020 election. I am both raising and spending considerable campaign funds under the current contours of my district as I prepare for the 2020 election. Currently, I have $664,695.20 cash on hand. I have spent nearly $441,106.25 on my 2020 reelection campaign. Accordingly, the 2020 election cycle is well underway for me and my opponents.

9. The composition and boundaries of District Thirteen were a critical factor in my decision to run for congress in that district.

10. Plaintiffs' requested injunction would require me to develop new relationships with new constituents. I will be forced to quickly and haphazardly understand their needs and address their problems, which will necessarily differ from those of my current constituents.

11. I will also be required to quickly learn the contours of my new district prior to the next election. This will require me to spend significant campaign funds to both learn the

contours of my new district as well as developing relationships with new constituents. This will also require the additional expenditure of significant campaign funds to develop a new strategy to account for the new and different contours of my district. Since time would be of the essence, to learn the new contours of my district and get to know the new constituents, I would need to do telephone banking, television advertisements, radio advertisements, and internet advertisements, all of which is more expensive and less persuasive than being able to do grassroots campaigning and speaking directly with my constituents. Unfortunately, while less expensive, grassroots campaigning is time consuming and it will not be practical to undertake such campaigning if the 2020 elections are not held under the 2016 Plan, because there is not enough time.

12. A ruling in Plaintiffs' favor will also cause confusion as some of my current constituents may be moved into new districts for the 2020 election. They will be confused as to which office to seek help from for constituent services. This will cause delays in providing timely constituency service.

13. Similarly, because an order from this Court may adjust the district lines shortly before an election, this will cause confusion among my supporters. My supporters may mistakenly believe that I am no longer the congressional candidate for their district. They will volunteer on other campaigns. The reverse is also a risk. My supporters may volunteer on my campaign despite their district lines changing and residing in a new district.

14. Granting Plaintiffs' Motion for Preliminary Injunction will force me to spend additional funds getting to know new districts and the voters living in those districts. Approximately 81 individuals have contributed the maximum federally allowable $2,800 this cycle to my re-election campaign's primary account. Many of these individuals gave because of my actions in representing the current district. Any new map threatens my ability to continue to represent these individuals, and allows any competitor of mine to start with a

fresh $2,800 limit for their primary campaign. It is my understanding that under federal law I will not be allowed to solicit these major donors again during this primary campaign – even if my district is dramatically different than it is now.

15. Additionally, there is a risk that the new contours of my district will not include my residence. There is also a risk that I will be paired in another district with an incumbent.

FURTHER AFFIANT SAYETH NOT.

This the 21 day of October, 2019.

By: _____
Rep. Ted Budd

SWORN TO AND SUBSCRIBED BEFORE ME

This the 21 day of October, 2019.

NGUYET PALICH
Notary Public

My Commission Expires:

NGUYET M. PALICH
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires April 14, 2024

April 14, 2024

EXHIBIT C

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 012667

REBECCA HARPER, *et al.* *Plaintiffs,*	)	
v.	)	ORDER
Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Standing Committee on Redistricting, *et al.,* *Defendants.*	)	

THIS MATTER comes before the undersigned three-judge panel upon its own motion pursuant to its inherent authority and discretion to manage proceedings before the Court.

Plaintiffs in this litigation challenge the congressional districts established by an act of the North Carolina General Assembly in 2016, N.C. Sess. Laws 2016-1 (hereinafter S.L. 2016-1), claiming the districts violate the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution.

On October 28, 2019, this Court granted Plaintiffs' motion for a preliminary injunction, enjoining Legislative Defendants and State Defendants from preparing for or administering the 2020 primary and general elections for Congressional Representatives under the 2016 congressional districts established by S.L. 2016-1. Plaintiffs seek to permanently enjoin the future use of the 2016 congressional districts and have filed a motion for summary judgment, scheduled to be heard on December 2, 2019.

In this Court's October 28, 2019, Order granting the preliminary injunction, the Court noted that summary judgment or trial may not be needed in the event the General Assembly, on its own initiative, acted immediately and with all due haste to enact new

congressional districts. The Court suggested the General Assembly proceed in a manner that ensured full transparency and allowed for bipartisan participation and consensus that would result in congressional districts more likely to achieve the constitutional objective of allowing for those elections to be conducted more freely and honestly to ascertain, fairly and truthfully, the will of the people. On November 15, 2019, new congressional districts were established by an act of the General Assembly. N.C. Sess. Laws 2019-249 (hereinafter S.L. 2019-249). Shortly thereafter on November 15, 2019, Legislative Defendants filed a motion for summary judgment arguing Plaintiffs' present action—challenging the constitutionality of S.L. 2016-1—is moot, and Plaintiffs filed a response and motion for expedited review of the newly-enacted congressional districts.

Section 163-106.2 of our General Statutes provides that "[c]andidates seeking party primary nominations for the following offices shall file their notice of candidacy with the State Board no earlier than 12:00 noon on the first Monday in December and no later than 12:00 noon on the third Friday in December preceding the primary: . . . Members of the House of Representatives of the United States." N.C.G.S. § 163-106.2(a). In the Court's October 28, 2019, Order, the Court retained jurisdiction to adjust the State's 2020 congressional primary elections should doing so become necessary to provide effective relief in this case. In light of the recent developments in this litigation, including the enactment of S.L. 2019-249, Legislative Defendants' motion for summary judgment, and Plaintiffs' motion for the Court's review of S.L. 2019-249, and to allow the Court sufficient opportunity to fully consider the significant issues presented by the parties, the Court will enjoin the filing period for the 2020 congressional primary elections in North Carolina until further order of the Court.

Accordingly, the Court, in its discretion and pursuant to its inherent authority, hereby ORDERS that:

1. On the Court's own motion, the filing period provided by N.C.G.S. § 163-106.2(a) is hereby enjoined for only the 2020 congressional primary elections, and the North Carolina State Board of Elections shall not accept for filing any notices of candidacy from candidates seeking party primary nominations for the House of Representatives of the United States until further order of the Court.

2. Any party to this action may respond to Plaintiffs' motion for review of the newly-enacted congressional districts, S.L. 2019-249, by submitting a response brief to the Court by 11:59 p.m. on November 22, 2019, in the manner set forth in the Case Management Order. Plaintiffs shall have until 11:59 p.m. on November 26, 2019, to submit a reply to any response brief in the manner set forth in the Case Management Order.

3. The Court's November 1, 2019, Order establishing a briefing schedule for summary judgment motions remains in effect.

4. The following will be heard by the Court at 9:00 a.m. on December 2, 2019:
    a. Plaintiffs' motion for summary judgment;
    b. Legislative Defendants' motion for summary judgment; and,
    c. Plaintiffs' motion for review of S.L. 2019-249.

SO ORDERED, this the 20th day of November, 2019.

/s/ Paul C. Ridgeway
Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite
Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton
Alma L. Hinton, Superior Court Judge

EXHIBIT D

STATE OF NORTH CAROLINA

COUNTY OF WAKE

COMMON CAUSE, et al.,

Plaintiffs,

v.

REPRESENTATIVE DAVID LEWIS in his official capacity as Senior Chairman of the House Select Committee on Redistricting; et al.,

Defendants.

FILED
2019 OCT -4 AM 10:03
WAKE CO. C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

NOTICE OF FILING:
AFFIDAVIT OF KAREN BRINSON BELL

NOW COMES Defendants the North Carolina State Board of Elections and its members (collectively "State Defendants"), by and through the undersigned counsel, and hereby submit the attached Affidavit of Karen Brinson Bell in support of State Defendants' Memorandum on Election Administration and Deadlines. A copy of that Memorandum is being delivered to the Court via email to the Trial Court Administrator, pursuant to the Case Management Order in this action.

Respectfully submitted this 4th day of October, 2019.

N.C. DEPARTMENT OF JUSTICE

Stephanie A. Brennan

Amar Majmundar
Senior Deputy Attorney General
State Bar No. 24668

Stephanie A. Brennan
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Attorneys for State Defendants

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing document in the above titled action upon all parties to this cause by depositing a copy by email and addressed as follows:

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This the 4th day of October, 2019.

Stephanie A. Brennan
Special Deputy Attorney General

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE, et al.,

Plaintiffs,

v.

REPRESENTATIVE DAVID LEWIS in his official capacity as Senior Chairman of the House Select Committee on Redistricting; et al.,

Defendants.

AFFIDAVIT OF
KAREN BRINSON BELL

I, Karen Brinson Bell, swear under penalty of perjury, that the following information is true to the best of my knowledge and state as follows:

1. I am over 18 years old. I am competent to give this affidavit, and have personal knowledge of the facts set forth in this affidavit. I have consulted with senior staff at the State Board in the preparation of this affidavit.

2. I currently serve as the Executive Director of the North Carolina State Board of Elections (the "State Board"). I became Executive Director of the State Board effective June 1, 2019. My statutory duties as Executive Director include staffing, administration, and execution of the State Board's decisions and orders. I am also the Chief State Elections Official for the State of North Carolina under the National Voter Registration Act of 1993 and N.C.G.S. § 163-27 (2019 Spec. Supp.). As Executive Director, 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, I provide guidance to the directors of the county boards.

3. In our state, the county boards of elections administer elections in each county,

including, among other things, providing for the distribution of voting systems, ballots, and pollbooks, training elections officials, conducting absentee and in-person voting, and tabulation and canvassing of results. The State Board is responsible for development and enhancement of our Statewide Elections Information Management System ("SEIMS"), which includes managing functions that assign voters to their relevant voting districts, a process known as "geocoding." The State Board also supports the county boards and their vendors in the preparation and proofing of ballots.

4. For North Carolina House and Senate districts, the geocoding process starts when the State Board receives legislative district shapefiles, which include geographic data setting the boundaries for legislative districts. The State Board's staff then works with county board staff to use the shapefiles to update the voting jurisdictions that are assigned to particular addresses in SEIMS. This process then allows the State Board to work with county board staff and ballot-preparation vendors to prepare ballots. The State Board must perform an audit of the geocoding to ensure its accuracy before ballot preparation.

5. The amount of time required for geocoding generally corresponds with the number of district boundaries that are redrawn within the counties. In this case, I understand that there are 37 counties that are subject to remedial redistricting, between the state House and Senate maps, and a significant number of those counties are likely to have newly drawn district boundaries within the counties' borders. Staff estimates that, given what we currently know, geocoding would likely take between 17 and 21 days (including holidays and weekends) for the 2020 primary for state legislative offices, depending on the degree of change to intracounty district lines.

6. Ballot preparation and proofing can begin after geocoding is complete and

candidate filing closes. For the 2020 primary elections, candidate filing for state legislative districts occurs between noon on December 2, 2019, and noon on December 20, 2019. *See* N.C.G.S. § 163-106.2(a). The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control checkpoints that precede ballot printing and the coding of voting machines. This includes proofing each ballot style for content and accuracy, ballot printing, and delivery of all ballot materials to county boards. Staff estimates that, given what we currently know, ballot preparation and proofing would likely take between 17 and 21 days (including holidays and weekends) for the 2020 primary for state legislative offices, depending on the number of ballot styles to prepare, which largely depends on the degree of change to intracounty district lines, and the number of contested nominations.

7. Geocoding and candidate filing may occur concurrently, although that is not ideal because the completion of geocoding permits candidates and county boards to verify if a candidate desiring to file for election lives in a particular district. It is possible, however, to check candidate eligibility while geocoding is still taking place.

8. Geocoding and ballot preparation must occur consecutively, however, not concurrently. Ballots cannot be prepared until the proper geographical boundaries for voting districts are set in SEIMS. Additionally, the end-of-year holidays could pose difficulties for available staff time for the State Board, county boards, and vendors. Therefore, the total time required for geocoding and ballot preparation is likely between 34 and 42 days (including holidays and weekends).

9. Under N.C.G.S. § 163-227.10(a), the State Board must begin mailing absentee ballots 50 days prior to the primary election day, unless the State Board authorizes a reduction to 45 days or there is "an appeal before the State Board or the courts not concluded, in which case

the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal." The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) requires that absentee ballots that include elections for federal office be made available by 45 days before a primary election, *see* 52 U.S.C. § 20302(a)(8)(A), unless I request a waiver of this requirement based on a legal contest delaying the preparation of ballots (or another enumerated hardship), and that waiver is granted by the federal official designated to administer UOCAVA, *see id.* § 20302(g). The state requesting a waiver must present a comprehensive plan that provides absentee UOCAVA voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the federal election.[1] Based on the current primary date of March 3, 2020, for state legislative districts, 50 days before the primary election falls on January 13, 2020, and 45 days before the primary election falls on January 18, 2020.

10. In sum, the State Board would need to receive the shapefiles for geocoding and ballot preparation between now and 34 to 42 days before the deadline for distributing absentee ballots. Currently, that deadline is January 13, 2020, which means the shapefiles must arrive between now and December 2–10, 2019. If that deadline were moved to January 18, 2020, the shapefiles would need to arrive between now and December 7–15, 2019.

11. If the deadlines for distributing absentee ballots were extended beyond what is required by UOCAVA, the State Board would also have to factor in additional administrative steps that must be prepared before in-person voting occurs. Currently, early voting is set to begin on February 12, 2020 for the 2020 primary.

12. Before in-person voting occurs, the State Board must work with county boards to load data onto physical media cards that are placed in voting tabulation machines, a process called

[1] https://www.fvap.gov/uploads/FVAP/EO/2012_waiver_guidance.pdf.

"burning media." The media cards ensure that the tabulators anticipate the layout of ballots and properly attribute votes based on the ballot markings. The county boards must also conduct logic and accuracy testing to ensure that tabulation machines accurately read ballots and to correct any errors in coding. Staff estimates that burning media, preparing ballot marking devices and tabulators, and logic and accuracy testing would likely take the counties 14 days. After that process, the State Board works with the county boards to conduct a mock election, which takes one day, and generally affords two weeks thereafter to remedy any technical problems identified during the mock election. That two-week period could be reduced, but the State Board generally believes that the two-week period fully insures against risks associated with technical problems that may be identified in the mock election.

13. Accordingly, regardless of when the absentee ballot distribution deadline falls, allowing 29 days after ballots have been prepared to prepare for in-person election voting is preferable. Under the current deadlines for distributing absentee ballots, which falls roughly a month before early voting begins, these processes can be accommodated. The time requirements for these processes would only become relevant if the absentee distribution deadline is shortened to less what is currently required by UOCAVA.

14. If the Court were to order a separate primary for state legislative districts, a different set of administrative requirements would be triggered.

15. First, it is not technically possible to perform geocoding while in-person voting is occurring, and it is difficult to perform geocoding during the canvass period after the election. This is because making changes in SEIMS related to geocoding inhibits the actual voting process. County canvass takes place 10 days following an election. Generally, at that point, geocoding may begin, assuming no recount has been ordered. Accordingly, we recommend that geocoding for any separate legislative primary not begin any earlier than March 14, 2020. Relying on the aforementioned estimates, it would take between 34 and 42 days after March 14, 2020, to geocode and prepare

ballots for a separate primary. Candidate filing could occur before or simultaneous with geocoding.

16. Second, state law regarding the deadline for distributing absentee ballots would again require 50 days' time prior to the primary election day, unless the State Board reduced that time to 45 days or there is "an appeal before the State Board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal." N.C.G.S. § 163-227.10(a). The federal UOCAVA deadline would not apply if the primary did not involve federal offices.

17. Third, one-stop early voting would have to begin 20 days before the primary election day under N.C.G.S. § 163-227.2(b). Accordingly, all of the administrative processes that must occur before in-person voting begins (geocoding, ballot preparation, burning media, preparing touch-screen ballots, logic and accuracy testing, mock election, and technical fix period, among other things), which are estimated to take between 63 and 71 days total, would need to occur between March 14, 2020, and 20 days before the date of the separate primary.

18. Fourth, there are additional administrative challenges that counties would face if a separate legislative primary were held (assuming that the legislative primary were not to coincide with a second primary that may need to be held in any event, due to an unresolved nomination contest from the March primary). Chief among these challenges would be recruiting poll workers and securing polling locations, along with the associated costs. Increasingly, county elections officials have found it necessary to spend more time recruiting early voting and election day poll workers, especially because of statutorily mandated early voting hours weekdays from 7 a.m. to 7 p.m. and technological advances in many counties now require that elections workers be familiar with computers. Additionally, a large portion of precinct voting locations in the state are housed in places of worship or in schools, with still others located in privately owned facilities. Identifying and securing appropriate precinct voting locations and one-stop early

voting sites requires advance work by county board of elections staff and coordination with the State Board.

This concludes my affidavit.

This the 4th day of October, 2019.

Karen Brinson Bell, Executive Director
N.C. State Board of Elections

Sworn to and subscribed before me this 4 day of October, 2019.

LATANYA N GANT
My Commission Expires
NOTARY PUBLIC
February 11, 2024
JOHNSTON COUNTY, NC

(Notary Public)

My commission expires: February 11, 2024

EXHIBIT E

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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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULE

OTHER AUTHORITIES

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) 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. Plaintiffs filed their response, a copy of which is attached as Exhibit 1. The three-judge court denied Defendants' stay request by order entered February 9, 2016. A copy of that order is attached as Exhibit 2.

