

IN THE SUPREME COURT OF THE UNITED STATES

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

Applicants,

v.

DAVID HARRIS & CHRISTINE BOWSER,

Respondents.

**Appeal from the
United States District Court
for the Middle District of North Carolina**

**RESPONDENTS' OPPOSITION TO 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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I. INTRODUCTION

This application for a stay comes before the Court on what the district court below found to be a “textbook” example of racial gerrymandering. *See* ECF No. 142 (“Memorandum Opinion”), at 22. It’s an apt description. The errors that led North Carolina to draw Congressional Districts (“CDs”) 1 and 12 as far-flung racial archipelagos using a mechanical racial quota are those described at length in the first and latest chapters of the Court’s racial gerrymandering jurisprudence.

The Court’s modern racial gerrymandering jurisprudence opens with *Shaw v. Reno*, 509 U.S. 630 (1993) (“*Shaw I*”), and *Shaw v. Hunt*, 517 U.S. 899 (1996) (“*Shaw II*”). In those seminal cases, the Court struck down a predecessor version of CD 12 as a racial gerrymander, rejecting the contention that drawing a bizarre, noncompact district was “a remedy narrowly tailored to the State’s professed interest in avoiding” liability under the Voting Rights Act (“VRA”). *Shaw II*, 517 U.S. at 911. And in *Alabama Legislative Black Caucus v. Alabama*, its most recent pronouncement, the Court found “strong, perhaps overwhelming, evidence that race did predominate” where a legislature “relied heavily upon a mechanically numerical view” of the VRA. 135 S. Ct. 1257, 1271, 1273 (2015).

In this case, the district court was confronted with two bizarrely shaped districts that were drawn using a “nonnegotiable,” mechanical racial quota in a misguided attempt to comply with the VRA. Memorandum Opinion at 19. The present stay application itself makes clear how the State of North Carolina (“State”) went so badly astray. Premised on a fundamental misconstruction of *Bartlett v. Strickland*, 556 U.S. 1 (2009), the State believed that it was required to maximize

the number of majority-minority districts, and that doing so would inoculate the State from liability under the VRA. *See, e.g.*, 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 (“Motion”), at 31. But the VRA is designed to ameliorate and dissipate racial balkanization, not perpetuate it. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) (“It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.”). The State compounded its error by seeking to comply with the VRA using a numerical racial threshold unfounded in any evidence. *Compare* Memorandum Opinion at 28-29 *with Alabama*, 135 S. Ct. at 1273.

In a thorough and, indeed, exhaustive opinion, the district court laid bare the consequences of the State’s errors, detailing at length the mountain of evidence establishing that race was the predominant factor behind CDs 1 and 12, and the utter dearth of justification for the State’s predominant use of race.

Respondents David Harris and Christine Bowser (residents of the two districts at issue here)—and every other voter in CDs 1 and 12—have already been subjected to two elections under the unconstitutional enacted plan. The State’s improper use of race to sort voters by the color of their skin has violated the Fourteenth Amendment rights of millions of North Carolina citizens. Applicants pronounce themselves in no hurry to remedy this state of affairs. Rather, Applicants

ask the Court to delay implementation of a remedy until 2018. In other words, Applicants seek the Court's leave to use an unconstitutional map for two years from the district court's final judgment, and five years after Respondents filed suit, and to allow North Carolina to utilize an unconstitutional congressional districting plan for nearly the entirety of the 2010s.

This is, to put it mildly, an extraordinary request. Applicants are unable to muster compelling arguments in support of that request. The factors considered by the Court in assessing a motion to stay a final judgment cut strongly against Applicants, and the balance of harms tips decidedly in Respondents' favor.

Applicants have little likelihood of success on the merits. Perhaps recognizing that fact, Applicants do not even attempt to address the vast majority of the evidence the district court relied on to support its ultimate holdings. Indeed, the application does not so much as mention the stark and compelling *direct* evidence of the General Assembly's racial motives. The district court's factual findings are subject to the deferential "clear error" standard of review, *see Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("*Cromartie II*"), and the district court's conclusions that race predominated and that the use of race was not narrowly tailored are amply supported by the evidence.

Once Applicants' half-hearted arguments as to the merits are set to one side, it becomes readily apparent that the true premise of Applicants' Motion is that the Court should stay the final judgment because it would be easier and less costly for the State to run the 2016 election under an unconstitutional map. Perhaps.

But the harm Respondents and other residents of CDs 1 and 12 will irrefutably suffer if the stay is granted and the Court thereafter affirms on the merits 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.” For more than *100 years*, North Carolina has held its congressional primary election no earlier than May. Knowing full well that the district court might strike down the enacted plan, Defendant (here, Applicant) Governor Patrick McCrory signed a bill passed by the General Assembly that accelerated the primary election from May to mid-March. He did so mere weeks before the trial in this matter commenced. It was hardly coincidence. The State cannot lock into place an unconstitutional redistricting map by manufacturing an artificial “crisis.”

The district court—intimately familiar with the factual record—denied Applicants’ motion to stay the implementation of its final judgment. The Court should, likewise, reject Applicants’ Motion so that the voters of North Carolina can—for the first time since 2010—vote under a constitutional congressional districting plan.

II. BACKGROUND

Following the 2010 Census, the North Carolina General Assembly appointed redistricting committees to develop new districting plans. Memorandum Opinion at 10. Representative David Lewis and Senator Bob Rucho, chairs of the House and Senate redistricting committees, respectively, were jointly responsible for

developing a new congressional district plan. *Id.* Rucho and Lewis engaged private districting counsel (Applicants' counsel here), who in turn engaged Dr. Thomas Hofeller as the sole mapdrawer of the new congressional plan. *Id.* at 11. Hofeller received his instructions (always orally, never in writing) solely from Rucho and Lewis. *Id.* He never spoke to the representative of CD 1 (Representative G.K. Butterfield) or CD 12 (at the time, Representative Mel Watt), never spoke to the Legislative Black Caucus or its members, and never spoke to any other legislator other than Rucho and Lewis. *Id.* at 11-12.