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

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 3. A copy of the Final Judgment is attached as Exhibit 4. (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

[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.

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 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

[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.

[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.

(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.

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

[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."

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]

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

[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 "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).

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)

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 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'

[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.

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

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

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 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.

[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).

[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.

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 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

[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.

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.

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 5) 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 25, 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

[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.

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

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

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 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.

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

[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.

[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.

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).

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

[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.

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-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

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

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.

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

[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.

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 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

[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."

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 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

[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.

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 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]

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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[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 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

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
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 JOSHUA HOWARD, in his capacity as the Chairman of the North Carolina State Board of Elections,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY FINAL JUDGMENT AND MODIFY INJUNCTION

TABLE OF CONTENTS

Page

I. INTRODUCTION

> [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. Rather, as this Court has stated, it is a case that presents a "textbook" example of racial gerrymandering. *See* ECF No. 142 ("Memorandum Opinion"), at 22. In its thorough and, indeed, exhaustive opinion, this Court detailed at length the mountain of evidence establishing that race was the predominant factor behind Congressional Districts ("CDs") 1 and 12, and the utter dearth of justification for the General Assembly's predominant use of race.

Plaintiffs—and every voter in North Carolina—have already been subjected to two elections under the unconstitutional enacted plan. The General Assembly's improper use of race to sort voters by the color of their skin has violated the Fourteenth Amendment rights of millions of North Carolinian citizens. Unchastened, Defendants now ask the Court to delay implementation of a remedy until *2018*. Defendants fail to argue—let alone demonstrate—that they are likely to prevail on the merits of their pending appeal. They do not even acknowledge the Court's finding that Plaintiffs and millions of other North Carolinians have been forced to vote twice in racially gerrymandered districts and will suffer irreparable injury if they are forced to do so again in 2016. Rather, Defendants' motion is premised entirely on the assertion that it would be easier and less costly for the State to run the 2016 election under an unconstitutional map. Perhaps.

But even if Defendants could establish a likelihood of success on the merits (which they cannot), the harm Plaintiffs and other residents of CDs 1 and 12 will irrefutably suffer if the stay is granted vastly outweighs the administrative inconvenience and additional cost the State will incur if the primary is delayed to facilitate the implementation of a remedial map. This is particularly true here because (as further discussed below) the State is itself responsible for the present "emergency." Knowing full well that this Court might strike down the enacted plan, Defendant McCrory signed a bill passed by the General Assembly that accelerated the primary election from May to mid-March. He did so less than two weeks before the trial in this matter commenced. It was hardly coincidence.

Stripped to its essence, then, Defendants ask the Court to delay remedying the unconstitutional racial gerrymander for two years from this Court's Final Judgment, five years after Plaintiffs filed suit, and to allow two congressional elections to go forward under an unconstitutional map during the pendency of this case. The Court should reject Defendants' motion so that the voters of North Carolina can—for the first time since 2010—vote under a constitutional congressional districting plan.

II. BACKGROUND

On October 24, 2013, well more than two years ago, Plaintiffs filed this lawsuit, challenging the unconstitutional racial gerrymander of CDs 1 and CD 12. ECF No. 1. On December 24, 2013, Plaintiffs filed a motion for preliminary injunction, seeking to enjoin conduct of future elections under the enacted plan. ECF No. 18. On May 22,

2014, the Court denied the motion without prejudice and the 2014 elections proceeded under the enacted plan. ECF No. 65.

On June 6, 2014, the parties filed cross-motions for summary judgment. ECF No. 74-75. On July 29, 2014, the Court denied the parties' cross-motions without prejudice, concluding that there were "issues of fact as to the redistricting which occurred as to both CD 1 and CD 12" that were "best resolved at trial." ECF No. 85 at 2. The Court also continued the trial date pending the United States Supreme Court's then-forthcoming decision in *Alabama Legislative Black Caucus et al. v. Alabama*. *Id.*

In March 2015, the Supreme Court issued its decision in *Alabama*, holding that reliance upon mechanical racial percentages strongly suggests that race was the predominant consideration in drawing district lines and grossly misconstrues the requirements of the Voting Rights Act. *See* 135 S. Ct. 1257 (2015). Thereafter, on May 6, 2015, the Court held a status conference, and set this case for trial commencing on October 13, 2015. *See* ECF No. 91.

On September 30, 2015, Governor McCrory signed a bill moving the congressional primary from May 2016 to March 15, 2016. *See* ECF No. 145-1 ¶ 6 (citing S.L. 2015-258). During debate on this bill, legislators raised an obvious concern—that by accelerating the congressional primary, the General Assembly was "trying to lock in these districts for another cycle and hamstring the courts should they conclude, for whatever reason, that the districts should be redrawn." *See* Taylor Knopf, *Senate Proposes Detailed Plan for Combined March Primary*, RALEIGH NEWS & OBSERVER, Sept. 23, 2015, http://www.newsobserver.com/news/politics-government/politics-

columns-blogs/under-the-dome/article36316269.html. In response, Senator Rucho stated unequivocally that these concerns were a non-issue because if the Court ruled in Plaintiffs' favor, it could (as has been done in past redistricting cycles) simply "stop" the election. *See id.* ("So at any point, if that is a concern [redrawing the districts], the courts can manage that without any issue.").

Starting October 13, 2015, and just two weeks after the State greatly accelerated the primary election, the Court held a three-day bench trial. On February 5, 2016, the Court issued its Memorandum Opinion holding that CD 1 and CD 12 are unconstitutional racial gerrymanders. The Court enjoined the State from holding further elections under the enacted plan, "recogniz[ing] that individuals in CD 1 and CD 12 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." Memorandum Opinion at 62 (quoting *Page v. Va. State Bd. of Elections*, Civil Action No. 3:13cv678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015)). Consistent with North Carolina law, the Court provided the State until February 19, 2016 to enact a new, constitutional congressional districting plan. *See id.* (citing N.C. GEN. STAT. § 120-2.4).

On February 8, 2016, Defendants filed the present motion to stay pending appeal.

III. ARGUMENT

Defendants fail to meet their heavy burden of establishing that the Court should stay implementation of its final judgment. Defendants cannot establish the prerequisites for obtaining the extraordinary relief of a stay pending appeal. Defendants have little

likelihood of success on the merits. Plaintiffs will suffer irreparable injury if the stay is granted and they are forced to vote again under the unconstitutional enacted plan, and the public interest weighs heavily against the requested stay for the same reason. Accordingly, any administrative inconvenience and expense to the State necessitated by remedying the racial gerrymander of CDs 1 and 12 for purposes of the 2016 election pales in comparison to the injury Plaintiffs and the public at large will suffer if a stay is granted.

A. Defendants Face a Significant Burden to Establish Their Entitlement to the "Extraordinary Relief" They Seek

A stay is an exercise of judicial discretion. *See Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 125 (4th Cir. 1983) ("[F]ederal district courts possess the ability to, under their discretion, stay proceedings before them when the interests of equity so require."). The granting of a stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winston–Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Personhuballah v. Alcorn*, No. 3:13CV678, 2016 WL 93849, at *3 (E.D. Va. Jan. 7, 2016) ("[A] stay is considered extraordinary relief for which the moving party bears a heavy burden.") (internal citation omitted).

In determining whether to grant a stay pending appeal, the Court considers four factors: "(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." *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970).

The first two factors of the test outlined above "are the most critical." *Nken*, 556 U.S. at 434; *cf. Johnson v. United States*, No. C-83-186-D, 1984 WL 738, at *2 (M.D.N.C. May 7, 1984) (a stay should be denied unless the moving party can show a strong likelihood of success on appeal, "even if this results in rendering the issues moot"). A party seeking a stay pending appeal "will have greater difficulty demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision of the district court based upon complete factual findings and legal research. *Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The moving party, moreover, is required to show something more than "a mere possibility" of success on the merits; more than speculation and the hope of success is required. *Nken*, 556 U.S. at 434; *see also Mich. Coal.*, 945 F.2d at 153. By the same token, "simply showing some 'possibility of irreparable injury,' . . . fails to satisfy the second factor." *Nken*, 556 U.S. at 434 (*quoting Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

Under these well-established standards, Defendants cannot begin to meet their burden of showing a stay is appropriate.

B. Defendants Cannot Establish a Likelihood of Success on the Merits

First, and perhaps most obviously, defendants cannot establish a likelihood of success on the merits.

A districting plan fails constitutional muster if it uses race as the predominant factor in determining whether to place a substantial number of voters within or without a district unless the use of race is narrowly tailored to a compelling government interest. *Alabama*, 135 S. Ct. at 1267.

Here, the Court held that race was the predominant factor undergirding CDs 1 and CD 12 and that the General Assembly's use of race to draw these districts was not narrowly tailored. The Court's lengthy and exhaustive Memorandum Opinion speaks for itself. Plaintiffs will not repeat the substance of that Opinion here. Suffice to say, the Court applied well-established law and made well-supported factual determinations.

Indeed, the Court's Opinion was simply a straightforward application of the United States Supreme Court's recent decision in *Alabama*, 135 S. Ct. 1257. As the Court itself explained, here, as in *Alabama*, the North Carolina General Assembly sought to comply with the Voting Rights Act by using a numerical racial threshold unfounded in any evidence whatsoever. The record is replete with both direct evidence of the General Assembly's race-based motives and circumstantial evidence that race was the predominant factor behind CDs 1 and 12. In the course of reaching its ultimate holdings, the Court addressed and resolved the factual disputes that led it to deny the parties' cross-motions for summary judgment. On appeal, those factual findings are subject to "clear error" review. *See Easley v. Cromartie*, 532 U.S. 234, 242 (2001). The Court's conclusion that race predominated and that the use of race was not narrowly tailored is amply supported by the evidence, and Defendants assuredly cannot show that the Court's decision constitutes "error," much less "clear error."

Indeed, perhaps sensing the futility of the task, Defendants barely try. Rather, Defendants' discussion of the merits is limited to a single line—their bald assertion that they "believe this Court's judgment will be reversed by the United States Court." Defendants' Emergency Motion to Stay Final Judgment and to Modify Injunction ("Motion") at 4. At the risk of stating the obvious, Defendants' expression of their *hope* of success on appeal does not meet their burden of establishing a *likelihood* of success on the merits.[1]

Nor is there, as Defendants suggest (Motion at 4), some kind of "per se" rule that redistricting cases are subject to an automatic stay. *See, e.g.*, *Travia v. Lomenzo*, 381 U.S. 431, 431 (1965) (denying motion to stay district court order requiring New York to use court-approved remedial redistricting plan). To the contrary, district courts routinely deny motions to stay implementation of court-adopted remedial redistricting plans. *See, e.g.*, *Personhuballah*, 2016 WL 93849, at *3-5 (order denying motion to stay order during pendency of Supreme Court review); *see also Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (same, and collecting cases).

Personhuballah, decided only last month by a fellow court in the Fourth Circuit, is highly instructive. There, after a three-judge panel struck down a congressional

[1] *See, e.g.*, *Spirit Airlines, Inc. v. Ass'n of Flight Attendants*, No. 14-CV-10715, 2015 WL 4757106, at *2 (E.D. Mich. Aug. 12, 2015) ("no likelihood of success on appeal where proponent of stay 're-argu[es] . . . the issues without any new analysis or case citation'") (quoting *Smith v. Jones*, No. 05–CV–72971, 2007 WL 3408552, at *2 (E.D. Mich. Nov. 15, 2007)); *Stewart Park & Reserve Coal. Inc. (SPARC) v. Slater*, 374 F. Supp. 2d 243, 263 (N.D.N.Y. 2005) (same, where moving party simply attempted to "to relitigate or reargue" the court's earlier rulings); *Anderson v. Gov't of Virgin Islands*, 947 F. Supp. 894, 898 (D.V.I. 1996) ("Defendants attempt to recharacterize the factual findings in this case fails to show a likelihood of success on the merits of the appeal.").

districting plan as an unconstitutional racial gerrymander, the losing party (intervenors) moved the court to stay its decision. *See Personhuballah*, 2016 WL 93849, at *3-5. As here, intervenors argued that it was simply "too late" to implement a remedial plan in advance of the 2016 elections and that the court should thus "modify [its] injunction to ensure the 2016 election proceeds under the Enacted Plan regardless of the outcome of the Supreme Court's review." *Id.* at *4. And, as here, intervenors argued that stays are granted as a matter of course in redistricting cases where a court has struck down an apportionment plan. The *Personhuballah* court denied the stay motion and rejected these arguments in no uncertain terms, noting that "[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." 2016 WL 93849, at *3 (citation omitted).

Thereafter, intervenors made a direct application for stay to Circuit Justice Roberts, contending that implementation of a remedial plan for 2016 would cause "electoral chaos." *See* Intervenor-Defendants' Motion to Suspend Further Proceedings and to Modify Injunction Pending Supreme Court Review at 9, *Personhuballah v. Alcorn*, No. 3:13-cv-678 (E.D. Va. Nov. 16, 2015). Circuit Justice Roberts referred the application to the full Supreme Court, which (only one week ago) denied the application. *Wittman v. Personhuballah*, No. 14-A724, Order in Pending Case (Feb. 1, 2016). Precisely the same result should obtain here and for the same reasons.

As *Personhuballah* well illustrates, none of the cases Defendants cite establish any rule relaxing standards for granting the "extraordinary relief" of a stay in the redistricting context. The mere fact that other courts have, on other occasions, in other states, on other

factual records, stayed implementation of remedial redistricting plans is of no moment here.[2]

The Court has entered a final judgment striking down CDs 1 and 12 and enjoining further elections under the unconstitutional enacted plan. That judgment should be implemented promptly. Indeed, Defendants' suggestion that the Court's injunction should have no practical effect absent Supreme Court review is directly refuted by Supreme Court precedent. *See Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that the Court "does not require appellate review of [a court-adopted remedial] plan prior to the election").

C. Granting a Stay Will Cause Irreparable Injury to Plaintiffs and Is Contrary to the Public Interest

There is no doubt that granting the requested stay would cause irreparable injury to Plaintiffs and the public. As the Court has recognized, "individuals in CD 1 and CD 12 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." Memorandum Opinion at 62 (internal citation omitted).

[2] The cases cited by Defendants are uninformative not only for lack of any articulated basis for granting a stay but also because they involved injunctions issued later in an election year. *See, e.g.*, *Hunt v. Cromartie*, 529 U.S. 1014 (2000) (noting, without explanation, that Court had stayed an order issued on March 7, on March 16, regarding upcoming 2000 elections); *Voinovich v. Quilter*, 503 U.S. 979 (1992) (same, as to an order issued on March 30, on April 20, regarding upcoming 1992 elections); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992) (same, as to an order issued on July 16, on July 17, regarding upcoming 1992 elections); *Louisiana v. Hays*, 512 U.S. 1273 (1994) (same, as to an order issued on July 25, on August 11, regarding upcoming 1994 elections); *Miller v. Johnson*, 512 U.S. 1283 (1994) (same, as to an order issued on September 12, on September 23, regarding upcoming 1994 elections).

Indeed, the right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds*, 377 U.S. at 554-55, 562; *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."). Accordingly, any illegal impediment on the right to vote is an irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, it is simply beyond dispute that Plaintiffs and other voters will suffer irreparable injury if they are forced to participate in a third election under an unconstitutional redistricting plan. *See Personhuballah*, 2016 WL 93849, at *4 ("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, constitutes irreparable harm to them, and to the other voters in the Third Congressional District.") (internal citation omitted); *Larios*, 305 F. Supp. 2d at 1344 ("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.").

Moreover, the public interest also weighs heavily in favor of denying Defendants' motion. Where a court finds that a legislature has impermissibly used race to draw congressional districts, "the public interest aligns with the Plaintiffs' . . . interests, and thus militates against staying implementation of a remedy." *Personhuballah*, 2016 WL

93849, at *5. "[T]he harms to the Plaintiffs would be *harms to every voter in*" CDs 1 and 12 who are being denied their constitutional rights. *Id.* (emphasis added). "[T]he harms to [North Carolina] are public harms" because "[t]he public has an interest in having congressional representatives elected in accordance with the Constitution." *Id.* Indeed, "[a]s 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.* (quoting *Reynolds*, 377 U.S. at 585).

D. The Balance of Harms Favors Plaintiffs: The State's Administrative Inconvenience Does Not Outweigh the State's Ongoing Violation of the Constitutional Rights of Millions of North Carolina Citizens

Faced with the fact that three of the four relevant factors cut strongly against them, Defendants premise their motion entirely on their claim that the State will suffer irreparable injury in the absence of the requested stay. To that end, Defendants offer two closely-linked rejoinders. First, Defendants express concern that voters will be "confused" if the primary is modestly delayed and they vote in new, constitutional districts, whereas they are intimately familiar with voting under the enacted, unconstitutional plan. *See* Motion at 3. Second, Defendants contend that it will be cheaper and administratively easier for the State to run the 2016 elections under an unconstitutional map rather than to promptly cure the racial gerrymander of CDs 1 and 12. *Id.* Neither of these arguments is availing.

As to "voter confusion," Plaintiffs submit that voters would be justifiably confused to learn that they will be subject, once again, to elections under a map deemed

unconstitutional by this Court. Voters would be particularly perplexed because North Carolina—no stranger to redistricting litigation—has adopted a statute *specifically* designed to address the instant scenario. That statute provides that, in the event a court strikes down a redistricting plan, the court should provide the General Assembly with as little as two weeks to "act to remedy any identified defects to its plan" and if the General Assembly fails to act, to "impose an interim districting plan for use in the next general election." N.C. GEN. STAT. ANN. § 120-2.4.

Defendants' contention that it is simply "too late" to remedy the unconstitutional enacted plan in 2016 is similarly unavailing. There is ample precedent for the adoption of remedial plans to redress racial gerrymandering in North Carolina in election years. Where necessary, courts can and have delayed the primary election to allow time to implement a remedial plan. Indeed, this is precisely what happened in 1998, when the Eastern District of North Carolina struck down a predecessor version of CD 12. Then, the court denied the defendants' motion to stay implementation of a remedial order (as did the United States Supreme Court on a subsequent motion), and the primary election was delayed. *See Cromartie v. Hunt*, 133 F. Supp. 2d 407, 410 (E.D.N.C. 2000) *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001). The 2002 primary election was also delayed as a result of ongoing redistricting litigation, with the United States Supreme Court again refusing to stay implementation of a remedial plan in an election year. *See*

Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002).[3] North Carolina is hardly unique. Numerous courts in other jurisdictions have, likewise, recognized that they have the authority to postpone elections when necessary to implement an appropriate remedy.[4]

Indeed, Defendants' complaints about the administrative inconvenience of delaying the primary ring particularly hollow. Consistent with long-standing practice, the 2016 primary was originally set for May. Anne Blythe, *NC Candidates to File for 2016 Elections Amid Questions About 2011 Redistricting*, RALEIGH NEWS & OBSERVER, Nov. 30, 2015, http://www.newsobserver.com/news/politics-government/state-politics/article47237720.html. Late last year, knowing full well that this case was pending (along with two other lawsuits challenging various state legislative and congressional districts in state and federal court), the General Assembly moved up the

[3] In 2002, the trial court struck down the 2001 Senate and House districting plans on February 20, 2002. The North Carolina Supreme Court enjoined the State from using the 2001 maps to conduct the May 7 primary election, even though the candidate filing period had already closed. Ultimately, the primary was held on September 10, 2002, under a court-drawn plan. This procedural history is detailed at length in *Stephenson v. Bartlett*, 582 S.E.2d 247, 248-49 (N.C. 2003).

[4] *See, e.g.*, *Larios v. Cox*, 305 F. Supp. 2d 1335, 1342 (N.D. Ga. 2004) (denying motion to stay in racial gerrymandering lawsuit and noting "that the court has broad equitable power to delay certain aspects of the electoral process if necessary"); *Petteway v. Henry*, No. CIV.A. 11-511, 2011 WL 6148674, at *3 n.7 (S.D. Tex. Dec. 9, 2011) (noting that "[i]f forced to craft an interim remedy, this court has the authority to postpone . . . local election deadlines if necessary."); *Garrard v. City of Grenada, Miss.*, No. 3:04CV76-B-A, 2005 WL 2175729, at *4 (N.D. Miss. Sept. 8, 2005) (postponing election from October 2005 to November 2005); *Republican Party of Adams Cty., Miss. v. Adams Cty. Election Comm'n*, 775 F. Supp. 978, 981 (S.D. Miss. 1991) (describing procedural history of related state court litigation, where court had "enjoined the primary, runoff, and general elections for Adams County supervisors that were scheduled to occur under state law on September 17, 1991" until November 5, 1991); *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C.1982), *aff'd*, 459 U.S. 1166 (1983) (delaying Georgia's 1982 congressional elections to remedy Voting Rights Act violation); *Heggins v. City of Dallas, Tex.*, 469 F. Supp. 739, 743 (N.D. Tex. 1979) (entering order on February 22, 1979, postponing election scheduled for April 7, 1979); *Griffin v. Burns*, 570 F.2d 1065, 1066 (1st Cir. 1978) (in case involving 42 U.S.C. § 1983 claim, affirming trial court order requiring a new primary be held and postponing the general election).

primary by two months, to March 15. *Id.* Accordingly, any "injury" to the State necessitated by moving the primary *back* to allow for implementation of a remedial plan is directly traceable to the State's precipitous decision to move the primary *forward* in the first place, knowing full well the risk of an adverse determination by this Court. Notably, contrary to the State's position now, at the time the State moved the primary, Senator Rucho declared publicly that doing so would pose no impediment to a court timely adopting a remedy. *See supra* at 3-4.

To be sure, North Carolina likely will incur additional cost and burden in altering its election plans to remedy the unconstitutional congressional plan, as it has done on numerous occasions in the past. But the irreparable *constitutional* injury Plaintiffs and all other North Carolinians will suffer if the stay is granted far outweigh any *administrative* injury North Carolina will suffer if the stay is denied. *See Buchanan v. Evans*, 439 U.S. 1360, 1361 (1978) (in considering a stay, the court "should balance the equities" to "determine on which side the risk of irreparable injury weighs most heavily") (citation omitted). Simply put, a choice between forcing millions of North Carolinians to vote in yet another election under the unconstitutional enacted plan and delaying the congressional primary election is no choice at all. *See, e.g., Dye v. McKeithen*, 856 F. Supp. 303, 306 (W.D. La. 1994) ("The potential injury of an election in which citizens are deprived of their right to vote negates any damage that may be sustained by Vernon Parish in the potential delay of elections.").

IV. CONCLUSION

Stripped to its essence, Defendants—through the guise of the instant motion—ask the Court to grant them the "fruits of victory whether or not [their forthcoming] appeal has merit." *Personhuballah*, 2016 WL 93849, at *4 (internal quotations omitted). Plaintiffs respectfully submit that the Court should be entirely "reluctant" to do so. *Id*. Defendants cannot establish a likelihood of success on the merits and have not even tried, and Plaintiffs and more than a million other North Carolinians will suffer grievous and certain injury if a stay is granted. Plaintiffs respectfully submit that the Court should deny Defendants' motion so that a remedial plan can be adopted promptly and North Carolina's voters can, at long last, have the opportunity to vote under a constitutional congressional map.

Respectfully submitted, this the 9th day of February, 2016.

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CERTIFICATE OF SERVICE

On February 9, 2016, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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EXHIBIT 2

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

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE, Plaintiffs, v. 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.	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 4

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE, Plaintiffs, v. 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.	)	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 5

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, Plaintiffs, v. 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.	)	**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: (15 races)	President and Vice-President of the United States United States Senate (1 seat) United States Congress (13 seats)
Statewide: (184 races)	Governor of North Carolina Council of State (9 seats) State Senate (50 seats) State House of Representatives (120 seats) Supreme Court (1 seat) Court of Appeals (3 seats)
County/Local: (~770 races)	Superior Court (13 seats) District Court of North Carolina (152 seats) District Attorney (5 Seats) 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

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

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

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

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

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

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

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)	

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**

EXHIBIT F

NORTH CAROLINA GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

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KELLY ALEXANDER, JR., DONALD R. CURETON, JR., ALICIA D. BROOKS, KIMBERLY Y. BEST, LAURENE L. CALLENDER, and LATRICIA H. WARD,	)	COUNTY OF WAKE
Plaintiffs,	)	19 CVS 011321
versus	)	
NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,	)	
Defendants.	)	

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TRANSCRIPT, Volume 1 of 1
Monday, November 18, 2019
Pages 1-100

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Monday, November 18, 2019 Criminal Session

Honorable Craig Croom, Judge Presiding

Motions Hearing

Tammy B. Wiener, CVR-CM
Official Court Reporter - Wake County Resident Reporter
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(Court opened session on Monday, November 18, 2019 at 11:26 a.m. before the Hon. Craig Croom for the purposes of this matter.)

(Present at Bar: Donald Cureton, Kimberly Best, Alicia Brooks, plaintiffs; Bob Hunter, Esq., for the plaintiffs; Olga Vysotskaya, Esq. for the defendant governor; Paul M. Cox, Esq. for the defendant State Board of Elections; Thomas A. Farr, Esq. and Alyssa Riggins, Esq. for the legislative defendants.)

THE COURT: All right. We are on the record in case number 19 CVS 011321, Kelly Alexander, et al. versus State Board of Elections and there are several other named defendants. The governor I believe is also named as well.

I have motions to dismiss, motions to dismiss and also here for a preliminary injunction. Who wants to go first? I imagine I should probably do the motions first, the motions to dismiss, or do you wish to hear the preliminary injunction first? I think I'll probably need to hear the motions first.

MR. HUNTER: Mr. Farr has some wisdom on jurisdiction that I think he wants to impart to the Court, and it might be best if we discuss the jurisdictional issue first --

THE COURT: Okay.

MR. HUNTER: -- and then go to the motions because

if you have the jurisdiction to hear the preliminary injunction motion and the 12(b)(6) motions, then you will have -- I think we will be able to sort through a lot of the other stuff depending on your ruling on that question.

THE COURT: Okay.

MR. HUNTER: And then we could probably -- depending on what Your Honor wants to do with that, we could go forward from that. But I think probably the jurisdictional question might sort things out for us.

THE COURT: Okay. Let's go ahead and get all this on the record, too. Let's get everyone who is here and who is representing which side of this. I know we have some other defendants as well.

MS. VYSOTSKAYA: Yes, Your Honor. I'm Olga Vysotskaya, and I represent the governor in this action. We have motions to dismiss which we do believe Your Honor has jurisdiction to decide.

THE COURT: Okay. All right. And Mr. Farr?

MR. FARR: Yes, sir, Your Honor. Thank you so much. Tom Farr, Ogletree Deakins. With me is my partner, Alyssa Riggins. We are here to represent the legislative defendants. And I do think that my learned colleague and good friend, Mr. Hunter, made a good point, that we ought to say something about what the Court's jurisdiction is.

So we don't think the jurisdictional issue applies

to the motion to dismiss the governor because the jurisdictional issue just goes to whether you have the jurisdiction as a single judge to rule on the facial constitutionality of the statute. I believe the governor's motion to dismiss is basically a sovereign immunity sort of thing, which does not call into question the constitutionality statute, so I think you do have jurisdiction to hear that. We would consent to that.

Our dispute is whether you, as a single judge, can rule on either our motion to dismiss or Mr. Hunter's motion for a preliminary injunction because in both instances you're going to be ruling on the facial constitutionality of the statute.

THE COURT: Okay. All right.

MR. FARR: That's about it, Your Honor. I've got -- I've got a notebook that I could hand up to you --

THE COURT: Please.

MR. FARR: -- that's got a copy of the statute in it.

THE COURT: Please.

MS. VYSOTSKAYA: Yes, Your Honor. And we could handle it in any order you would like us to handle it.

THE COURT: I'm going to take care of you first.

MS. VYSOTSKAYA: Okay. Thank you.

MR. FARR: May I approach, Your Honor?

THE COURT: Yes. And then once I take care of you, then I --

MR. FARR: Okay. So the first insert there is the statute that establishes the three-judge court. And we've got some other cases in there if we get to the other motions --

THE COURT: Okay.

MR. FARR: -- that might be helpful to the Court. Thank you, Your Honor.

MS. VYSOTSKAYA: Your Honor, may I approach and --

THE COURT: Yes.

MS. VYSOTSKAYA: -- hand to you my reading material, too? Thank you.

THE COURT: Y'all should bring coffee when y'all bring all this paperwork.

MS. VYSOTSKAYA: I apologize for that inconvenience.

MR. COX: Your Honor, I'm Paul Cox, and I represent the state board of elections and the state board members and the executive director. We have a motion to dismiss. I agree with the position of the parties that have been laid out so far about the order of proceeding. I do think the governor's motion could be heard independent of the separate issue of whether you have jurisdiction to rule on the preliminary injunction and motions to dismiss under

12(b)(6).

THE COURT: Okay.

MR. HUNTER: My view on the jurisdictional motions are that you have jurisdiction to hear everything.

THE COURT: Okay. All right. Let's hear from the governor's counsel first.

MS. VYSOTSKAYA: Your Honor, I am honored to represent Governor Cooper in this action, and Governor Cooper moved to dismiss all claims filed against him based on 12(b)(1), 12(b)(2) and 12(b)(6).

Basically, in essence, Governor Cooper's defense here is that he is not a proper party defendant. We filed it under 12(b)(1), 12(b)(2), 12(b)(6) because our appellate courts haven't given us a very clear guidance as to which rule you're supposed to use and advice to all practitioners is usually to plead it under all three.

So the question before you on merits in this case is whether or not Session Law 2018-14 is constitutional under a number of North Carolina -- under a number of clauses of the North Carolina Constitution and the United States Constitution. What that law does in general is it divides Mecklenburg County into eight judicial subdistricts for nominating and electing district court judges and, according to plaintiffs, the division of the 21 judgeship seats is unequal and in part based on improper racial

considerations.

Federal law claims against Governor Cooper should be dismissed based on 11th Amendment immunity. It is very clearly recognized in federal courts that the state is not a person for purposes of section 1983 claims that allege violations of federal law by state officials. And that immunity extends not only to the state per se, it extends to state agencies and it also extends to state officials sued in their official capacity.

Governor Cooper here is sued in his official capacity, 11th Amendment immunity applies unless it falls under an exception. The only exception that is relevant potentially to this case is Ex Parte Young exception, and our court of appeals, and specifically in the book it will be at tab 31, Thigpen versus Cooper case, our court of appeals basically borrowed the analysis that the federal courts applied to determine whether or not a state official who is sued is a proper official, proper defendant, in the case.

In order for a state official to be a proper official, he has to have a special relationship with the law that is being challenged. Here there are only two allegations against the governor in the complaint. The allegation in paragraph 35 of the complaint simply states that Governor Cooper is the governor of the state of North

Carolina, and another allegation against Governor Cooper is contained in paragraph 136, and what it states is that Governor Cooper vetoed that law after the law was presented to him and the veto was overturned by the general assembly. Those allegations per se do not establish a special relationship between Governor Roy Cooper and this law that is sufficient for purposes of piercing the 11th Amendment immunity.

There is a potential -- and there are no other allegations. Now, we could anticipate that plaintiffs may claim that Governor Cooper's general executive authority is sufficient to pierce his immunity. He is after all a chief executive officer responsible for implementation of all laws in the state of North Carolina. The problem with that argument would be that federal courts, including in Ex Parte Young itself, stated very clearly that the general executive authority is not enough. So by that logic, in other words, you could sue governor whenever you allege that any statute in the state has been unconstitutional. The courts are clear that's not enough, and Thigpen versus Cooper confirms that view.

Another way plaintiffs could try to pierce the governor's immunity for federal law claim violations is by stating "Well, you know, the governor appoints and removes officers to the state board of elections, and the state

board of elections have some connection to implementation of Session Law 2018-14. Now, the problem with that argument would be that federal courts have ruled against that argument as well. And one of the cases that -- it would be your tap 22. Very recently North Carolina -- the Middle District Court in North Carolina has confirmed that that appointment and the removal powers that Governor Cooper has to the state board is not enough to pierce the 11th Amendment immunity either.

And the final argument -- and that was a surprise argument that came in plaintiffs' brief -- is that by virtue of the fact that Governor Cooper issues a commission to all the district attorneys, to all the judges in the state of North Carolina, including district court judges, that that commission power the governor has pierces the governor's authority (sic).

Well, the problem with that argument, of course, is that the statute by which Governor Cooper issues commission to judges is not the statute that is being challenged in this lawsuit; it's a different statute entirely, and it's not challenged in this lawsuit.

The second problem, of course, if that type of logic, that expansive logic, would apply, then you would have to bring over the chief justice of the North Carolina Supreme Court as a party defendant as well, because he has

certain powers over commission -- over issuing commissions to judges, and director of the Administrator Office of Courts, who has powers to issue commissions to switch district court judges from one district to another, for example. That type of expansive reading of Ex Parte Young is not appropriate, and there is not a single case that plaintiffs have cited in their brief that supports that proposition. So all the federal law claims against Governor Cooper should be dismissed.

State law claims, plaintiffs allege that the statute also violates a number of clauses in North Carolina Constitution. For very similar reasons that I have just argued that apply to dismissal of federal law claims, Governor -- claims against Governor Cooper for state law violations is also not appropriate.

The way plaintiffs framed their lawsuit, they bring a declaratory judgment request and injunctive relief request. So part of the lawsuit is under the Declaratory Judgment Act. And in order for a court to hear a Declaratory Judgment Act action, there has to be an adversity of interest between the parties. Of course, based on allegations in plaintiffs' complaint, you know, Governor Cooper has specifically vetoed the legislation in question, and there are no other allegations. So is there is no adversity that has been alleged.

But even more problematic is the fact that there is no existing actual controversy between the governor, who has no special connection with enforcement of the statute, and plaintiffs. So because of that, the prerequisite -- the jurisdictional prerequisite of existing controversy is not satisfied either, so no adversity, no controversy.

And for similar reasons, also the claims against governor should be dismissed because the state doctrine of sovereign immunity applies to protect the governor from these type of state law claims. Now, plaintiffs did argue in their brief that the Corum exception applies and leaves sovereign immunity of the state for claims against the governor, but that presupposes, once again, that governor has any type of enforcement role in connection with Session Law 2018-14 and that he has threatened to harm plaintiffs' constitutional rights or have already harmed them, and no allegations in the complaint nor is it possible to establish that type of allegation because of governor's lack of enforcement authority over this session law.