For decades, African-American voters in CDs 1 and 12 had been able to elect their candidates of choice, regardless of whether they formed a majority of the voting age population in these districts. *See id.* at 8. Nonetheless, in redrawing CDs 1 and 12, the General Assembly increased the black voting age population ("BVAP") of the districts substantially. In CD 1, the BVAP was raised from 47.76% to 52.65%. *Id.* at 27.¹ The BVAP of CD 12 was ramped up even more dramatically—from 43.77% to 50.66%. *See id.* at 38.²

In 2013, Respondents filed this lawsuit, challenging CDs 1 and 12 as unconstitutional racial gerrymanders under the Fourteenth Amendment. ECF No. 1. On December 24, 2013, Respondents filed a motion for preliminary injunction,

¹ As a result of these changes, Representative Butterfield went from winning 59.3% of the vote in 2010 (*see* Pl. Ex. 112) to 75.3% and 73.4% in 2012 and 2014, respectively. North Carolina State Board of Elections, *Election Results*, <https://www.ncsbe.gov/Election-Results> (last visited Feb. 15, 2016).

² As a result of these changes, Representative Mel Watt went from winning 63.9% in 2010 (*see* Pl. Ex. 112) to 79.6% in 2012, and Representative Alma Adams won 75.4% of the vote in 2014. North Carolina State Board of Elections, *Election Results*, <https://www.ncsbe.gov/Election-Results> (last visited Feb. 15, 2016).

seeking to enjoin conduct of future elections under the enacted plan. ECF No. 18.

On May 22, 2014, the district 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 Nos. 74-75. On July 29, 2014, the district 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 district court also continued the trial date pending the Court's then-forthcoming decision in *Alabama Legislative Black Caucus v. Alabama*. *Id.*

In March 2015, the 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 VRA. *See* 135 S. Ct. 1257. Thereafter, on May 6, 2015, the district 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.”³ In response, Rucho stated unequivocally that these concerns were a nonissue because if the court ruled in Respondents’ 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, just weeks after the State greatly accelerated the primary election, the district court held a three-day bench trial.

On February 5, 2016, the district court issued the Memorandum Opinion holding that CDs 1 and 12 are unconstitutional racial gerrymanders. All three judges on the panel concurred that CD 1 was drawn with race as the predominant factor and was not narrowly tailored. *See* Memorandum Opinion at 63; *see also id.* at 68 (Osteen, J., concurring in part and dissenting in part). All three judges concurred that, if race was the predominant factor, CD 12 failed strict scrutiny. *See id.* Judge Osteen dissented in part only because, while he concurred that race was a factor in drawing CD 12, he drew different factual inferences from the record and concluded that race was not the *predominant* factor in CD 12. *Id.* at 72-99.

The district 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

³ *See* Taylor Knopf, *Senate proposes detailed plan for combined March primary*, News & Observer, Sept. 23, 2015, <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article36316269.html>.

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 gave 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, Applicants filed a notice of appeal. ECF No. 144. That same day, Applicants requested that the district court enter a stay pending appeal. ECF No. 145. The next day, on February 9, 2016, the district court unanimously denied Applicants' motion to stay. *See* ECF No. 148. The district court held that Applicants had not made a strong showing of likelihood of success on the merits, given that the district court had struck down CDs 1 and 12 for reasons set out in its order, and that the factual findings in that order were subject to "clear error" review. *Id.* at 2-3.

The district court also found that Applicants had not established a personal irreparable injury warranting the relief they requested. *Id.* at 3. To the contrary, the district court found that *Respondents* would clearly suffer irreparable injury if the stay were granted. *Id.* ("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, constitutes irreparable harm to them, and to the other voters in CD 1 and 12.") (citation omitted).

Finally, the district court concluded "that the public interest aligns with the [Respondents'] interests, and thus militates against staying this case." *Id.* at 4. As the district court noted, the harm Respondents are suffering "are public harms"

because every voter in CDs 1 and 12 is being deprived of his or her constitutional rights, and the public at large “has an interest in having congressional representatives elected in accordance with the Constitution.” *Id.*

For all these reasons, the district court denied Applicants’ motion to stay. The next day, Applicants filed the present Motion.

III. ARGUMENT

Applicants cannot meet their heavy burden of demonstrating that the Court should countenance the State’s attempt to force Respondents and millions of other North Carolinians to vote under an unconstitutional districting plan in 2016 regardless of the merits of Applicants’ appeal. Indeed, Applicants cannot show that they are likely to prevail on the merits of their appeal, and their application should be denied for this reason alone. Even if they could, the application should be denied because the certain injury that Respondents and the public at large will suffer if the 2016 elections go forward under an unconstitutional plan far outweighs any administrative expense or other considerations necessitated by taking the steps required to hold elections in 2016 under a constitutional districting plan.

A. Applicants Face a Significant Burden to Establish Their Entitlement to the “Extraordinary Relief” They Seek

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). It is instead “an exercise of judicial discretion.” *Id.*

The granting of a stay pending appeal is “extraordinary relief,” and the party requesting a stay bears a “heavy burden.” *Winston–Salem / Forsyth Cty. Bd. of Educ.*

v. Scott, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice); *see also Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (“The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.”); *Williams v. Zbaraz*, 442 U.S. 1309, 1311 (1979) (“[T]he applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.”) (quoting *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975)).

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*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two factors of the test outlined above “are the most critical.” *Id.*

To establish a likelihood of success on the merits of an appeal to the Court, a party must show: (1) a “reasonable probability that four Justices will consider the issue sufficiently meritorious” to note probable jurisdiction *and* (2) that a majority of the Court will reverse on the merits. *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). And the moving party must show that it is *likely* to prevail on the merits in the absence of a stay—more than speculation and the hope of success is required. *See Nken*, 556 U.S. at 434 (a party seeking a stay must show something more than

“a mere ‘possibility’” of success on the merits).⁴ By the same token, “simply showing ‘some possibility of irreparable injury’ . . . fails to satisfy the second factor.” *Nken*, 556 U.S. at 434-35 (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

Contrary to Applicants’ suggestion that redistricting cases are subject to a stay pending appeal to the Court as a matter of course, Motion at 19-21, there is no such rule. Indeed, just this month, the Court denied a stay application in a similar redistricting case out of Virginia. *Wittman v. Personhuballah*, Order in Pending Case, No. 14-A724, (Feb. 1, 2016).