Your Honor, to save the time, our 12(b)(6) motion and -- is based on the same argument, is that the governor's simply not a proper party and the case -- and all claims against him should be dismissed under 12(b)(6) grounds. And the case that is most helpful in your consideration probably would be Peele versus Provident Life Insurance Company case.

It's tab 23 of the book that I handed to you. And the situation in that case was that there were several parties named, and one of the parties was a proper party defendant and a couple of them were not. It was an employment discrimination case. And because a party county in that particular case was not a proper party defendant, the court of appeals concluded that all claims against the improper party should be dismissed on 12(b)(6) grounds. That wraps up my argument, Your Honor. I will be happy to answer any questions you may have.

THE COURT: So your argument is immunity under the 11th Amendment and also under the state sovereign immunity, and also you're basing it on there is no controversy --

MS. VYSOTSKAYA: That's right.

THE COURT: -- or adversity, as you described.

MS. VYSOTSKAYA: That's right, Your Honor.

THE COURT: All right. Thank you. Yes, sir, Mr. Hunter, a response?

MR. HUNTER: If Your Honor chooses to rule on the 12(b)(6) motions, I think you do, you should, there is jurisdiction -- you would have jurisdiction to do that. If you have jurisdiction to rule on the 12(b)(1) and 12(b)(2) motion, which I think you do, then that would influence your decision on the 12(b)(6) motion as well.

The governor of North Carolina has powers under

Article III. I'm going to read section one of Article III from the Constitution. "The executive power of the state shall be vested in the governor."

Now, in North Carolina, up until the 1970s or so, the governor had no role in legislation whatsoever. But now, after the 1970 amendments giving him the veto power, he now has authority over legislative matters that he did not have before and that the veto is -- gives him a stick in the bundle of stick that used to be all the legislative power was vested in the legislature. So now both the executive and the legislative authorities have legislative power, and the governor has the ability to veto acts of the legislature.

In this particular case I would like to read you what the governor's veto message says to show you that he has an interest in this case, a legally significant -- he's part of the justiciable controversy of this case. I read from verified complaint paragraph 136. "After initial passage of Session Law 2018-14, Governor Cooper vetoed the measure with the following message to the legislature. 'The legislative attempts to rig the courts by reducing people's votes hurts justice. Piecemeal attempts to target judges create unnecessary confusion and show contempt for North Carolina's judiciary.'" I agree with that sentiment. And I think that he, because he signs -- he just -- let me slow

down a little bit.

He has a special relationship with judges because after the election, the state board of elections certifies to the secretary of state the result of the elections and then the secretary of state certifies it to the governor and he issues a commission. If I went into your office today, wherever you permanently reside, it's likely that on the wall of your -- of your office, I would see your commission from the governor, and you don't get a commission, except from the AOC director on where to sit, from the chief justice. So he has a special relationship or special role in this particular litigation.

Now, the other question that I want to indicate to you, because he has not only a factual and a legal basis for doing this, is that the governor also writes checks, and we're asking for fees and attorneys' fees in this case, and he writes the checks. So that any order we think that we're entitled to get will ultimately go to the governor for some check writing that he needs to do. So that I think that for those reasons the governor has to be here.

Now, let me just mention one other thing to my good friend from the attorney general's office. The -- if we were in federal court, for example, in Greensboro and Judge Biggs was the judge and we were challenging -- we were the NAACP challenging the voter ID case, they would have

only sued the governor and the state board of elections. Now, the reason they did that was because they are the proper and necessary parties. Now, there is a difference between a necessary party and a proper party. And when that case went all the way to the US Supreme Court, there was no 11th Amendment violation. And the reason there was no 11th Amendment violation there, because the governor wanted to be in that so he could settle the lawsuit. And that's what he and the attorney general did in that case.

So when my friends in the legislature attempted to intervene in that case, Judge Biggs said "Well, no, the legislature is not..." -- "...can't intervene. They don't have any interest in this case" because the governor and the state board of elections have the authority to execute the law, and the legislative power doesn't extend to that.

Now, we are in state court and under the North Carolina Rules of Civil Procedure, the legislature has made itself a necessary party in these cases or else I wouldn't have sued them. I would be delighted to sue the governor or just the state board of elections, but they've made themselves a necessary party here. I don't know what that says about separation of powers. I'm not here to argue that. We've got plenty to chew on without that.

But having said that, the governor has control over the board of elections to some degree in his

appointments. He just litigated that in Cooper versus Berger. And we are entitled to have the governor in. It's not -- you know, he is certainly a proper party if he's not a necessary party for resolution of this agreement, and we have sued him, and we think he ought to be in here because he has important wisdom to give the Court on the rigging of the judicial elections in Mecklenburg County by the legislature. Those are his words, not mine.

THE COURT: Let me ask you this question then. You mentioned fees and legal fees that may be paid and all these things, but where's the controversy?

MR. HUNTER: You don't have to have a case or controversy as though you do in federal court. You only have to have, in North Carolina state court, a justiciable issue, and we are asking for a declaratory judgment on a state scheme of elections. So in Blankenship, which is the primary case you're going to be hearing about, that was the justiciable controversy. In Cooper versus Harris the justiciable controversy was the voter ID.

So all I'm saying is that we've got a justiciable controversy, and that's all we need. Now, as to -- as to regards to the 11th Amendment argument that my friend made, just go to your civil trial judges' deskbook that the UNC professors put out and that will answer the question for you about whether or not sovereign immunity is available here or

not. It's not. It says that sovereign immunity and the 11th Amendment don't apply here because we're going for injunctive relief; we're not asking for monetary damages. And so at the end of the day we will be asking Judge (sic) Cooper to restrain himself from signing any commissions that come out of this illegal plan that has been promulgated by the general assembly.

THE COURT: Hmm. Okay. Yes, ma'am. Respond to that commission aspect. In other words, you anticipate what you are doing may do in the future, in other words, you need that authority over that person in order to do that.

MR. HUNTER: Yes, sir.

THE COURT: Okay. Yes, ma'am.

MS. VYSOTSKAYA: Yes, Your Honor. A couple of problems with that argument that I would like to highlight for the Court. First of all, the power to issue commission comes out from an entirely different statute than the one that is being challenged in this lawsuit. It's not contained in Session Law 2018-14. It's in -- it is North Carolina General Statute 163-182.16, used to be 163A-1185 but it was recodified recently.

And so that statute is not being challenged at all. If you read plaintiffs' complaint, you will find not a single allegation concerning the issuance of commissions, nor you would even find a request for injunctive relief on

the basis of that statute. So that doesn't establish a special relationship between enforcement that is required under Session Law 2018-14, the only law that is being challenged in this lawsuit.

Secondly, what an overbroad proposition that is. Why then the justice of the supreme court -- the chief justice of the supreme court is not a proper or necessary party under my friend Judge Hunter's argument. Why not director of AOC who also issues commissions to judges? Why not the secretary of state who is named as a person -- after the results of the elections are certified by the board of elections, that goes to her and she then, the secretary of state, is supposed to submit the certified results of the elections to the governor in order for governor to issue a commission. Why not her then? It's just a very overbroad proposition, exactly the kind of proposition that Ex Parte Young exception to federal lawsuits has specifically sought to curb.

And I -- if I may, I will very quickly read from Ex Parte Young, because I think it's really, really instructive language. What it said was as follows: "If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature

could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as executive of the state, was, in a general sense, charged with the execution of all its laws...that would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." That answers it there. That's a 100-year-old principle that only firmed up that proposition.

And talking about Judge Biggs, very recently in a lawsuit that I have already talked about, NAACP, it was NAACP versus Governor Cooper, Governor Cooper was sued in connection with a different statute, that was SB 824, a voter ID statute, and plaintiffs there made specific allegations that governor appoints people to the board and that he has supervision over the board of elections, and by that virtue they argued Governor Cooper was a proper party.

Judge Biggs dismissed Governor Cooper from that lawsuit. That decision is I think tab 12 in the book. And the logic was what I argued to Your Honor, that immunity applies, that there is no special relationship between the governor and the election law in that lawsuit involved.

And, of course, Your Honor, if you dismiss Governor Cooper from this action, the lawsuit, this lawsuit, does not go away. There are proper parties that have been named here; it's just Governor Cooper himself is not a proper party. And certainly he has authority to write a check at the end of the day -- what I read to you from Ex Parte Young a second ago is directly applicable, you could test the constitutionality of any statute by arguing that he has authority to write checks.

Oh, Your Honor, one more thing that I wanted to note, my friend Judge Hunter read to you from Governor Cooper's veto message, and I think that veto message highlights precisely why there is no controversy and adversity between the parties as in between plaintiffs vis-a-vis Governor Cooper. And I disagree with my friend Judge Hunter when he says that all that is required under the state Declaratory Judgment Act is existence of a justiciable issue. That is not correct. Controversy is required.

It's -- Corum itself repeats that proposition. Petroleum Traders also repeats that proposition. Both cases are cited in the notebook. And it's not just existence of a justiciable issue; it's existence of controversy between the parties involved that is needed, and it's a jurisdictional prerequisite.

THE COURT: Yes, sir? I wasn't sure if you were getting up or not.

MR. HUNTER: The only thing I have to say is Ex Parte Young applies to the 11th Amendment to the Constitution. It applies to suing a state in federal court. It does not apply to suits in state court, particularly for injunctive relief. So Judge -- Governor Martin, for example, was sued in Republican Party of North Carolina versus Martin. We have a long history of governors being included as proper parties but not necessary parties. That's all that I'm saying under rule 17, the governor can be sued in -- as a proper party in state court. The 11th Amendment does not apply to state cases.

Now, we have brought a federal claim in this court, but it's only on count three, not counts one and two, and it -- count three is only partly federal. We brought two claims for racial discrimination, one under the 15th Amendment to which the Ex Parte Young might apply but since we're asking for an injunction it doesn't apply, and the other one under Article (sic) 19 of the North Carolina Constitution which prevents racial discrimination, which is separate from that.

So under either one -- so Ex Parte Young just has nothing to do with our state law claims. It's only an 11th Amendment decision in federal court. And I think -- I don't

think my friend disagrees with that, but the -- you can read your judges' deskbook. I quoted the section in my brief verbatim that sovereign immunity just doesn't apply in these cases.

THE COURT: All right. Hold on one second.

(There was a pause in the proceedings.)

MR. HUNTER: If you will look on page nine of my brief, Judge.

THE COURT: Okay.

(There was a pause in the proceedings.)

MS. VYSOTSKAYA: Your Honor, and I would be happy to address the state law claims part.

THE COURT: Okay. Let me finish reading this for one second, then I will hear from you.

MS. VYSOTSKAYA: Yes.

(There was a pause in the proceedings.)

THE COURT: Question. Why not include the secretary of state in this, as she described, in terms of they certify the election results? You know, I'm not trying to create more lawsuits, but I'm just curious about your argument on that.

MR. HUNTER: I will be happy to add them as an additional defendant in a subsequent motion, but, quite frankly, the secretary of state doesn't sign a direct commission that goes to the winner of an election.

THE COURT: But they certify it.

MR. HUNTER: The state board of elections certifies the results and gives to the winner of an election a certificate --

THE COURT: Okay.

MR. HUNTER: -- and then she takes that certificate and sends it to the governor. It's given from the state board of elections to the governor. When you don't -- when you have an election, whether it's for a primary or a general election, the property interest that people are fighting for is the certificate of election. So that property interest is issued by the state board and then it goes to the secretary of state, she certifies it to the governor and then the governor writes the commission.

I will be happy to add that person, but I don't think that she has the executive power. She has just derivative power from the -- from the legislature. And the governor has legislative power here and the executive power because he's got the veto. He has some legislative power and he's got executive power because the Constitution gives it to him.

MS. VYSOTSKAYA: Your Honor, your question encapsulates exactly what I'm trying to get at. Cut out secretary of state and the governor, if the Court ends up issuing an injunction in this case, the governor is not

going to have nothing sent to him under the statue. Secretary of state will have nothing sent to her under this statute, the statute that is actually being challenged in this lawsuit.

He is absolutely not a necessary party. He is certainly not a proper party. He could have chosen to stay in this lawsuit if he chose -- if he chose to do so, but that's up to him. It's not based on the ways that plaintiffs draft their complaint that he has to be made a party in this lawsuit.

Very quickly, I wanted to address what Judge Hunter was talking about before, which is a state law claims. In our brief -- it's part of that book that I handed to you. It was also submitted to you I believe electronically by Ms. Myers. But on pages nine through page 11 is where we discuss why state law claims should be dismissed, similar rationale that we argued for Ex Parte Young. And we cite several cases. Your Honor, I apologize. It's page actually 11 through page 14 of -- it's in that book that I handed to you. I think it's going to be your document under tab number two, we included that brief.

THE COURT: Mm-hmm. Where are you again?

MS. VYSOTSKAYA: So we are on page -- tab two, page 11 through page 14 is a discussion of why state law claims should be dismissed. There are a couple of cases

that would be helpful to the Court to consider, and one of the cases that appears on page 12 is State Ex Rel. Edmiston versus Tucker that talks about the necessity for actual and real existing controversy between parties having adverse interest in the matter in dispute in order for state law claims against the state being able to proceed. So that's one case. So not just the justiciable issue but existence of actual and true controversy between actual adverse parties is required.

And the other cases this James versus Hunt where -- which we included. It's on the same page of my brief, on page 12. We included that case to illustrate situations in which the governor could be actually a proper party in a lawsuit. Governor Hunt in that case actually did certain things under the statute that was being challenged and because of that he was named as a defendant and the action against him was proper.

This is not the situation here. Not only governor has no specific -- not only plaintiffs fail to allege anything the governor has to do under the statute in their complaint, but there is no set of facts -- you know, you just can't connect governor even if you look outside the four corners of the complaint to any functions underneath the specific statute that would be sufficient to pierce the immunity.

(There was a pause in the proceedings.)

THE COURT: Anything else on this?

MR. HUNTER: No, Your Honor.

THE COURT: Okay. I assume you are seeking, I think you just said, a declaratory judgment as well as part of your lawsuit?

MR. HUNTER: Yes, sir.

THE COURT: All right.

MR. HUNTER: We will be getting to that.

THE COURT: Okay. All right. This is what I'm going to do. Let me read over a couple of things in here over lunch. I will let you know about your decision at 2:30. Let's go ahead and hear the jurisdictional issue.

MS. VYSOTSKAYA: Thank you, Your Honor.

THE COURT: Mm-hmm.

MR. FARR: Thank you very much, Your Honor.

THE COURT: Yes, sir.

MR. FARR: Your Honor, this is pretty clear-cut. Could you pick up that notebook that I handed you and turn to tab one?

THE COURT: I am there already. I had your notebook open.

MR. FARR: Oh, there you go. Thank you, sir. So I just think this is very clear-cut, Your Honor. We're talking about GS 1-267.1. And if you look at (a1) it says

"Except as otherwise provided in subsection (a) of this section..." and that section deals with redistricting cases "...any facial challenge to the validity of an act of the general assembly shall be transferred pursuant to GS 1A-1, rule 42(b)(4) in the superior court of Wake County and shall be heard and determined by a three-judge panel of the superior court of Wake County organized as provided in section (b2).

Now, to give you a little background on that, Your Honor -- I know a little bit about this -- you may have heard of or recall the Stephenson case, which was the original redistricting case. I represented the plaintiffs in that case. We elected to file the case in Johnston County and we got a senior judge down there named Knox Jenkins who eventually declared the 2001 legislative plans illegal and he issued an injunction.

After that case was decided, the first part of this statute, section (a), was enacted because of the general consensus that in cases involving important constitutional questions, litigants shouldn't be able to forum shop and there should be some normalcy about where cases like that were heard. So the statue was originally enacted to cover redistricting cases requiring that they be transferred to Wake County and be heard by a three-judge court.

The (a1) section was added to the statute at some point in time by the current general assembly, but the thinking is the same, that people should not be able to just pick, you know, any random county in the state and that there should be some orderly review of important claims like this in the same court with the same procedures.

So it doesn't equivocate there. It says it shall be heard, shall be heard, not just determined, shall be heard and determined by a three-judge panel in the superior court of Wake County.

Then, Your Honor, you go down to (b2) and it talks about the reasons for the way this three-judge court is set up. It's a difficult assignment for a superior court judge on his own to make a decision on whether a statute is unconstitutional. Everyone in this courtroom -- and I know Your Honor -- understands that there is a heavy presumption that all statutes passed by the general assembly are constitutional.

And so dating back to the original statute that was passed dealing strictly with redistricting cases and then as amended by let's say the general assembly since 2001, the so-called Republican general assembly -- honestly, Your Honor, I don't remember exactly when they made this amendment, but it was the Republican general assembly that made this amendment. The concept is that the interests of

justice are served by not only having three judges look at cases like this but also by making sure that there is a geographic diversity of the judges who rule on the constitutionality of a statute.

So if you look at (b2), you will notice that the chief justice has to appoint the members of the three-judge court and they have to represent a geographical diversity. So all parts of the state are represented in cases like this of such great importance where we're getting a ruling on whether a statute is unconstitutional or not.