Personhuballah is, indeed, highly instructive. There, after a three-judge panel struck down a congressional districting plan as an unconstitutional racial gerrymander, the losing party (intervenors) moved the district court to stay its decision. *See Personhuballah v. Alcorn*, No. 3:13CV678, 2016 WL 93849, at *3-5 (E.D. Va. Jan. 7, 2016). 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, noting that “[t]here is no authority to

⁴ Notably, a party seeking a stay pending appeal “will have greater difficulty in 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 on complete factual findings and legal research. *See Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context.” *Id.* at *3 (citation omitted).

Thereafter, intervenors made a direct application for stay to the Court, contending that implementation of a remedial plan for 2016 would cause “electoral chaos.” See Application for Stay Pending Resolution of Direct Appeal of Liability Judgment at 2, *Wittman v. Personhuballah*, No. 14-A724 (Feb. 1, 2016). Only two weeks ago, the Court denied the application. Order in Pending Case, *Wittman v. Personhuballah*, No. 14-A724 (Feb. 1, 2016). Precisely the same result should obtain here and for the same reasons.

As *Personhuballah* well illustrates, the Court—and others—regularly deny motions to stay in redistricting cases. 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 in upcoming election); *Larios v. Cox*, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (noting that “stays are not commonly granted in redistricting, or any other type of litigation” and collecting cases wherein district courts denied stays in redistricting cases).⁵

None of the cases Applicants cite purport to establish a rule relaxing standards for granting the “extraordinary relief” of a stay in the redistricting context. To the contrary, it has never been the rule that a court presiding over

⁵ See also *Giles v. Ashcroft*, 193 F. Supp. 2d 258, 261 (D.D.C. 2002) (noting, with respect to related litigation, that a party had “sought to stay the federal court’s ruling [ordering adoption of a redistricting plan] until the United States Supreme Court could hear an appeal, but that request was denied on March 1, 2002, and the appeal remains pending before the Supreme Court at this time”); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (denying a stay pending appeal of an order striking down Florida’s Third Congressional District).

redistricting litigation must grant a stay—whatever the facts of the case before it—simply because other courts have, on other occasions, in other states, on other factual records, stayed implementation of remedial redistricting plans.⁶

On this record, and under the well-established standards governing this application, Applicants cannot meet their burden of showing a stay is appropriate and the application should accordingly be denied.

B. Applicants 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; *see also Miller*, 515 U.S. at 916 (“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.”)

⁶ The cases cited by Applicants 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); *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); *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).

Here, the district court made the factual determination that race was the predominant factor as to both CDs 1 and 12 and that the use of race in these districts was not narrowly tailored. The district court's Memorandum Opinion is lengthy, carefully crafted, and well-reasoned. The district court's factual findings, which compel its ultimate conclusion that enacted CDs 1 and 12 fail constitutional scrutiny, are subject to clear error review. These findings are entirely supported in the record and most assuredly are not clearly erroneous.

It is thus unsurprising that, as further detailed below, Applicants refuse to engage with the Memorandum Opinion as it is actually written and the record as it actually exists. Rather, Applicants mischaracterize both the district court's factual findings and legal conclusions, creating and then slaying a chimerical version of the Memorandum Opinion.

To provide just one (glaring) example, Applicants assert that the district court "did not affirmatively find that race was the predominant motive in drawing CD 12" but instead rested its holding solely on its "skepticism that it was 'coincidental' that CD 12 ultimately ended up being slightly above 50% BVAP." Motion at 23. To the contrary, after detailing 15 pages of direct and circumstantial evidence, the district court expressly stated that "[i]n light of all of the evidence, both direct and circumstantial, the Court finds that race predominated in the redistricting of CD 12." *See* Memorandum Opinion at 48. As this illustrates, and as further discussed below, there is a gaping hole in Applicants' description of the evidence the district court relied on to find that race predominated in CDs 1 and

12—the evidence the district court relied on to find that race predominated in CDs 1 and 12.

1. The District Court’s Findings as to CD 1

a. The Record Contains Overwhelming Support for the District Court’s Factual Findings as to CD 1

As to CD 1, the district court concluded that the district “presents a textbook example of racial predominance.” Memorandum Opinion at 22. The district court was not limited to consideration of merely circumstantial evidence, as is often the case in redistricting litigation. Rather, in addition to circumstantial evidence, the district court pointed to the “extraordinary amount of direct evidence” demonstrating that the General Assembly used a “racial quota” to construct CD 1, which then “operated as a filter through which all line-drawing decisions had to pass.” *Id.* Indeed, the district court found that “[i]t 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.” *Id.* at 30. Quite surprisingly, the evidence set out below is not discussed or even acknowledged in the stay application.

First, and most obviously, the mapdrawer, Hofeller, confirmed that Rucho and Lewis instructed him to—and he did—draw CD 1 as a majority-BVAP district. *See id.* at 25. Because the mapdrawer was directed to draw CD 1 as a majority-minority district as his top priority, he necessarily placed a substantial number of voters within or without CD 1 based on their race. To give just one example, when asked whether he moved into CD 1 a part of Durham County that was “the heavily

African-American part” of the county, he responded simply, “Well, it had to be.” Trial Tr. 640:7-10; *see also* Memorandum Opinion at 26.⁷ Hofeller further acknowledged that “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 [he had] been given by the two chairmen” to draw the district as majority BVAP. Memorandum Opinion at 22-23 (internal citation omitted). That is, Hofeller “had no discretion to go below 50-percent-plus-one-person BVAP.” *Id.* at 27 (citing Trial Tr. 621:13-622:19). This is the very definition of racial predominance. *Alabama*, 135 S. Ct. at 1267, 1271 (finding “strong, perhaps overwhelming, evidence that race did predominate” where legislators used mechanical racial targets in an attempt to comply with the VRA).