It should -- the legislative clearly has decided it should not be done by a single judge. That's too much of a burden on a single judge. And it also should be done by a court that's got geographical diversity so all parts of the state are represented to some extent in ruling on the constitutionality of a statute.

Then, Your Honor, I just want to point you to -- and if you would take a look at this, Your Honor, the second page -- it's section (c). I just would like to read that into the record. It says "No order..." -- no order -- "...or judgment shall be entered affecting the validity of any act of the general assembly that apportions or redistricts state legislative or congressional districts or finds that any act of the general assembly is facially invalid on the basis that the act violates the North

Carolina Constitution except by a three-judge panel of the superior court organized and provided by subsections (b) and (b2)," (b2) being the section that applies to facial challenges to statutes other than redistricting statutes.

And I just want to point out some key things there. It doesn't say no judgment can be entered. It says no order or judgment can be entered. And no order can be entered finding that an act of the general assembly is facially invalid unless it's done by a three-judge court.

THE COURT: Hold on a second. Go ahead. I just wanted to make sure there were no notations in there. But go ahead.

MR. FARR: Oh, sure. I'm sorry, Your Honor. I should have brought that for you. That's really all I have to say, Your Honor. It's just that the statute is very clear that a facial challenge, when it's filed, if it's filed anywhere in the state, it's got to be transferred to Wake County Superior Court and when it lands in Wake County Superior Court, either by being transferred or being filed there in the first place, it can not only not be determined, it can't be heard by any court other than the three-judge court assigned by the chief justice.

And then we see in section (c), Your Honor, that you can't enter -- not only can you not enter a judgment, you can't enter an order concerning the facial invalidity of

a statute unless it's done by a three-judge court.

So I think this is a very cut and dry argument supported by the text of the statute, and, unfortunately, Your Honor -- or fortunately, if I was a judge, I'd rather have two colleagues ruling on these important issues instead of having to bear that burden myself.

I don't think you have jurisdiction to rule on this statute until the senior resident judge and the chief justice get together and appoint two more justices to hear this case along with you, assuming you would be the Wake County justice that would be assigned to it.

THE COURT: I would not. I'm a special, so -- it has to be resident judge.

MR. FARR: Okay. So that's my argument, Your Honor. I have nothing more to say on that.

THE COURT: Hmm. Yes, sir. Let me hear you on this because that's interesting.

MR. HUNTER: Your Honor, if you would -- the statute has been also modified by the general assembly and the procedure -- I think it's rule 17, could be rule 45 -- where -- how you go about getting a three-judge panel. And the procedure in which you get a three-judge panel, which I've become painfully aware of, is that you have to have a hearing on 12(b)(6) motions prior to the time that Judge Ridgeway will send it to the three-judge panel.

So there is a provision in the statute that was done by this general assembly in the past ten years to require once a complaint is filed, if there is a 12(b)(1) -- 12(b) motions to be heard, they can be heard by a single judge or the judge can punt them to a three-judge panel.

Now, the other statue that's at play here is the statute on injunctions, and there is nothing in this statute that -- we're not asking for final declaratory relief from you. We are only asking for preliminary relief. Mr. Farr reads that to read "order," but superior court judges have the unfettered ability to enter into a preliminary relief under the statute, and there are no exceptions to that.

I disagree with Mr. Farr that this part of the statute is a jurisdictional thing. And the reason I disagree with Mr. Farr is because I was in Stephenson versus Bartlett 2, as was Mr. Farr, and we were both on the same page on that -- in that particular case. And this case was decided before this most recent amendment.

But in that particular case, in Stephenson versus Bartlett, there was a 1, 2, 3 and 4. In the fourth case the general assembly provided a -- a three-judge panel statute to be heard after they had amended the stuff, and Judge -- Mr. Farr and I were arguing this is a new court and that the general assembly couldn't create a new court that was different from courts in Article IV and they couldn't create

new courts under Article IV of the Constitution, a similar argument to what we are making today under Article IV of the Constitution.

And in that opinion, Judge -- Justice Edmunds said that this was a procedural device, that it was not a new court, that the three-judge panel is a procedure, it's not jurisdictional, it's merely procedural.

So in that sense I believe -- and I've articulated this in my brief and have the case citations for it -- that when we filed our case, I asked for a three-judge panel in August and I called up the AOC, I called up the trial court administrator, and they wouldn't let me have a three-judge panel right away. They forced us to -- they forced me to calendar their 12(b) motions before they would even send it over.

Now, I don't -- if Judge -- if Mr. Farr is correct in that, then they should've immediately asked for a three-judge panel. The problem is, from Judge Ridgeway's standpoint, I believe, there's so many panels, there's so many lawsuits that challenge the facial constitutionality, he wants some method of doing it.

So now we have the situation where we need to have a preliminary injunction entered to -- to alter the status -- not alter the status quo but to maintain the status quo ante. And a single judge has the statutory

ability to do that. Because we're not asking for a final decision from you. We're only asking that you find that it's more likely than not we are going to win this lawsuit. Finding something that is more likely than not or making that finding and finding irreparable harm, or, if you don't find that it's more likely than not we're going to win that we can't get a remedy -- we can't get a remedy unless an injunction is ordered, or we won't get a remedy at the end of the day unless there is a preliminary injunction ordered, then that question can be postponed.

Now, in my attachments to my brief to my preliminary injunction motion, I have attached -- this is not the first three-judge panel that's come along down the pike to the Wake County Superior Court. And in my memorandum I have attached two types of injunctive relief we talked about and we're going to talk about that later. But right now as to jurisdiction, I want you to --

THE COURT: Are you talking about your brief in opposition to the motion to dismiss or your preliminary injunction?

MR. HUNTER: I think it's the preliminary injunction motion.

THE COURT: All right.

MR. HUNTER: It was -- but it might be my brief. It is the order that we had for Judge -- that Judge Stephens

ordered in the board of elections case.

THE COURT: Yes, I have that.

MR. HUNTER: And in that case he set -- he set the matter on for a hearing at a later time before a three-judge and entered a preliminary injunction motion. And I think that is the proper procedure to use in this case because I think Judge Stephens had jurisdiction to do that, and I think you have jurisdiction to do that, and I think that is what is proper under this thing, not to enter a final judgment but to enter a preliminary injunction motion.

Now, we can argue over whether or not you should do it at a later time, but right now we're just talking about do you have the jurisdiction to do it, and I think under the preliminary injunction statute you have that jurisdiction. Because jurisdiction is kind of like the weather. Some judge has jurisdiction to prevent an injustice from occurring at any one given time, and if you have to temporarily stop the state from doing something or stop a party from doing something that is unjust or illegal, you have that authority until the right body can come along to do it.

And that's what Judge Stephens did in that case. It's also what Judge Fox did in the Republican Party of North Carolina versus Martin case. And I think that's what other -- that is the practice here and that's what the

practice has us do in ruling on the 12(b)(1).

His reading of the statute would make no sense under the procedures that are set out in the rules of civil procedure because ruling on a 12(b)(6) motion -- a 12(b)(6) is a dispositive motion. So if you have the authority to rule under a 12(b)(6) motion, it's not in contravention of that statute.

Similarly, if you have the ability to rule on a preliminary injunction motion, it's not covered by that statute. It's only a final order or a final judgment because it takes some time to get to a three-judge panel. So that is a procedural difference between the two cases.

And the supreme court has already answered this by saying in Stephenson versus Bartlett 4, which I have cited in my brief, that this is a procedural device; it is not a jurisdictional device. You have what I will call concurrent jurisdiction, not exclusive jurisdiction. The three-judge panel doesn't have exclusive jurisdiction. It's a concurrent jurisdiction to exercise your preliminary injunction powers, as did Judge Stephens in the board of elections case.

MR. FARR: May I respond, Your Honor?

THE COURT: You sure can, sir.

MR. FARR: Thank you. First of all, Your Honor, I've got several points I want to talk about. Counsel for

the plaintiffs talks about a 12(b)(6) motion that was filed where a three-judge court was not requested. I believe that was the governor's motion to dismiss on the sovereign immunity grounds, and everyone agrees that that doesn't go to a three-judge court. When we filed our motion to dismiss, we noted the jurisdictional objections that we had to a single judge hearing this case when we filed our motion. It's not up to me to get a three-judge court; it's up to plaintiffs to try to push it and for the court to do whatever they can with the resources they have to assign a three-judge court.

Secondly, I really disagree with counsel's description of the Stephenson case. In the Stephenson case the issue was whether the plaintiffs could go to Knox -- to Judge Jenkins and file a motion to show cause as to whether or not the newest version of the legislative statutes complied with the judgment that Jenkins had issued.

And whatever they said about a new procedure for hearing cases, the ultimate ruling in that case was that Judge Jenkins no longer had jurisdiction in the case to hear it. He had no jurisdiction to hear our motion to show cause because the Court found the case was over and that we would have to file a new case in a new court, the three-judge court that had been established by the statute.

So yes, they established a new procedure for a

three-judge court, but the actual issue in the case was whether Judge Jenkins in Johnston County had the jurisdiction to rule on a motion to show cause that we filed arguing that the 2003 legislative plans did not apply with his judgment.

Next, Your Honor, I want to talk about the status quo. We didn't go into this in detail on our brief that we're going to give you on the preliminary injunction, but we cited cases that go into this, and we don't -- we strongly disagree with counsel's description of what the status quo is.

The status quo is that elections should go forward and have been going forward and the campaigning has started and we've already had one election already under the statute that is being challenged in this case. The status quo is the statute that currently exists that's been in operation that candidates are going to run under.

And what the plaintiffs want to have is they want to have a mandatory injunction -- I think it's also called a prohibitory injunction -- where they want you to upset the apple cart and completely change the status quo. So they're not asking you to preserve the status quo; they're asking you to change the status quo. And those types of injunctions are not favored in North Carolina. The status quo is the current election plan that is in place in

Mecklenburg County.

The case that counsel cited that Judge Stephens issued, I'll have to say I don't agree with Judge Stephens' ruling that he had jurisdiction to enter a TRO in that case, but that's what he entered. He entered a TRO that had a ten-day limit on it and there was no preliminary injunction issued in that case. Of course, I don't believe there has been any appellate review of that decision, but it's not quite accurate to say that he issued a preliminary injunction; he issued a temporary restraining order that disappeared and no PI was ever entered in that case.

I don't quite understand why -- counsel for the plaintiffs, Judge Hunter, won a landmark political gerrymandering case, it was called Martin -- maybe -- I don't know who the plaintiff was, but basically it was a lawsuit challenging the way judicial districts were drawn alleging there were political gerrymanders. It was in federal court. I've got no idea how that has anything to do with our three-judge court statute dictating who has jurisdiction to not only decide these cases but to hear the cases.

And finally, counsel for the plaintiff, Judge Hunter, I think he made my point when he said a 12(b)(6) motion is a dispositive motion. So if you granted our 12(b)(6) motion that the statute is constitutional, you are

ruling on the facial validity of the Constitution and we don't think you have jurisdiction to do that. We've noted that in our brief that we filed. We just filed that motion and in that motion we noted that we did not think you had jurisdiction to hear it, but we filed it just out of an abundance of caution in case the court disagreed with us. But I think that counsel hit it right on the head, it is a dispositive motion.

Granting a preliminary injunction is a dispositive motion in a technical sense. Well, first of all, you have to hear it, which you're not supposed to be able to hear it under the statute, but in many ways -- and you know, Your Honor, preliminary injunctions often decide cases, and we have filings for these offices that are opening up on December 2nd. So in many respects you're hearing the case, you're making a ruling on the facial validity of the statute and in many respects it may be a dispositive ruling because what do you do with the filing period coming up.

Nobody wants the filing period to be continued. That's happened in the past. It's a disaster. I mean everybody on all sides of these cases, Democrats, Republicans, it's not good to put off the primaries. So a preliminary injunction in this case, given the length of time that the plaintiffs have taken to file this lawsuit and the fact that we have filing deadlines coming up on December

2nd, if it's not a dispositive motion, it sure is darn close to being a dispositive motion. So we don't think you have jurisdiction to make that order, but more importantly, Your Honor, as the statute says, you don't have jurisdiction to hear the facial challenge. Thank you.

THE COURT: Hmm. That's a big question. Go ahead.

MR. HUNTER: I'm sorry, did you...

THE COURT: I said that's a big question. Go ahead.

MR. HUNTER: It is a big question, Your Honor, and I want to address that when we get to the preliminary injunction motion question, but right now we're just talking about jurisdiction.

A couple of things Mr. Farr said I disagree with. He -- a lot of times a judge has conflicting statutes, and you have to use a rule of reason in harmonizing those statutes. And so you have to figure out when there are two different -- when there is a statute that says you have the ability to issue a 12(b)(6) order, does that -- and you have the ability to issue an injunction order, and then you say a three-judge panel is supposed to make a final decision on the constitutionality of the statute, there's a gap there. And that gap you have to craft in the common law a remedy.

You're not the first judge who has had to craft a

remedy for this situation. At least to my knowledge you're the third, and there might be more. And the reason I had given you Judge Stephens' order is because that's how he resolved the remedy of these conflicts, how do you keep an illegality or an unjustice from going forward given this procedural framework that you're given to.

The other case that I've cited is an unpublished case, and that's why I gave you a copy of it, called Republican Party of North Carolina versus Martin. And Mr. Farr is right, it is the only case in federal court that will ever be done -- which I brought -- having to do with political gerrymandering. Now the Supreme Court has said we shouldn't have won that case, but we did. And that eliminated superior court judges from being elected statewide.

Now, at one time in our history no blacks and no Republicans could be elected as a superior court judge in this state because their votes were submerged by an overall requirement that primaries were held in superior court districts which were very large and submerged votes and that they were -- they were afflicted with this problem.

And Kelly Alexander and I, my law firm, brought a case called Alexander versus Martin. In Alexander versus Martin we dealt with the racial aspects of the case. And after we filed the lawsuit, the general assembly settled

that lawsuit, Tom Ross and I settled that lawsuit, and that lawsuit was done so that there could be these carve-out districts in Mecklenburg County, Wake County, Durham County, Forsyth County, Greensboro, Cumberland and down east.

And the first African-American judges that were elected were elected as a result of that litigation that we brought, and they were elected because they had -- because the general assembly saw the unjustice of it and did it.

Now, that was done under section two of the Voting Rights Act because there was liability under section two of the voting rights act in the 1980s because we had Gingles, and in Gingles, both congressional and the legislative districts were ruled unconstitutional because they submerged black voters in these large multi-member districts.

Now, that was why superior court judges were divided in the first place, not because the North Carolina Constitution allows it, but because there was a supremacy clause federal lawsuit brought to -- to end that practice, and it was a racial remedy, and that is what the racial remedy, which predates this act -- it was done to assist black communities and black judges and black candidates in getting elected to superior court judge.

Subsequent to that lawsuit we brought a lawsuit for the Republican Party versus Martin, and Judge Fox was -- was confronted with the same remedial issue you're grappling

with today. And what Judge Fox did was he said "Well, I'm going to let everybody file for both seats" and the Fourth Circuit said -- said -- had -- that Fourth Circuit case I gave you is the result of an appeal on that, and "We're going to have the votes counted by district and at large."

I'm not recommending that in this case because the status quo ante is not -- it's the status quo ante, which means the status quo before the illegal plan was put into effect. Now, we can disagree about what the status quo is, but in all the -- in the redistricting cases that Judge Ridgeway has just heard, the status quo ante is what I say it is and not what Mr. Farr says it is because he's lost that case. And they're also arguing -- and, you know, I'm sorry he lost the case. I was supporting him in that. But nevertheless, the status quo ante is what it was before the illegal act of the legislature.

So my view of this case is that for 50 years Mecklenburg County had at-large districts throughout the whole county. Everybody had an equal vote. There has never been a section two violation found in Mecklenburg County. Blacks have freely gotten elected in countywide elections. And two of my clients have gotten elected in -- three of my clients have gotten elected in countywide elections. But they can't get elected in segregated districts, and these are horribly segregated districts. That is an injustice

that needs to be corrected.

Now, if we don't correct this injunction in preliminary injunction or we can't get to a three-judge panel because of procedural issues, then the injustice will be continued for another two years or may be continued for another two years. Now, you have the jurisdiction to prevent this injustice from coming and ruling on the underlying merits of the case. Justice Fox -- Judge Fox had that, as did Judge Stephens. And all I'm telling you is the procedure is in conflict -- or the statutes are in conflict, and you have the right to craft the appropriate remedial measures. Just a second, Your Honor, I have a thought from my client here.

(There was a pause in the proceedings.)

MR. HUNTER: The other thing I do want to say is I don't -- I mean Mr. Farr and I are involved in a lot of litigation. This is the only case we're not on the same side on. So we're good friends, and we have this -- they're called Purcell argument that we make, and I'm making that argument over in federal court right now.

The problem with that is the general assembly just changed the election districts for the general assembly Friday. So if it's not -- it's not too much change for the general assembly to do that for the congressional districts, it's not too much change to go back to a system that is used

in the majority of all the other counties in North Carolina. We're not -- it's not prejudicial -- there is no interest on the other side.