But this was far from all. As ably detailed by the district court, the record also contained the following evidence of racial predominance:

(1) The legislative record is “replete with statements” by the plan’s architects, Rucho and Lewis, that CD 1 was a “VRA District” that had been drawn purposefully to achieve a predetermined racial quota. *See* Memorandum Opinion at 23-24. Among other things, the architects stated that CD 1 “was drawn with race as a consideration,” stated that CD 1 “must include a sufficient number of African-

⁷ *See also* Trial Tr. 570:24-571:7 (explaining that “[w]ith the exception of Greene County, the percentage of the African-American population outside [CD 1] was lower than the percentage inside the district, which is exactly what you would think would be the case since the district we’re talking about is an *African-American majority district*”) (emphasis added); Trial Tr. 542:11-24 (“[I]f you build a minority district in a group of counties and . . . only part of some of the counties are in the minority district, than it’s *completely logical* that the portions . . . of the counties that are in the minority district, which in this case would be District 1, would have a much higher number of minority residents . . . in them than the portion outside the district.”) (emphasis added).

Americans so that [CD 1] can re-establish as a majority black district,” and that they consciously “elected to draw the VRA district [e.g., CD 1] at 50 percent plus one” BVAP. *Id.* (citations omitted). *Compare Alabama*, 135 S. Ct. at 1271.

(2) Rucho and Lewis issued multiple public statements reiterating that race predominated in the construction of CD 1. *See* Memorandum Opinion at 24. The district court did not quote from these statements in the Memorandum Opinion, but they are stark and compelling. For example, on July 1, 2011, Rucho and Lewis issued a joint public statement accompanying the release of the 2011 Congressional Plan. Interpreting *Strickland*,⁸ the statement read:

[T]he State is now obligated to draw majority black districts with true majority black voting age population. Under the 2010 Census, the current version of the First District does not contain a majority black voting age population.

. . . .

Because African-Americans represent a high percentage of the population added to the First District . . . we have . . . been able to re-establish Congressman Butterfield’s district as a true majority black district.

Pl. Ex. 67, at 3-4; *see also* Pl. Ex. 68, at 3 (in July 17, 2011, statement, asserting that the State added to CD 1 “a sufficient number of African-Americans so that [CD 1] can re-establish as a majority black district”).

(3) The mapdrawer and the plan architects candidly acknowledged that traditional redistricting criteria were subordinated to the singular pursuit of drawing CD 1 as a majority-BVAP district. *See* Memorandum Opinion at 29. Among

⁸ The State’s erroneous reading of *Strickland*, which pervades its stay application, is addressed below at 22-23.

other things, “Hofeller testified that he would split counties and precincts when necessary to achieve a 50-percent-plus-one-person BVAP in CD 1,” and Rucho and Lewis likewise acknowledged that “[m]ost of our precinct divisions were prompted by the creation of Congressman Butterfield’s majority black First Congressional District.” *See id.* (citations omitted).

(4) Hofeller did not consider measures of compactness in drawing CD 1 and, in fact, substantially reduced the compactness of CD 1. *Id.* This subordination of compactness is plain on the face of CD 1.⁹

In sum, the direct evidence here is precisely “the kind[] of direct evidence [the Court has] found significant in other redistricting cases.” *Cromartie II*, 532 U.S. at 254 (citing *Bush v. Vera*, 517 U.S. 952, 959 (1996) “(State conceded that one of its goals was to create a majority-minority district)”; *Miller*, 515 U.S. at 907 “(State set out to create majority-minority district)”; *Shaw II*, 517 U.S. at 906 “(recounting testimony by Cohen that creating a majority-minority district was the ‘principal reason’ for the 1992 version of District 12)”). And the circumstantial evidence provided by the district’s Rorschach-blot shape confirms the predominant use of race.

Likewise, the district court’s conclusion that the General Assembly’s predominant use of race in CD 1 was not narrowly tailored to a compelling government interest is similarly well supported in the record evidence.

⁹ A map of CD 1 is provided in Appendix A.

Section 2 liability is determined on a totality of the circumstances inquiry. *See Thornburg v. Gingles*, 478 U.S. 30, 43-46 (1986). But, in this context, a court considering a Section 2 claim does not even reach the “totality” inquiry unless the plaintiff establishes the three *Gingles* preconditions: (1) that the minority group in question is “sufficiently large and geographically compact to constitute a majority in a single member district”; (2) that the group “is politically cohesive”; and (3) that a “white majority votes sufficiently as a bloc” such that it can “usually . . . defeat the minority’s preferred candidate.” *Id.* at 50-51.

The district court concluded that CD 1 failed strict scrutiny because the State failed to establish “a ‘strong basis in evidence’ for concluding that creation of a majority-minority district—CD 1—was reasonably necessary to comply with the VRA.” Memorandum Opinion at 50-51. In particular, the State adduced no evidence establishing the third *Gingles* factor—that a “white majority was *actually* voting a bloc to defeat the minority’s preferred candidates.” *Id.* at 55.

As explained by the district court, “CD 1 has been an extraordinarily safe district for African-American preferred candidates of choice for over twenty years.” *Id.* at 59. African-American preferred candidates—without fail—“easily and repeatedly” won reelection even though “African Americans did not make up a majority of the voting-age population in CD 1.” *Id.* Nonetheless, the General Assembly ratcheted up the BVAP of this “VRA district” from 47.76% to 52.65%. *Id.*

It is undisputed that the General Assembly did *no analysis whatsoever* to determine the approximate racial composition necessary to maintain the minority’s

ability to elect its candidates of choice in CD 1, let alone whether a 50%-plus-one BVAP threshold was compelled under the VRA. *See id.* at 54. Applicants claim that the district court “ignored” evidence regarding racially polarized voting in CD 1. Motion at 33-34. To the contrary, the district court considered this evidence expressly and found it wanting. *See* Memorandum Opinion at 55. And for good reason. As the district court explained, the “generalized reports” that Applicants reference (a) did not relate specifically to CD 1 and (b) did not demonstrate that a white majority usually voted as a bloc to defeat African Americans’ candidates of choice. *Id.*¹⁰ A state does not have a “strong basis” in evidence for believing it must greatly increase the BVAP of a district that has long elected minority candidates of choice to avoid Section 2 liability simply because it is aware that there is *some* measure of racially polarized voting in that *general* part of the state. *Id.* (“[I]t 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 also, 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”) (emphasis omitted), *aff’d* 543 U.S. 997 (2004).

¹⁰ Applicants concede the point in their application. *See* Motion at 32-33 (“[W]hites have never been able to vote as a bloc to defeat the African American candidate of choice . . . in CD 1.”)

Thus, the State failed to meet its strict scrutiny burden of establishing a strong basis in evidence for concluding that Section 2 compelled it to transform CD 1 into a majority-minority district. *See* Memorandum Opinion at 51-57.¹¹

b. Applicants Cannot Show that the District Court's Findings as to CD 1 Are Clearly Erroneous

Applicants scarcely even try to demonstrate that the predominance finding as to CD 1 is clearly erroneous. The vast majority of Applicants' argument on "predominance" is directed to the district court's predominance finding in *CD 12*. *See* Motion at 22-29. Applicants offer only two fleeting and half-hearted arguments as to the CD 1 predominance finding, neither of which is availing.

First, Applicants suggest that the district court erred because "politics" somehow "partially explained" CD 1. *See* Motion at 24. There are several flaws with this argument. Most obviously, the inquiry is whether race *predominated*, not whether it was the *sole* factor. *See Bush*, 517 U.S. at 963 (race predominated even though "[s]everal factors other than race were at work," including an "unprecedented" focus on "incumbency protection"). In any event, Applicants "proffer[ed] no evidence to support" this post-hoc "politics" argument and, to the contrary, "[t]here is nothing in the record that remotely suggests CD 1 was a political gerrymander, or that CD 1 was drawn based on political data."

¹¹ Below, Applicants also attempted to use Section 5 to justify the use of a mechanical racial target of 50% plus one to draw CD 1. While the strict scrutiny argument in the stay application is not a model of clarity, it appears that Applicants abandon reliance on Section 5. *See* Motion at 34 (asserting, wrongly, that the district court's decision would "foreclose future Section 2 vote dilution claims"). In any event, as the district court ably explained, the State did not have a strong basis in evidence for its race-based drawing of CD 1—it instead used a mechanical racial quota without any targeted analysis of whether that quota was justified by Section 2 or Section 5. *See* Memorandum Opinion at 57-60.

Memorandum Opinion at 30. This factual finding is not clearly erroneous.

Applicants' Motion—generous with rhetoric but sparing of record citations—certainly contains no *evidence* supporting their bald “politics, not race” argument as to CD 1. *See* Motion at 24-25. There is no basis to conclude that the district court's conclusion was erroneous, much less clearly so.

Second, Applicants complain that the district court merely “*presumed* racial predominance based on the fact that Defendants drew CD 1 at the 50% BVAP level to foreclose vote dilution claims under Section 2.” Motion at 28. Again, there are several fatal flaws with this argument. As an initial matter, while the appropriate use of race to comply with the VRA may *satisfy* strict scrutiny, Memorandum Opinion at 19-20, a state cannot talismanically invoke the VRA as a means of *avoiding* strict scrutiny altogether. *See supra* at 18. But the nub of the matter is that the State's 2011 redistricting—and its stay application—rests on a fundamentally erroneous understanding of *Strickland*. *See* Memorandum Opinion at 57 n.10. In *Strickland*, a plurality of the Court held that a Section 2 plaintiff cannot satisfy the first *Gingles* precondition unless he or she establishes that it is possible to draw a reasonably compact majority-minority district. 556 U.S. at 25. “That is, section 2 does not compel the creation of crossover districts wherever possible.” Memorandum Opinion at 57 n.10. This is, to state the obvious, “a far cry from saying that states must create majority-BVAP districts wherever possible,” *id.*, as Applicants effectively argue here, *id.* To the contrary, the Court has *expressly repudiated* that interpretation of the VRA. *See generally Miller*, 515 U.S. 900

(rejecting the Department of Justice’s then-existent “maximization” policy); *see also Strickland*, 556 U.S. at 24 (“Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances.”).

This also explains why Applicants’ strict scrutiny argument so badly misses the mark. *Strickland* does not, as the Applicants would have it, establish some kind of “safe harbor” that allows legislatures to evade constitutional scrutiny in racial gerrymandering claims. Nothing in the plurality decision in *Strickland* even suggests that the Court intended to silently overrule *Miller*’s unequivocal holding that the VRA does not require a state to pursue a “maximization” policy. And nothing in *Strickland* suggests that it repudiates the second and third *Gingles* factors such that a state can use VRA compliance as a defense to a racial gerrymandering claim merely upon showing that it is *possible* to draw a majority-minority district.

Because it misinterpreted *Strickland* in drawing the congressional map in 2011, the State turned the VRA on its head, transforming it into what amounts to a tool for perpetuating electoral racial segregation. The words of the Court in *Miller* apply with full force here:

The [VRA], and its grant of authority to the federal courts to uncover official efforts to abridge minorities’ right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. . . . The end is neither assured nor well served, however, by carving electorates into racial blocs. . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.

Miller, 515 U.S. at 927-28.¹²

2. The District Court’s Findings as to CD 12

a. The Record Contains Overwhelming Support for the District Court’s Factual Findings as to CD 12

The district court’s factual determination that race predominated in CD 12 is also well supported by direct and circumstantial evidence. *See* Memorandum Opinion at 33-48. Again, this factual determination is not clearly erroneous, and so Applicants cannot establish a likelihood of success on the merits of their appeal as to CD 12.