Now, in this case -- I mean they submitted Dan Bishop's affidavit in a 12(b)(6) motion. Under the rules we could go to summary judgment on that matter before you. I don't want to do that because I think that would be going too far. But there is no -- they have yet to articulate in their answer and their response here any compelling state interest to justify this segregation.

Now, I have here a map which I'm going to put in as an exhibit, which is my --

MR. FARR: Your Honor, are we moving to the merits of the case, or are we just talking about jurisdiction?

THE COURT: We moved there a long time ago, but let's deal with the jurisdictional question first.

MR. HUNTER: All right.

MR. FARR: Could I be heard on that, Your Honor?

THE COURT: Yes, sir.

MR. FARR: I just wanted to --

(Court reporter interrupted for clarification.)

MR. FARR: I'm sorry. Excuse me. It's amazing how I can repeat mistakes that I made early in my career, but I forgot to bring a copy of the rule book with me, so my associate, Ms. Riggins, has written up what we think rule

42(b)(4)4 says, which is what counsel referred to. And the pertinent part, we think, says "Court shall maintain jurisdiction over all matters other than challenge to the act's facial validity." Now that's the rule that I believe Judge Hunter cited. If I'm wrong about that, I'll be happy to be corrected.

We didn't file our affidavit in support of our motion to dismiss. The affidavit was filed in opposition to the preliminary injunction motion. I still don't understand what Judge Fox and federal court has to do with anything right now because the issue in this case -- and, again, we have a rule of law in this state. We have statutes that provide for the jurisdiction of the superior court. And we believe the statue very clearly does not grant you jurisdiction to rule on the facial validity of these statutes, no matter how allegedly unjust they are.

We don't agree they're unjust. We don't believe they're intentional racial segregation. We will get to that when we go to the merits of the preliminary injunction motion, if we hear that. The only issue is -- no matter how bad the alleged injustice, the only issue is whether you have jurisdiction to rule on this as a single judge, and the statute is very clear that you do not. And I promise Your Honor that will be all I have to say on this. Thank you very much.

(There was a pause in the proceedings.)

MR. FARR: Your Honor, Paul Cox on behalf of the state board of elections.

THE COURT: Yes, sir.

MR. COX: Could I just make one brief point? We're not taking a position on the jurisdictional matter with respect to the preliminary injunction. It is a difficult question. We don't have a position on that. I will just amend one thing. I do disagree with one thing that counsel for the legislative defendants has said. I do think the Court does have jurisdiction to rule on a 12(b)(6) motion. I think that's from the language of rule 42. That's the only difference.

(There was a pause in the proceedings.)

MR. HUNTER: Judge, I have one more thing just about jurisdiction, if I could.

THE COURT: Please. Please.

MR. HUNTER: We are -- we are bringing our claims both under state acts and the 15th Amendment and 1983, and I think that the federal authorities would give a single judge the opportunity to act on this statute. Now, I don't have any law on that for you, but sitting here thinking about it, I wanted to make that point to you.

We're not just bringing state claims here. We're bringing federal claims. And you would have concurrent

jurisdiction to find a federal violation under federal law and issue a preliminary injunction under the 15th Amendment and 1983.

(There was a pause in the proceedings.)

THE COURT: Mr. Cox, you mentioned rule 42.

MR. COX: It's specifically rule 42(b)(4).

THE COURT: Okay. I'm looking at it. You said that it specifically deals with the authority to hear 12(b)(6)?

MR. COX: That's right. I don't have the text in front of me, but I wrote it down from my phone when I looked it up on the general assembly's website. It's in the middle of the paragraph somewhere. It starts "For a motion filed under rule 11 or rule 12(b)(1) through (7), the original court..." -- which is this court -- "...shall rule on the motion. However, it may decline to rule on a motion that is based solely upon rule 12(b)(6)." So "it may decline." It's a discretionary matter. "If the original court declines to rule on a 12(b)(6) motion, the motion shall be decided by the three-judge panel."

THE COURT: Okay.

MR. FARR: And, Your Honor, I apologize for not noticing that. Please accept my apologies.

THE COURT: I'm looking at some old stuff. I noticed that my book is 2015. But I'm looking for that

language. That's the reason why I asked you that question. Does anyone cite it in their material by chance?

MR. HUNTER: I think we cite it, but we don't quote it.

THE COURT: Okay. Let me grab my computer. Or better yet -- let me grab my computer. That may help me with that.

(There was a pause in the proceedings.)

THE COURT: I got the '19 version. I see it there. Let me just swap these books in here. All right.

(There was a pause in the proceedings.)

THE COURT: Tell me where you mention rule 42 in your brief.

MR. HUNTER: It wasn't rule 42. That's the rule that you're citing to, Judge.

THE COURT: That is rule 42 I'm citing to?

MR. HUNTER: Yes, sir. That's the one that I was citing to.

THE COURT: You said it's in your brief though?

MR. HUNTER: Yes, sir.

THE COURT: Do you know about what page it's on?

MR. HUNTER: Oh, Lord. Okay. I've got two briefs before you. One -- it's the jurisdictional -- it's the jurisdictional section I think in my preliminary injunction brief.

MS. RIGGINS: Your Honor, it's page seven on the plaintiffs' preliminary injunction brief --

THE COURT: Thank you.

MS. RIGGINS: -- in the middle of the page.

THE COURT: Thank you.

(There was a pause in the proceedings.)

THE COURT: Okay. Curious. For you constitutional scholars, can someone tell me -- because as I looked in the older book I have back in the back, this language was not in there under rule 42. Which one came last, the provision in rule 42 or the provision in 1-267.1? Can anyone answer that question for me? I've got a funny feeling someone can.

MR. FARR: I sure can't right now, Your Honor. I'm sorry.

THE COURT: I believe she has the answer.

MS. RIGGINS: Your Honor, if you turn to tab one in the binder that Mr. Farr handed up, it indicates that North Carolina General Statute 267.1 was last amended by Session Law 2018-145. The copy that I pulled of rule 42 off the general assembly's website indicates that that rule of civil procedure was amended in 2016.

THE COURT: Okay. So that was amended in 2016.

MS. RIGGINS: And NC General Statute 267.1, based on the language underneath, I believe it is part D, to me

looks like it was last amended in 2018.

THE COURT: Okay. Well, my question is -- because I know -- I read that part. I just want to know which one came -- was that subsection (c) that was amended? It could have been -- I was just trying -- that's what I'm trying to figure out, when was -- in other words, did (c) come first or last?

MR. FARR: Your Honor, we could find that out.

THE COURT: If you could tell me that, that will help me answer this question. There is a -- in other words, we have two statutes that basically conflict each other, as you said earlier. The question is which one do I go with? So -- yes, sir?

MR. HUNTER: Well, the statutes -- if one came after the other, it doesn't necessarily -- then you -- you have to go to canons of construction to go to can the two be reconciled.

THE COURT: Okay.

MR. HUNTER: And so it doesn't -- what I guess I'm trying to say is the answer is a complex question. It's not does one override the other. If one doesn't specifically override the other, I'm not sure that Your Honor is going to be assisted particularly in knowing that information.

But the only way to get it is to really go to the session laws and look specifically or go on Westlaw and look

specifically at the session laws. And unless you have a library with session laws here, it would be hard to pick it up other than on the computer, and none of us have our computers here right now.

THE COURT: No, it's not that -- it helps me make the decision.

MR. HUNTER: I understand.

THE COURT: It's not determinative. I'm just -- it's an interesting thing. Yes?

MR. FARR: I do have one distinction, Your Honor, that I would like to point out. The rule -- which, again, I apologize for not mentioning that when I first started talking about this, but the rule says that you may at your discretion rule on the 12(b)(6) motion. If you ruled on it and you granted it, then you wouldn't be finding the statute invalid. If you ruled on it and did not grant it, you wouldn't be finding the statute invalid.

So the rule does not allow for you to make a finding that the statute is invalid. The statute says that you can't make a ruling finding the statute is invalid unless it's done by a three-judge court. So that's a very big distinction between the statute and the rule.

Under the rule if you elect to -- if you elect to rule on a 12(b)(6) motion -- which, of course, this could work to our advantage, but I frankly think it should be done

by a three-judge court. But if you ruled on a 12(b)(6) motion and you granted it, you would not be finding the statute invalid. If you denied it, you would not be finding the statute invalid; you would just be denying the 12(b)(6) motion. The statute says that you can't rule -- you can't enter an order or judgment finding the statute invalid. So there are two different questions here.

I hope that I've -- I hope the Court understands what I'm saying because it's a different issue. Under the rule you're not finding the statute invalid if you grant the 12(b)(6) motion.

(There was a pause in the proceedings.)

THE COURT: Also to Judge Hunter's point, let's think about the posture in which you seek an injunction or a TRO. It's always at the beginning of a lawsuit. Are you going to even have a three-judge panel -- say, for example, you were to sought this when you first filed your lawsuit -- as you did seek it --

MR. HUNTER: I did.

THE COURT: -- and you were just put on a calendar or you would just go to a judge for a TRO, are you saying that this particular statute subsection (c) would have prevented even him seeking a TRO sort of like what happened with Judge Stephens back in -- was it Bartlett -- the other -- Stephenson versus Bartlett?

MR. HUNTER: It was the North Carolina Board of Education case.

THE COURT: Okay. So still. Is it something -- how do you deal with that? That's my question.

MR. FARR: Well, Your Honor, I mean any party can go to a Court and ask for relief, and then the question is does the Court have jurisdiction over it. And the point we were making is that Judge Stephens in the board of elections case did not issue a preliminary injunction; he issued a TRO that expired in ten days and there was no preliminary injunction.

I don't believe he had jurisdiction to issue a TRO, but that was never appealed and decided by the court of appeals. But I go back to again what the statute says is that -- it says the case shall be transferred and heard by a three-judge court, and it says that a single judge cannot enter an order finding that the statute is valid.

Now, we can split hairs and say a preliminary injunction is not a final judgment that the statute is invalid, but it's a ruling that you're likely to find that the statute is invalid, it upsets the status quo for an ongoing election and in many effects, Your Honor, as you know, preliminary injunction almost -- you know, regularly decides the case.

So it's a very significant order and certainly,

Your Honor, if we get that far and you think you've got jurisdiction to hear this case and if you decide to issue a preliminary injunction, I'm jumping way ahead of myself here, but at a minimum I think you should stay your order and give us an opportunity to seek appellate review on whether you have jurisdiction. I don't think that you do.

And I would also note, Your Honor, in the Blankenship case, again we're mixing the merits with the jurisdictional issue here, but if you read the Blankenship case, that judge found that the districts were illegal under his understanding of the equal population requirement, but even he stayed his order in the case allowing the state to take, you know, appellate review of that case.

So this -- you know, this is a very significant ruling. It could very well decide the case. And the statute in our view clearly states that you can't make a ruling about the invalidity of the statute without having it go to a three-judge court.

THE COURT: Okay.

MS. VYSOTSKAYA: Your Honor, may I clarify for a second what Judge Stephens actually has done in the board of education case? Because I was one of the counsel involved. And I was arguing with Mr. Farr his argument to you right now, that a single judge does not have jurisdiction to issue a TRO. In that case Judge Stephens obviously disagreed with

us. He issued a TRO, and the TRO was also extended for a prolonged period of time until a three-judge panel was then impaneled. And it ended up -- the case actually was appealed all the way to the supreme court.

The issue of preliminary injunction was not relevant at the appellate level because the three-judge panel disagreed with Judge Stephens' TRO to begin with, so they lifted the TRO and denied the motion for preliminary injunction in that case. But I do recall that there was an argument made by plaintiffs that 1-267.1 is not a jurisdictional but a venue statute, and I'm not quite sure that our appellate courts have clearly resolved that as of today.

THE COURT: Okay.

MR. HUNTER: Judge, perhaps our Constitution can be of assistance to you in your dilemma, Article I section 18. I'm going to read it.

THE COURT: Yes, sir.

MR. HUNTER: "All courts shall be open; every person for an injury done in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial or delay."

Now, in this particular case our clients, due to no fault of their own, have -- are going -- you know, if we

don't get to our remedy -- the purpose of all statutes, I guess I want to say, is to get to remedy, and if -- that's the constitutional aspect of it.

Now, I know that things have to be done in due course, but this threat of appellate review really doesn't bother me too much other than to say your order is simply interlocutory. It is only a temporary order until a three-judge court can review it. And that's all we're really asking for is that you keep the status quo ante until the three-judge panel can review it.

And the problem is we've got a filing period coming up. Now, I don't know whether or not Judge Stephens is going to delay the filing period or not for all the judges -- for all the offices in the state under another case that Judge -- Mr. Farr is involved in, Harper versus Lewis. I don't know what's going to happen with the supreme court case.

But this is there like -- I've got a chart here of how many -- I think there are nine or ten judges up for election this year. This is not a crisis that can't be managed in one single county by the board of elections in Mecklenburg County. This is not an Armageddon kind of case in terms of harm. But, you know, we're way into the merits now.

But all I'm saying is that the interlocutory

appeal aspects of this question would really -- if you just preserve the status quo until we can get a three-judge hearing on the matter and let them determine the final preliminary injunction, or review it, that would be fine with us.

THE COURT: That's what I want to do during lunch as well. I want to see how quickly we can get that.

MR. HUNTER: Well, if it's -- if my experience with three-judge panels is anything, Eric Holder got one in one day when he was doing the thing. I've had to wait four months to get one. Other lawyers who do this kind of work, Skip Stam, told me it took him two years to get a three-judge panel. So I don't -- I think the rule in this case is very mystifying because, quite frankly, Judge -- Mr. Stam advised me if I don't file for a preliminary injunction, it could be two or three years before we get the merits of anything heard by a three-judge panel.

So the delay -- denial -- I mean justice delayed is justice denied in this case because these people want to run for judge, and right now they have no opportunity to run for any of these judicial seats that are going to be up in 2020. They're -- moreover, they don't even have a vote in the 2020 judge races.

THE COURT: Okay. Let me do this. Does anyone have any objection to me checking on that?

MR. HUNTER: No, sir.

THE COURT: All right. Any objection?

MR. FARR: No, sir, Your Honor.

THE COURT: Any objection?

MR. COX: No, Your Honor. I could provide a little more context. Your Honor was asking about the sequence of events for the rule being updated versus the statute.

THE COURT: Yes.

MR. COX: The statute was amended in relevant part in 2014, Session Law 2014-100, and the rule was amended in relevant part in 2016, so the rule came after -- the rule change came after the statute.

THE COURT: All right. Okay. All right. Let me do that. I'm going to contact some folks during lunch just to talk about scheduling because I'm a big believer in doing it the right way. So we'll still come back at 2:30; don't get too happy yet. We'll come back at 2:30, and I'll give you my ruling on the jurisdictional question, and then we'll go from there, if necessary, okay? Don't feel rushed. I know y'all are trying to squeeze this in, but I had planned to have you all for the rest of the day anyway. So I will see y'all at 2:30. Mr. Sheriff, we will be in recess until 2:30.

(A recess was taken at 1:06 p.m.)

(Back on the record at 2:27 p.m.)
(Present at Bar: Donald Cureton, Kimberly Best, Alicia Brooks, plaintiffs; Bob Hunter, Esq., for the plaintiffs; Olga Vysotskaya, Esq. for the defendant governor; Paul M. Cox, Esq. for the defendant State Board of Elections; Thomas A. Farr, Esq. and Alyssa Riggins, Esq. for the legislative defendants.
THE COURT: All right. With respect to the jurisdiction question, after reviewing the statutes that we have in this case, I find I have no jurisdiction to hear the preliminary injunction. I can hear the 12(b) motions. And I have contacted the folks at AOC to see if we can't get y'all in court as soon as possible regarding your preliminary injunction, all right? Now, let's hear you with your 12(b) motions.
MR. HUNTER: You do have 12(b) jurisdiction?
THE COURT: I do. Under rule 42 I do have that.
MS. VYSOTSKAYA: Your Honor, is there a ruling on the governor's motion or not yet?
THE COURT: There will be. Let me go on and hear y'all on your 12(b) motions.
MR. COX: I'll go first on behalf of the state board. Your Honor, I trust you have a copy of our --
THE COURT: I do.
MR. COX: -- brief supporting the motion to

dismiss. And, of course, this is a motion to dismiss in part based on 12(b)(6). We are moving to dismiss the first two counts in the complaint. Count one is a claim that the session law under challenge violates North Carolina's -- I call it the unified judiciary clause. It's Article IV section two of the North Carolina Constitution.

And count two, I believe that one is subject to dismissal as well. It's essentially an equal population challenge not based upon any special group or protected group status, but purely based upon unequal population distribution among the districts that were created by the session law.

As to the first claim, the unified judiciary clause of Article IV section two of the North Carolina Constitution states "The general court of justice shall constitute the unified judicial system for the purposes of jurisdiction, operation and administration and shall consist of an appellate division, a superior court division and a district court division."

Now I will emphasize that the purposes -- the purposes are laid out in the constitutional provision here, the purposes of jurisdiction, operation and administration. Nowhere in that list is the purposes of election, the purposes of, you know, deciding the contours of the lines for a district.

A separate provision of the Constitution of Article IV actually does address election of district court judges. That is section ten of Article IV. And it states the general assembly can divide the state among a convenient number of local district court districts, and it goes on to say that district court judges shall be elected for each district for a term of four years in a manner prescribed by law. And then last it says the number of district court judges shall be determined by the general assembly.

So as you can see clearly here, the hook here for the plaintiffs in their count one is the first provision I mentioned to you, section two. But obviously when you read section two in contrast to section ten, section two doesn't address how district court judges end up on the bench. It only addresses the need to ensure uniformity in the jurisdiction, administration, operation of the courts, the district courts.

And the plaintiffs in their complaint discuss correctly that where these provisions came from is the Bell Commission from the 1950s that led to the amendments to the North Carolina Constitution in the early 1960s. The Bell Commission was, as we explained in our brief, concerned with the fact that you would get very different type of justice in one county -- from one county to another. We had a system of justices of the peace. We didn't have uniform

jurisdiction from court to court. If you went to Alamance County, you might have a particular type of court, a specialized subject matter court, hearing your case. If you went to Mecklenburg County, you might have a completely different type of court. And you really had to know what the local procedures were and the local law was in order to succeed in your case or else you would be out of luck.

So the Court wanted to ensure that there wasn't that, as it said, a hodgepodge of the type of justice you would get across the state, so it decided to -- the general assembly and the voters, the framers of that amendment, decided to change the Constitution so that it had uniform jurisdiction throughout for trial courts in the state.

I've not found any -- I've done some research on Westlaw. I've not found any case that supports the notion that this provision of the North Carolina Constitution has anything to do with the manner in which district court judges are selected for the bench.

And I will add one other item from the Bell Commission. The Bell Commission actually works against the plaintiffs' argument here because the Bell Commission did address a recommendation for how district court judges should be selected for the bench, but it recommended in a different part than what we're talking about here -- in a different part of their recommendations, they recommended

that the chief justice of the supreme court select district court judges, that they get nominated by the local bar and that the chief justice would select them, no election, in other words.

So, you know, that part of the history is sort of ignored in the plaintiffs' argument, that this provision that was enacted from the Bell Commission should address the manner in which district court judges are put on the bench. Clearly the only time the Bell Commission was concerned about that was when it recommended that the chief justice should select district court judges rather than have election. The general assembly and the voters obviously didn't take up that recommendation, but they did take up the recommendation about ensuring the uniform operation and jurisdiction of the district courts.

So I don't have anything else to add on that claim. I think it's based upon the text of the constitutional provision and the history here, and in my review of the case law I've not found anything to support the theory advanced by the plaintiffs for count one, so that's why we seek the dismissal of that count. Unless the Court has any questions, I'll move on to count two.

THE COURT: Yes, sir. Go ahead.

MR. COX: So count two, as I mentioned, is an argument. It's not based upon a protected group being

treated differently or anything; it's purely based upon the argument that voters in Mecklenburg County elect district court judges differently than voters in other counties. Now, of course, in Wake County we have subdistricts as well. There's some subdistricts in Union County. And there's a parsing of Vance County as well. It's not quite the same thing.

But the argument here in count two is that by creating the subdistricts, the session law made it such that voters in Mecklenburg County had -- their votes don't count as much in terms of getting representation on the district court bench. The only authority for that -- and there is authority for that proposition as a legal matter -- comes from the Blankenship case. And my esteemed colleague talked about the Blankenship case, and I'm sure he'll bring it up as well.

In the Blankenship case the North Carolina Supreme Court did decide that claims under the equal protection clause of the North Carolina Constitution, arguing that you have unequal distribution of voters in judicial seats, judicial districts, there could be a claim under the equal protection clause for that in the North Carolina Constitution. Importantly, the court in Blankenship recognized that the federal courts have not recognized that claim under the federal equal protection clause. So in

North Carolina our supreme court decided they were going to go a little bit further than what the equal protection clause in the federal constitution allowed for. But when the court -- when the supreme court recognized that type of claim under the North Carolina Constitution, it put a -- it put a high bar on that claim. The end of its opinion is pretty clear. It talked about --

(The court reporter interrupted for clarification.)

MR. COX: The end of its opinion is pretty clear. It talks about what is required to show a prima facie case of an equal protection claim like this based upon disparate populations in voting districts. It said a prima facie showing of a significant voting disparity is required and that the disparity in voting power must closely approach the gross disparity -- "closely approach" is the word used -- the gross disparity that was shown in Blankenship.

Now, in Blankenship, the disparity at issue was one district had roughly five times the number of residents -- or had voting power that was roughly five times greater than the residents of a different district and had voting power that was four and a half times greater than the residents of another district and four times greater than the residents of the remaining district. Here there is a -- we admit there is a disparity in the number of voters-to-judge in the districts in Mecklenburg County under

the session law, but it doesn't come close to approaching what the court in Blankenship said was -- made out a prima facie case for the violation. Here's it's not even two-to-one. It's not -- I mean in Blankenship it was five-to-one, four-to-one at the most. And the court said to make a prima facie case, you have to show that it is closely approaching, as I said is the language of that case. And, you know, the disparity here doesn't closely approach that. So because the court did recognize a new constitutional claim in Blankenship but it put a very short leash on that constitutional claim, this -- this claim before you doesn't reach that far.

I should -- I should add, too, there are two aspects, as I read the complaint, of what the plaintiffs are claiming under count two. One is that the districts within Mecklenburg County have disparate populations to judges, voting populations to judges, and that's what I was discussing with respect to Blankenship and how it doesn't even approach a two-to-one. You know, the smallest number is something like 30,000, the highest number is around 60,000. But it doesn't approach the five-to-one disparity that we're talking about in Blankenship.

The other theory that the plaintiffs are advancing for count two is that the session law treats voters in Mecklenburg County differently than it treats voters in

other counties. Now, that may be true, but it doesn't -- it doesn't -- the complaint doesn't demonstrate why that is constitutionally suspect. There is no allegation in the complaint about how they're being treated differently other than the fact that there are subdistricts in Mecklenburg County. The complaint doesn't allege that, you know, voters in Lee County or Harnett County have fewer or more residents per judge than voters in Mecklenburg County under this districting statute. So that's purely just a matter of failing to allege sufficient facts to make out a constitutional claim. So that's -- that's count two.

As I say, you know, in summary, count two alleges disparity in voting strength. That claim has not been recognized under the federal constitution. It has been recognized under the state constitution in the Blankenship case, but the Blankenship case put a high bar on making a prima facie case, which this case doesn't make.

Unless the Court has any other questions, that's -- that's the extent of -- or that's at least a summary of the argument we make in our briefs.

THE COURT: Okay. Yes, sir. Any response?

MR. HUNTER: Oh, yes, sir. First of all, in my response to the motion to dismiss, I would like to point out to the Court that the State's motion to -- for 12(b)(6), the state board's motion, was untimely filed and that's a

jurisdictional requirement. I have attached to my brief an opinion from Judge Robinson which indicates that the state board's -- and they admit that they filed their 12(b)(6) motion with the answer, and under the rules of civil procedure they have to file the motion before their answer. They can't file it at the same time. So there is a procedural defect in their complaint to start with.

If Your Honor will turn with me in the complaint to paragraph 103 on page 27 of the complaint, you will -- you will see references to two statutes, 7A-140 and 7A-200. One of those statutes defines what a -- the state legislature defines what a district court shall consist of and who may vote in elections of the district court. It requires that counties or whole counties -- counties -- single counties or combinations of counties have to form a judicial district and requires that all voters in a county have to vote on all district court judges.

Now, my friend from the state board ignored that provision of the Constitution. And what our argument is under Article IV is the legislature is -- there's a tension between Session Law 2018-14 and these statutes. The phrase "local court districts" has relationships to section one in that the jurisdiction of a district court is countywide. It is like you have -- or when you were a district judge, you had jurisdiction over all of Wake County. If a claim arose

in Wake County, you would have jurisdiction over it. And so the operation of the courts here in Wake or in Mecklenburg or anywhere in the state, the operation of your court has one courthouse that you go to. And it is a court district; it is not just an election district. And so the Constitution refers to court district. So it has to have a courthouse, a clerk of court, a sheriff, and the judges have to be elected in whole counties under the statute or combinations of counties.

That has been the practice of the general assembly up until these odd counties got separated, and they were separated to create these mini-courts for political reasons, which is exactly the reason that the Bell Commission stopped all that stuff by putting a JP here for a political favor or putting a municipal court to handle municipal stuff or to have an equity court in one place. You would have like hundreds of courts, and you would never know where to go collect things; you would never know how to do things. It was a unified court.

Now, unification here has a specific constitutional connotation. That connotation has been put and baked into the statutes. And the statutes in all the other counties in North Carolina except these few counties have that -- meet those requirements. This statute does not -- does not make those two statutes. So the legislature

itself didn't modify the -- didn't modify those amendments. Those are state policy amendments, which is the state policy that is consistently applied throughout the -- throughout the state and meets the constitutional definitions is what I say and what the legislative statutes say it is. So the fact that they drew these in contradiction to the statutes creates an equal protection problem.

Now, on the issue of -- there is another problem here I want to point out to Your Honor. If you look with me, I think -- just one second.

(There was a pause in the proceedings.)

MR. HUNTER: If you look at the statute in question -- let's see if I can find it. I think -- here it -- I think our friend with the state board attached it to his brief.

MR. COX: Bob, are you looking for the session law?

MR. HUNTER: Yes. It's attached to his brief.

MR. FARR: It's also in our notebook we handed up to the judge.

MR. HUNTER: Thank you. I would like for you to look at section 2B on page 18. Now, I'm going to hand this up for illustrative purposes only, Judge. This will have more resonant, but it's a map of the districts by racial design. But I'm not going to talk about race in this

particular part of the argument. I will be talking about it in just a second.

Those are the judicial districts drawn in Mecklenburg County. If you look at page 18, not only are the judicial districts at disparities within the complaint, but they have a system there to enhance the disparity, and this is the staggered terms element of the judicial districts. So, for example, the disparity is a rolling disparity in the elections of 2018 and 2020.

So this disparity is -- for example, these are the different judges that are going to be elected in these different places. But when it comes out, three judges and one judge, if you use the multiplier, it varies very differently. So in districts 26A, which is there, which is where two of these judges live, there were three judges elected in 2018 and districts B and C -- excuse me, district C had no judges elected. So the voters in that district did not have any chance at all -- they were completely disenfranchised in their ability to vote for a judge. So their ratio under the ratio factor is zero to 93,000 or 57,000. It's a huge disparity. It extends beyond the disparity in Blankenship.

And the same thing is true -- will be true this year for voters in 26A, 26E -- I'm sorry, in other districts in Mecklenburg County. A will have no -- these plaintiffs

will have no votes at all in 2020, in addition to not being able to run for any judgeships.

Now, that is unlike most of the other district -- district courts in North Carolina. And that is the point about the not-unified part. In order to have -- you have to have unified jurisdiction, operation and administration. And the -- whether you put the elections section into any one of those three, it belongs in one of them.

Now, there's another important part I would like for Your Honor to read. If you look at -- or I'll read it to you. "The judicial power of the state shall, except as provided in section three of this article, be vested in a trial for a court of impeachments and in a general court of justice. The general assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate part of government..." -- and here is the important part -- "...nor shall it establish or authorize any courts other than are permitted by this article."

Well, the judicial power -- the general court of justice is part -- the district court division is part of the general court of justice. And in section ten, it requires that it has to divide the state in a convenient number of local court districts. The general assembly itself has statutorily said that these have to be whole

counties, single counties, or a combination of counties, and all the voters in the -- in the judicial district have a right to vote for them. That is denied them in this statute. So the equal protection clause does apply to this claim. The legislative defendants make a different claim, and we'll hear from them in just a second.

Now, the idea that your -- the idea that the race piece doesn't apply to the -- to the equal protection clause I think is wrong. I didn't just plead that. Now, under the pleading laws -- pleadings statutes, as I understand it, you just look at the four corners of the complaint, and if there's any theory at all on which I can win, you have to uphold this. Now, his motion is untimely, and it's not based. Now, he even admits it's a partial thing because we still have the race claim in here as a 15th Amendment violation. But any 15th Amendment violation is, by its very nature, a 14th Amendment violation, or, put differently, any Article I declaration of rights that is a racial discrimination is -- also violates the law of the land clause.

So you can't have one without the other. These go together. And that's my argument about that, particularly if you read the four corners of the complaint and you put in the rule. I mean there is -- there is plenty of pleading here to get past an equal protection claim. It is the same

as Blankenship. It is enhanced. It's Blankenship plus race plus a staggered term.

So we have shifted the burden to the state in my view in the complaint to have them come up with a justification. Now, you didn't have Mr. Cox say there is any justification for this discrimination. What is the compelling state interest that Mr. Cox is going to tell you about? I look forward to him telling you why the folks in Mecklenburg County should be treated differently than 97 percent of the other counties and why the African-Americans in Mecklenburg County have to be treated differently than all the other folks. I'll be very interested to see what his compelling justification is. It certainly does not appear in Dan Bishop's affidavit, which is the only thing that we've got to balance it on. So to say that we haven't pled an equal protection clause is not true.

THE COURT: Thank you, sir.

MR. COX: Your Honor, may I briefly respond?

THE COURT: Briefly.

MR. COX: As a procedural matter, Your Honor is probably very familiar with the motions to dismiss that are included in the answer to the complaint. As Your Honor probably knows, a motion to dismiss for failure to state a claim can be raised and decided by the Court up until

verdict. This makes it different than the federal rule 12(b)(6) where, you know, it's much more restricted, where you have to make that motion before you answer and you can't raise that motion up until verdict. But in state court you can make the motion with your answer and the Court can rule on a motion to dismiss for failure to state a claim up until verdict. So the argument this is untimely has no support in the law.

The argument that there is a disparity due to the rolling nature of the elections is a new one. I didn't anticipate it. I didn't anticipate it because it's nowhere in the complaint. The complaint doesn't raise any allegations about the rolling nature of the elections leading to a disparity under a Blankenship theory of having zero numbers of voters voting on one district versus 30,000 voters voting on a different district.

And, in fact, where the complaint does make allegations about disparities in voters, it clearly goes district by district to show how many voters are in each district and will be represented by a judge. So Mr. Hunter's argument is a bit at odds with his complaint because nowhere in the complaint does this staggered term "rolling disparity" argument arise.

And finally, I just want to make it clear -- I think Mr. Hunter has confused what the argument is here.

It's that the equal protection clause claim in count two, which is not based upon race, which is based upon population disparity among the districts, should be dismissed. Now, the equal protection clause claim in count three is based upon an allegation of targeting a racial group, that not a subject of our motion and I want to make clear that his argument sort of tried to blend them together, but they're different claims even though they both rely on the equal protection basis. The supreme court recognizes that vote dilution against protected groups is a different status of claim and a different claim than vote dilution using the one person-one vote argument that districts are -- have unequal population.

So I just want to make that clear that that's the basis -- the vote dilution of voters and their vote strength is the basis of our motion to dismiss, not the argument that it targeted a particular group -- particular protected group. I think that -- that claim probably has sufficient factual allegations and we'll just have to bear -- we'll just see what the record bears out to determine whether they're successful on that claim.

THE COURT: Okay. Thank you.

MR. FARR: Your Honor, may I be heard?

THE COURT: I'm going to give you a chance in just a second. Sir in the back, stand up for a second. Sir, I

just want to make sure you're clear. I'm going to remind you of rule 15 in the general rules of practice about taking pictures. I have no problems with you taking a picture if you ask me first before you do that, okay? So whenever you're in the courtroom, just remember -- and put it in your head -- rule 15 that deals with that. You can take pictures, but at least ask permission beforehand, okay?

UNIDENTIFIED MALE: Okay. Thank you, Your Honor.

THE COURT: Yes, sir. Yes, sir. Go ahead.

MR. FARR: Thank you, Your Honor. Your Honor, our motion to dismiss count one is very straightforward and it's based upon the Martin v. Preston case. I hate to sound like -- well, I should get used to sound like it; it says I'm getting old -- but I was plaintiffs' counsel in the Martin v. Preston case. And Mr. Hunter knows a lot more about the background about what led to that redistricting because I do think it was prompted by a section two lawsuit that was brought challenging the superior court districts immediately following the Gingles case -- which is G-I-N-G-L-E-S -- which is the landmark section two case for legislative districts. So that was an impetus for it. But even though that was the impetus for it, when they redid those districts, the districts had to comply with the state constitution, in addition to whatever federal concerns had to be met by the new redistricting law.

So back in 1998 I was asked to represent Governor Martin to bring a lawsuit challenging the new superior court districts that were drawn, and one of the arguments we made -- and this is -- Your Honor, this case is in tab eight of the notebook I gave you, and if you read it, I think you'll find it is completely dispositive of count one. One of the claims we made was that up until that point in time all superior court districts in North Carolina were based upon whole counties or they were based on groups of whole counties, and the session law, Your Honor, that created these new districts I believe is tab two of the -- in the notebook I gave you. So that's the law. Tab two is the law that was challenged in the Martin v. Preston case. Ed Preston was the -- I think he was a special superior court judge, in fact.

THE COURT: I remember. Well, I don't remember him. I've heard of him. I was not born probably.