To provide just a selection of the evidence of racial predominance as to CD 12:

(1) Representative Mel Watt, who represented CD 12 in 2011, “testified at trial that Senator Rucho himself told Congressman Watt that the goal was to increase the BVAP in CD 12 to over 50% . . . ‘to comply with the Voting Rights Act.’” *Id.* at 36-37 (quoting Trial Tr. 108:23-109:1). The district court, “[b]ased on its ability to observe firsthand Congressman Watt and his consistent recollection of the conversation between him and Senator Rucho . . . credited his testimony and

¹² Applicants’ fundamentally flawed understanding of the VRA pervades their entire argument. As a result, their purported concern that the district court’s reasoning “guts the VRA and threatens to eliminate all majority black districts going forward,” Motion at 34-35, is entirely misplaced. All the Memorandum Opinion “guts” is Applicants’ erroneous belief that the VRA requires majority-black districts to be drawn wherever possible. Likewise, Applicants’ distortion of Respondents’ racial gerrymandering claim into “a claim on behalf of African American Democrats for influence or crossover districts” under the VRA, *id.* at 35-37, is another red herring. The only issue at trial was whether the legislature’s predominant use of race in drawing CDs 1 and 12 was justified by the VRA. That issue was resolved with a resounding “no.” Respondents did not allege (and the district court did not hold) that the VRA required these districts to maintain or achieve a particular BVAP. In other words, Applicants continually conflate and confuse the legal principles undergirding racial gerrymandering claims and VRA claims, leading the legislature to draw a racial gerrymander—and leading Applicants to continue to defend that gerrymander here.

[found] that Senator Rucho did indeed explain to Congressman Watt that the legislature's goal was to 'ramp up' CD 12's BVAP." *Id.* at 37-38. Gauging witness credibility is a classic prerogative of the trial court and, accordingly, "can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985).

(2) Consistent with Representative Watt's testimony of his private conversation with Rucho, Lewis and Rucho then issued a public statement on July 1, 2011, indicating that "[b]ecause of the presence of Guilford County in the Twelfth District [which was, at the time, 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." Pl. Ex. 67 at 5. The district court took this statement at face value, Memorandum Opinion at 34-35, and it is strong evidence of racial predominance. *Compare Alabama*, 135 S. Ct. at 1271 (finding strong evidence of racial predominance where "[t]he legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

(3) Consistent with Rucho and Lewis's public statement, Hofeller confirmed that he was instructed to move black residents of Guilford County into CD 12 because of their race. Memorandum Opinion at 42-43.

(4) And consistent with all of the other direct evidence above, the State's preclearance submission confirms that, in drawing CD 12, "[o]ne 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,”¹³ that the State “drew the new CD 12 based on these considerations,” and emphasized that by increasing the BVAP of CD 12 from 43.77% to 50.66%, the enacted plan “maintains, and in fact increases, the African-American community’s ability to elect their candidate of choice in District 12.” Memorandum Opinion at 35-36 (citations omitted); *see also* Pl. Ex. 68, at 15 (stating that the General Assembly drew “District 12 as an African-American and very strong Democratic district that has continually elected a Democratic African American since 1992” and noting specifically that CD 12 had been drawn to protect “African-American voters in Guilford and Forsyth”).

(5) CD 12, the least compact district in the State, “is a ‘serpentine district [that] had been dubbed the least geographically district in the Nation.’”¹⁴ Memorandum Opinion at 38 (quoting *Shaw II*, 517 U.S. at 906). In redrawing CD 12 in 2011, Hofeller managed to reduce the compactness of CD 12 even further. Memorandum Opinion at 38-39. *Compare Alabama*, 135 S. Ct. at 1271 (describing irregular district boundaries as evidence of racial predominance).

Again, Applicants do not address *any* of this compelling evidence of racial predominance, which plainly shows that the General Assembly placed a substantial number of voters within CD 12 based predominantly on racial considerations.

¹³ Which objection, just to be clear, resulted in the map that led the Court to create its modern racial gerrymandering jurisprudence in *Shaw I*, and which the Court then struck down in *Shaw II* as a racial gerrymander.

¹⁴ A map of CD 12 is provided in Appendix B.

Alabama, 135 S. Ct. at 1267. The district court’s predominance finding as to CD 12 is not clearly erroneous.

Meanwhile, the district court’s conclusion that the General Assembly’s predominant use of race in CD 12 was not narrowly tailored to a compelling government interest is simply unassailable. As the district court noted, Applicants “completely fail[ed] to provide . . . a compelling state interest for the general assembly’s use of race in drawing CD 12.” Memorandum Opinion at 49. Applicants clearly agree: their stay application does not even attempt to challenge the district court’s strict scrutiny analysis for CD 12. *See* Motion at 29-34. In other words, if the district court’s factual determination that race predominated in CD 12 is not clearly erroneous, Applicants concede the district fails strict scrutiny.

b. Applicants Cannot Show that the District Court’s Findings as to CD 12 Are Clearly Erroneous

Instead of even attempting to explain away the direct and circumstantial evidence set out above, Applicants attempt to distract the Court by focusing entirely on the auxiliary circumstantial evidence that the district court found bolstered its predominance finding as to CD 12.

Applicants first challenge the district court’s predominance finding on the grounds that the district court supposedly “ignored evidence that politics completely explained CD 12.” Motion at 24. Quite the contrary, the district court considered Applicants’ “politics” arguments. It simply found them unconvincing in light of the record evidence. *See* Memorandum Opinion at 41 (“Despite the defendants’ protestations, the Court is not persuaded that the redistricting was purely a

politically driven affair” with respect to CD 12). After detailing the compelling direct and circumstantial evidence outlined above, the district court turned to Applicants’ “politics not race” argument, concluding that it “was more of a post-hoc rationalization than an initial aim.” *Id.* at 43. In that vein, the district court noted (1) how Hofeller’s testimony that he considered race in drawing CD 12 was inconsistent with the claim that he did *not* use race to draw CD 12, *id.* at 42-43; (2) “Senator Rucho and Representative Lewis themselves attempted to downplay the ‘claim[] that [they] have engaged in extreme political gerrymandering,’ thereby “discredit[ing] their assertions that their sole focus was to create a stronger field for Republicans statewide,” *id.* at 43; and (3) contemporaneous emails further suggested “that the politics rationale on which the defendants so heavily rely was more of an afterthought than a clear objective,” *id.* at 44. Applicants can hardly establish that the district court’s factual findings are clear error merely by expressing their disagreement with the inferences fairly drawn by the district court from the record evidence.