MR. FARR: Well, unfortunately I was not only born but I was the losing attorney in the Martin v. Preston case. So in the Martin v. Preston case, we made all the same arguments that you've heard today from Judge Hunter about why you can't divide district court districts into -- I don't like really to use the word subdistricts, but I like to say districts within Mecklenburg County. And we made all the same arguments that Judge Hunter made about superior

court districts. And if you read the Martin case -- and, Your Honor, I will cite you to the pages. This will help. It's in our -- I have a brief here that I want to hand up. I forgot to give this to you. May I approach, Your Honor?

THE COURT: Yes.

MR. FARR: Here's our brief, and it's got the page -- relevant pages, but I'll tell you what they are right now. Because there are a lot of claims in this Martin v. Preston case. One of the claims we made was this is illegal because we have rolling elections where everyone doesn't vote for the same number of superior court judges at the same time, similar to the argument that Judge Hunter made. We hadn't heard their argument before today, but the Martin case disposed of that argument also, saying that wasn't unconstitutional. But if you turn to -- let's see...

THE COURT: I have this. I've read this already.

MR. FARR: Okay. Then I won't belabor the point, Your Honor. It's just -- it's very clear that under that decision -- I mean two major points. Judge Hunter's argument today in this case is based largely on statutes that the general assembly passed where let's say we can construe the statutes as saying that the district courts need to be composed of a whole county. But, of course, you know, Your Honor, that the acts of a prior general assembly don't bind the current general assembly, and the fact of the

matter is there's nothing in the Constitution that requires judicial districts to be based on county lines. And that's the very issue that was decided in Martin v. Preston. There's no difference between superior court districts and district court districts.

And the supreme court has expressly found that unless there is an express provision in the Constitution that restricts the boundaries that the general assembly may adopt for judicial districts, they don't have to follow county lines in drawing judicial districts. They don't say in Martin v. Preston superior court districts, they say the Constitution does not bind the general assembly in drawing judicial districts that are based upon county lines.

And they make the point in that case, which came home more forcefully a few years later in the Stephenson v. Bartlett case, that unlike legislative districts, there are Constitution mandates to be based upon county lines, there is nothing in the Constitution that mandates that judicial districts have to be based upon county lines. And the supreme court in Martin said that that distinction was intentional; therefore, there is nothing in the Constitution that restricts the legislature from drawing districts that are not based on county lines.

And so all that the legislature did in this case, quite frankly, is that they -- they had some superior court

districts in Mecklenburg County that were out of whack population-wise, the levels of disparity were actually approaching levels in the Blankenship case, and the legislature decided to fix that by creating I believe eight single-member superior court districts that had equal population and then they made the rational decision of basing the district court districts on the superior court districts.

So -- so that raises two claims, if they're an equal population argument under the way the district courts were created, or the other question is could they create so-called subdistricts in Mecklenburg County. Those are two separate questions. And the answer under the Martin v. Preston case is there's nothing in the Constitution that prohibits the general assembly from creating districts within Mecklenburg County instead of just having one single-member 21 person district.

I think that the Martin v. Preston case is dispositive, Your Honor. And Judge Hunter's best arguments on this rest upon prior statutes that the general assembly has enacted indicating that district court districts should be based upon whole counties, but again, it's black letter law that the current general assembly is not bound by acts of the prior general assembly and the only thing that bars the current general assembly is the North Carolina

Constitution.

Since -- I do want to address the attorney general's argument about the -- about the one person-one vote, if I might, Your Honor, since it came up. We did not raise this as a motion to dismiss, and if you would like for me to sit down now, I will, but since the attorney general raised it, I would like to comment on it with your leave.

So, Your Honor, if you could turn to the Blankenship case that's in our notebook, and it's under tab four, I'll put some context into the attorney general's argument. So if you turn to tab four, on page five, it's the Westlaw page five, the supreme court has got a table of the number of residents per judge in the superior court districts that were at issue in Blankenship. Now, keep in mind, this is not a well-resolved issue as to whether or not equal protection and equal population applies to judicial districts. We had three judges on the supreme court who ruled that did not apply. The majority did say that it applied. And I think the attorney general has very well articulated the test that they adopted.

But, Your Honor, just look at the -- that chart that's on page five, and you can see that the population disparities between the number of residents per judge in these Wake County superior court districts were truly extreme. We're talking about over 100,000 people. That's

the difference. And then -- so, in other words, in superior court -- Wake County superior court district 10A, there were two judges, which meant 32,199 people per judge, where in 10C, for example, there was one judge and the population was 158,812. So, therefore, the difference between the population per judge between 10A and 10C was quite dramatic. It was the difference between 32,199 versus 158,312.

Now, Your Honor, if you compare that to what plaintiffs have alleged in their complaint -- and I don't know if you have the complaint handy there or not, Your Honor.

THE COURT: I do.

MR. FARR: In paragraph 89, they, for example, allege that it looks like the lowest number of residents per judge is in the new Mecklenburg County 26B where there is 36,577 people per judge. The worst comparison they can draw is Mecklenburg County district 26D, which has 60,160 people per judge. So that's only, what, less than 30,000 people, if I'm doing my math right. It's less than two-to-one. So the disparities in these Mecklenburg County districts are nowhere near as close as what existed in the Wake County superior court districts.

And I dare say that the ruling in Blankenship was a -- was a close ruling. Again, you had three judges who argued that the equal protection argument didn't even apply,

and the ones who did say that it applied I think that the general attorney has very ably outlined that they set a threshold of the type of gross disparities that existed in Wake County was what you had to have to trigger even constitutional review. And the disparities here are nowhere near as close as the threshold that triggered the constitutional review in Blankenship. So for that reason alone, I think the attorney general's motion to dismiss has a lot of merit to it.

Your Honor, I also want to comment about -- you have to be precise in analyzing these cases because the tests are different. So I heard Judge Hunter talking about there was some obligation on the state -- this is -- and this I guess is just food for thought -- that the state had to prove a compelling governmental interest because of the way these districts were drawn because of the alleged racial disparities. At least insofar as the one person-one vote argument is concerned, compelling interest is not the right term to use. Compelling interest is a term that comes when you have strict scrutiny usually involving a suspect class. What we're looking at in the one person-one vote area is heightened scrutiny, at least according to the North Carolina Supreme Court. And under the heightened scrutiny test, they said there were a number of things that a state could use to justify these population differences assuming

you first got to the gross population disparities that existed with the Wake County superior courts, which clearly do not exist in this case.

And then one other point again, Your Honor, just food for thought, this compelling interest argument that Judge Hunter has made does not come up in racial discrimination cases until the plaintiffs first prove that race was the predominant motive for drawing the districts, and we're a long way away from having evidence to prove that race was the predominant motive in drawing these districts. I just say this because we -- I think we've had some misstatements or -- which, frankly, Your Honor, this is -- this is very complex. This area of law changes all the time, and I would never, ever suggest that Judge Hunter, who I think is one of the finest jurists and one of the finest lawyers I know, would ever say something that was inappropriate in any respect, but you've got to be careful about when you use these terms because compelling interest doesn't come up under any of the tests that would apply to the first two claims. It only comes up with the third claim on racial discrimination, but they first have to prove that race was the predominant motive. They don't have to -- the state doesn't have to prove compelling interest, as that term is defined in lots of constitutional cases, to justify population disparities assuming you find they're gross

enough to trigger the state's obligation to articulate important governmental interest that might support those population disparities.

So at the end of the day, Your Honor, on the -- on the dividing the counties argument, I think Martin v. Preston is completely dispositive. It addresses all the same arguments that Judge Hunter has made. There is no difference between district court districts and superior court districts. In fact, the supreme court in Martin said nothing in the Constitution prohibited the state from creating judicial districts based upon parts of counties.

And insofar as the one person-one vote claim that the attorney general made, even though we did not move to dismiss that claim, we believe their argument was meritorious because if you read the Blankenship case, the relatively small population differences per judge in the Mecklenburg County districts are far, far less that the minimum amount of gross disparities that the majority in Blankenship said had to exist to trigger the heightened scrutiny, with the background that three of the justices didn't even believe that equal population tests applied to judicial districts. That's all I have, Your Honor, unless you have any questions.

THE COURT: No, sir. Thank you.

MR. FARR: Thank you very much.

THE COURT: I want to get my computer up. Yes, sir. Anything?

MR. HUNTER: In the first place, I have not applied a federal standard to the 12(b)(6) motion for timeliness. If Mr. Cox had read the decision of the North Carolina Business Court, Judge Robinson, he would realize that Judge Robinson was applying North Carolina law for which before his opinion there was no law, and it was a case of first impression. It is persuasive authority, not precedential authority, and it is also a case and which just tracks the language of 12(b)(6). So I think his motion is -- I still think his motion is untimely.

I want to remind the Court that the standard here is to look at the four corners of the complaint, and the standard is if there's any theory at all under which the plaintiff would win, you have a duty to deny their motions. So I'll just say that.

With regard to the Preston versus Martin case and the Blankenship case, Blankenship case -- in the Blankenship case in court district 10A, B, C and D, they were all created in 1987s. The African-American district that was the subject of the Court's scrutiny at that time was 10A, and the resident judge there was Abe Jones, and Mr. Jones was -- his district was the one that was under challenge.

There were four Republican and three Democratic

justices at the time. All three of the Democratic judges at that time felt that the districts were disproportionate. We do not have to prove the exact -- this is not a bright line test rule that Blankenship applied. It is simply we have to approach it.

Now, there are other factors here that Mr. Farr has conveniently pointed out to me because unweighted votes is just as important as the -- as the -- in these matters as are the residents per judge. So we're weighting votes here and they have to -- whether it's heightened scrutiny or compelling, the vehicle that the supreme court uses to achieve these goals has to be narrowly tailored to achieve a state interest. This set of districts either under equal protection clause or the state constitution Article IV or the racial issue in this case is nowhere near narrowly tailored. It is a crude political attempt to disenfranchise voters who've had a record of success in section two.

Now, remember, section two of the Voting Rights Act was the whole premise for what Mr. Farr has since shown as chapter 509 on -- in their brief. And the Voting Rights Act trumps the North Carolina Constitution. So the Voting Rights Act was the premise upon which the counties could be divided because of the supremacy clause. Now, Martin versus Preston would not have an effect on a federal court order and a federal court opportunity to draw something other than

whole counties. The argument that I'm making was not raised in Preston versus Martin, which is the unification of the court system, and that is -- there is no law on that, as Mr. Cox has identified, and that is the -- that is the law that we're having to determine, what did the founders mean when they said unified in operation, maintenance and jurisdiction.

And in my view, the unequal protection aspect of it comes when the legislature has created a definition of that for all the other counties and yet in Mecklenburg they have selected a different -- a different jumping off place for these districts. Now, I think a pleading is only supposed to put someone on notice of the claims. I don't think you can separate the equal protection claim from the claim of racial discrimination. Our Constitution does not do that. We have one section of the North Carolina Constitution, Article I, section 19, which includes equal protection and race, racial discrimination. We have pled that and both -- it's a situation of not either/or, as my friends seem to suggest, it's both/and.

And so with that, unless the Court has some specific questions they want to ask, I think that our complaint reading its four corner is well pled and certainly is not subject to a 12(b)(6) motion.

(There was a pause in the proceedings.)

THE COURT: Yes, sir, Mr. Farr?

MR. FARR: Yes, sir. I just wanted to make one slight comment, Your Honor. I think it's important to note nobody has argued that the plaintiffs' claim for alleged racial gerrymandering should be dismissed. That claim is not going away regardless of what you do here today. But it's not correct to say that the equal population claim is the same or flips over or is part of the racial discrimination claim. It's a completely different claim. The districts can be perfectly equal in population and still be racial gerrymanders. So whether or not it's a racial gerrymander or not has got absolutely nothing to do with whether the districts violate some sort of equal population requirement.

THE COURT: Okay.

MR. FARR: Thank you.

THE COURT: Mm-hmm. All right. With respect to the state board of elections' motion to dismiss pursuant to 12(b)(6), that motion is denied. With respect to the legislative's motion to dismiss with respect to 12(b)(6), that motion is denied. With respect to the governor, that motion is granted. Can you prepare an order so I can get this to Kellie like right now so y'all can get three judges? If y'all can get me an order real quick, that's what Kellie -- she's our trial court administrator -- told me to

do and then that way she can move a lot faster.

MR. HUNTER: My office is in Greensboro, Your Honor. I'll try to get you one --

THE COURT: Can you get somebody to email it to you?

MR. HUNTER: All right. I'll do that.

THE COURT: And then I'll print it and sign it and get it to Kellie.

MR. HUNTER: What is your email address?

THE COURT: Craig.Croom@nccourts.org.

MR. HUNTER: With an E?

THE COURT: Well, that's great. Perfect. Use this. Send it to her, and then that way I can get it and just print it.

MR. HUNTER: This orders...

THE COURT: Mm-hmm. You send it to that and then I can get that this afternoon and I can get it to Kellie immediately because time is of the essence so that you all can -- because I talked to them. They have already talked to David Hoke. They need that order like yesterday and then they can get it --

MR. HUNTER: Just out of curiosity, did Kellie say at all when the hearing could take place?

THE COURT: That we don't know, but they've already had conversations with David Hoke trying to get this

to happen.

MR. HUNTER: All right. Well, let me confer with counsel about what to put in the order and I'll type it up and get it done.

THE COURT: Okay. Thank you.

(Off the record at 3:22 p.m.)

(Back on the record at 3:33 p.m.)

(Present at Bar: Donald Cureton, Kimberly Best, Alicia Brooks, plaintiffs; Bob Hunter, Esq., for the plaintiffs; Olga Vysotskaya, Esq. for the defendant governor; Paul M. Cox, Esq. for the defendant State Board of Elections; Thomas A. Farr, Esq. and Alyssa Riggins, Esq. for the legislative defendants.)

THE COURT: All right. I just handed you all an order transferring this to a three-judge panel in 19 CVS 11321. I still need the orders, but it's not a rush now. This is the order I need so as to get you guys three judges, and then y'all can hopefully hear this preliminary injunction before them. There have already been talks about it, so hopefully that can happen forthwith. I hope it will happen forthwith.

MR. HUNTER: Well, Your Honor --

THE COURT: Yes, sir.

MR. HUNTER: -- I noticed that Judge Stephens put in his order that time is of the essence and that they would

be hearing the motion by a certain date -- or at a certain time and date. Do you feel inclined to put that in your order?

THE COURT: I can add that.

MR. HUNTER: The reason I ask is because the filing begins on December 2nd.

THE COURT: It's two weeks from today. I'm very aware of that. That's the reason why we talked with folks this morning, trying to make sure we get that done. In other words, I don't have the power to make people move any faster, but I would be more than willing to put that in the order. Hang on.

(There was a pause in the proceedings.)

THE COURT: I can change it right now. That's not a problem. December 2nd or December 4th?

MR. HUNTER: December 2nd.

MR. COX: To be clear, candidate filing opens December 2nd and closes December 20th.

THE COURT: Okay. It begins.

MR. COX: Right.

MR. HUNTER: Does it open at noon?

MR. COX: That's right.

THE COURT: It does.

(There was a pause in the proceedings.)

THE COURT: All right. This is -- y'all have the

order in front of you, don't you?

MR. HUNTER: Yes, sir.

MR. FARR: Yes, Your Honor.

THE COURT: I basically added a paragraph. I said the filing period begins at noon on December 2nd, 2019. Plaintiffs have a motion for a preliminary injunction pending in this case. Time is of the essence in scheduling the motion for preliminary injunction in light of the upcoming filing period beginning December 2nd -- beginning noon on December 2nd, 2019.

I still want orders from you all, but I also put in here the Court heard defendants' 12(b) motions to dismiss. These motions were denied with respect to all defendants except for Governor Roy Cooper. Governor Roy Cooper's motion to dismiss was granted. This the 18th day of November, 2019. Anything else that I need to add?

MR. COX: No, Your Honor, not from us.

MS. VYSOTSKAYA: No, Your Honor.

MR. HUNTER: No, Your Honor.

MR. FARR: No, Your Honor.

THE COURT: All right. So I will sign that and get this to Kellie. So hopefully y'all will have a three-judge panel pretty quick. And I'll follow up with Kellie as well. Before I let the court reporter go again -- I know I called y'all back in here -- anything else from the

governor's counsel?

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

THE COURT: On behalf of the board of elections?

MR. COX: No, Your Honor.

THE COURT: As to the legislature, Mr. Farr?

MR. FARR: No, Your Honor. Thank you for --

THE COURT: Anything, Judge Hunter?

MR. HUNTER: No, Your Honor. Thank you very much.

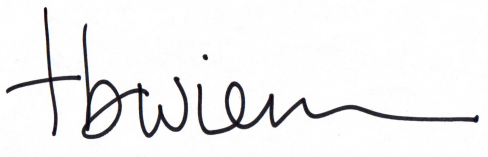
THE COURT: Yes, sir. Good luck to y'all.

(Court recessed at 3:42 p.m. in this matter.)

CERTIFICATE

I, Tammy B. Wiener, Official Court Reporter, do hereby certify that said hearing, pages 1 through 99 inclusive, is a true, correct, and verbatim transcript of said proceedings held on November 18, 2019 in the matter of Alexander, et al. v. Lewis, et al.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was heard; and further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, and am not financially or otherwise interested in the outcome of the action, this the 20th day of November, 2019.



Tammy B. Wiener, CVR-CM