This is also why Applicants’ reliance on *Cromartie II*, *see* Motion at 24, is, as the district court found (Memorandum Opinion at 47), misplaced. In *Cromartie II*, the Court considered a record containing nearly no evidence that race was considered in drawing a district, and overwhelming record evidence “articulat[ing] a legitimate political explanation for [the state’s] districting decision.” *Cromartie II*, 532 U.S. at 242. As the district court found, *Cromartie II* bears scant resemblance to the record here, where “at the outset district lines were admittedly drawn to reach a

racial quota” and “political concerns” were then “noted at the end of the process.” Memorandum Opinion at 47. The district court thus considered the evidence presented in *this* case, weighed it, and made well-supported factual findings fatal to Applicants’ litigation position.

Finally, Applicants express, at great length, their disagreement with the district court’s discussion of the analysis of Respondents’ experts that race better explained the boundaries of CD 12 than did politics. Motion at 23-24, 26-28. This, too, fails to establish clear error in the district court’s predominance finding.

As an initial matter, the district court’s predominance finding in CD 12 hardly turned on Respondents’ experts, who merely offered additional circumstantial evidence supporting the compelling direct and circumstantial evidence set out above.¹⁵ See Memorandum Opinion at 46 (noting that Respondents’ experts’ “studies produce only circumstantial support for the conclusion that race predominated”). More to the point, Applicants cannot establish that the district court committed clear error by positing that the district court should have credited their expert’s testimony instead of Respondents’. The district court, again, is in a unique position to make credibility determinations. See *Anderson*, 470 U.S. at 575.

¹⁵ Respondents’ expert, Dr. Peterson (on whose testimony the Court heavily relied in the *Cromartie* cases), concluded, on the strength of a boundary segment analysis, that “race ‘better accord[ed] with’ the boundary of CD 12 than did politics.” Memorandum Opinion at 44-45. Dr. Ansolabehere conducted an alternative analysis and 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.’” *Id.* at 45 (quoting Trial Tr. 314, 330:10-11). Both experts, in short, reach the same conclusion utilizing different methodologies.

And it considered and rejected all the attacks on Respondents' experts that Applicants offer here. *See* Memorandum Opinion at 44-47.¹⁶

C. Applicants Cannot—and Do Not—Dispute that Respondents and the Roughly 1.5 Million Other Residents of CDs 1 and 12 Will Suffer Irreparable Injury if a Stay Is Granted

Even if Applicants could establish a likelihood of success on the merits, which they cannot, a stay is inappropriate because the other relevant factors also counsel strongly against granting the stay.

There is no doubt that granting the requested stay would cause irreparable injury to Respondents and the public. As the district court 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 (citation omitted).

¹⁶ At the end of their Motion, in a footnote disconnected from the surrounding text, *see* Motion at 37 n.22, Applicants argue that Respondents' claims are barred by res judicata and collateral estoppel and thus the district court lacked authority to even *reach* the merits of Respondents' claims. The Court should hardly grant a stay based on a conclusory and obviously after-thought argument advanced in a footnote. *See Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1338-39 (2013) (Roberts, J., concurring); *see also Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 223-24 (1997) (declining to decide question that received only “scant argumentation”). Further, the district court considered and denied Applicants' motion for summary judgment on these grounds (*see* ECF Nos. 74, 85) and Applicants failed to present any further evidence at trial in support of their estoppel defenses, let alone appeal that decision. The district court rejected the argument because it is spurious. Respondents were not parties to the state court litigation, did not authorize any party to that case to act on their behalf and, indeed, were not even aware a state court case existed at the time they filed this lawsuit. Moreover, the state court plaintiffs are not plaintiffs in this case and have no ability to control this matter. *See generally* ECF No. 78 (Plaintiffs' Memo. in Opp. to Defendants' Mot. for Summ. J.). Applicants fixate on the state court case involving different parties, a different record, and almost entirely different claims, and which has no relevance to the instant stay application.

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 v. Sims*, 377 U.S. 533, 554-55, 562 (1964); *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 Respondents 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.”) (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.”) (emphasis omitted).

Moreover, the public interest also weighs heavily in favor of denying Applicants’ 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, “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.’” ECF No. 148, at 4 (quoting *Reynolds*, 377 U.S. at 585).

D. The Balance of Harms Favors Respondents: 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, Applicants premise their Motion almost entirely on their claim that the State will suffer irreparable injury in the absence of the requested stay. Applicants 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 how to vote under the enacted unconstitutional plan. *See* Motion at 2. Applicants further 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.* at 2-3. Neither of these arguments is availing.

As to “voter confusion,” Respondents submit that voters would be justifiably confused to learn that they will be subject, once again, to elections under a map deemed unconstitutional by the district 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. Applicants’ complaint that the district court “provid[ed] only two weeks to draw new plans” (Motion at 2) thus rings more than a little hollow. The district court, in fact, deferred to a state statute that could not indicate more clearly that the State believes two weeks is a sufficient time to draw new districts.¹⁷

Applicants’ contention that it is simply “too late” to remedy the unconstitutional enacted plan in 2016 is similarly unavailing. The November 2016 general election is nine months away. As far as Respondents are concerned, the State can take whatever steps it deems most efficacious for conducting constitutional elections while minimizing disruption and cost.

¹⁷ Likewise, Applicants’ complaint that the district court provided no “specificity” as to its findings and conclusions (Motion at 3 n.2) is specious. Even presuming that a *state* legislature can validly pass a statute requiring a *federal* district court to issue findings of fact and conclusions of law in a particular format, *see id.* (citing N.C. Gen. Stat. § 120-2.3), the district court’s Memorandum Opinion is specific and detailed. The district court’s majority and concurring opinions run for 100 pages and set out the factual findings undergirding the district court’s conclusions and its specific legal rationale for striking down CDs 1 and 12—the General Assembly lacked a compelling government interest justifying its decision to use a nonnegotiable 50%-plus-one floor to draw these districts.

If the State deems it prudent to postpone the congressional primary, there is ample precedent for doing so to facilitate the adoption of remedial plans to redress racial gerrymandering. Where necessary to provide an effective remedy, courts in North Carolina have not hesitated to order postponement of election dates. In 1998, for example, 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 this 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) ("*Cromartie I*").¹⁸ The 2002 primary election was also delayed as a result of ongoing redistricting litigation, with the Court again refusing to stay implementation of a remedial plan in an election year. *See Bartlett v. Stephenson*, 535 U.S. 1301, 1304 (2002).¹⁹ Thereafter, the General Assembly passed a bill moving the primary from May 7, 2002, to September 10, 2002, and granting the State Board of Elections authority to issue temporary orders modifying, deleting, or adding to any statute, regulation, or guideline "that may affect the 2002 primaries and general elections." *See* Appendix

¹⁸ Applicants' contention that *Cromartie I* is "inapposite," Motion at 2 n.15, is little more than an exercise in wishful thinking. In *Cromartie I*, the district court entered an order enjoining the North Carolina primary election a month before the election and ordering that election delayed to allow for adoption of a new remedial plan. 133 F. Supp. 2d at 410. The Court then declined to stay that decision. This is *precisely* the context here—except that the district court here ruled further in advance of the primary.

¹⁹ In 2002, a state trial court struck down the 2001 Senate and House districting plans on February 20, 2002. The North Carolina Supreme Court, *sua sponte*, then 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).

C. Further, the General Assembly eliminated the “run-off” primary in 2002, providing that “the result of the primary shall be determined by a plurality and no second primary shall be held.” *Id.*

Thus, if there is one state in the country that has experience in modifying election procedures as is necessary for the implementation of a remedial districting plan, it is North Carolina. But 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.²⁰

Moreover, Respondents submit that the Court should be particularly reluctant to credit Applicants’ complaints about the administrative inconvenience of delaying the primary because the State consciously and willfully set up the current collision between the district court’s injunction and the 2016 election calendar. Prior to this year, and for at least the past *100 years*, North Carolina has held its primary

²⁰ See, e.g., *Larios*, 305 F. Supp. 2d at 1342 (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*, Civil Action No. 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”); *Mahan v. Howell*, 410 U.S. 315, 332, modified, 411 U.S. 922 (1973) (noting that district court, in malapportionment case, had “postponed the primary elections, which had been set for June 8, until September 14”); *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 VRA 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).

election no earlier than May.²¹ Consistent with this long-standing practice, the 2016 primary was originally set for May.²² Late last year, knowing full well that this case was pending (along with other lawsuits challenging various state legislative and congressional districts in state and federal court), the General Assembly took the unprecedented step of moving up the 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 the district court. This kind of “self-inflicted harm . . . [is] not the sort of consideration that ought to give rise to a stay.” *CRAssociates, Inc. v. United States*, 103 Fed. Cl. 23, 27 (2012).²³

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

²¹ See, e.g., 1915 N.C. Sess. Laws 101, § 1 (enacting state’s first primary law and setting congressional primary election for the “first Saturday in June”); 1939 N.C. Sess. Laws 196, § 1 (moving primary to “the last Saturday in May”); 1971 N.C. Sess. Laws 170, § 1 (moving primary to the “Tuesday next after the first Monday in May”); 1975 N.C. Sess. Laws 844, § 1 (moving primary to “the third Tuesday in August”); 1977 N.C. Sess. Laws 661, § 1 (moving primary to the “Tuesday next after the first Monday in May”); 2015 N.C. Sess. Laws 258, §§ 1.(b), 2.(a) (moving 2016 primary to March 15, 2016).

²² Anne Blythe, *NC candidates to file for 2016 elections amid questions about 2011 redistricting*, News & Observer, Nov. 30, 2015, <http://www.newsobserver.com/news/politics-government/state-politics/article47237720.html>.

²³ See *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850 (7th Cir. 2003) (“[S]elf-inflicted wounds are not irreparable injury”); *Salt Lake Tribune Publ’g Co. v. AT & T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) (“We will not consider a self-inflicted harm to be irreparable”); *Hirschfeld v. Bd. of Elections in City of New York*, 984 F.2d 35, 40 (2d Cir. 1993) (“[T]he Board of Elections’ claim of irreparable injury was meritless because any injury in the absence of the stay would be self-inflicted.”); see also 11A Charles Alan Wright et al. Federal Practice and Procedure § 2948.1 (3d ed. 2013) (“Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.”).

has done on numerous occasions in the past. But the State's hyperbolic rhetoric outruns reality. The district court and the parties will be able to collaborate to implement an effective remedy in 2016 while mitigating expense and disruption to the State.

Notably, the vast majority of Applicants' irreparable injury argument is premised on the cost the State will incur to hold a "bifurcated" primary. Motion at 15. No rule compels the State to take that approach. Likewise, while the State complains that it may be difficult to secure additional voting locations for a different primary date, *id.* at 18, it has a range of options available to it such as, for example, moving the congressional primary to one of the dates in May *already* set aside for a "runoff" primary. *See* 2015 N.C. Sess. Laws 2015-258, § 2(d) (providing that if a second primary is required, it shall be held on May 24, 2016 for federal offices and otherwise on May 3, 2016).²⁴ Because the State has already set dates for a potential runoff primary, it has presumably already secured voting locations on these dates. Moreover, long before the district court issued its ruling in this matter, the State was well aware that it would need to budget for the conduct of potential primary runoffs on these dates.

Applicants' concerns about voter registration (Motion at 18) are also overstated. The voter registration deadline for the congressional primary could simply be extended to accommodate the delayed election; the state law restrictions on voter registration between first and second primaries would not apply since this

²⁴ Indeed, before the State accelerated its primary schedule five months ago, the primary was originally slated for May 2016.

would be the first congressional primary. *See* N.C. Gen. Stat. § 164-111. In any event, to the extent the smooth conduct of a congressional primary on one of these dates would benefit from modest modifications of the State’s ordinary election procedures, those procedures could be modified—which is precisely what the State did in 2002. *See* Appendix C.²⁵

So does Applicants’ suggestion that a delayed primary may require delaying the November 2016 general election simply falls flat given the state’s century-long history of holding primaries in or after May. *See supra* at 36. Indeed, in 2002, the State held a general election in November even though the primary had been moved to September 10, 2002. *See* Appendix C.

In sum, the State has any number of ways to mitigate the administrative burden of a delayed primary. Respondents—and the other 1.5 million residents in their districts—have no recourse to mitigate the denial of their constitutional rights. The irreparable *constitutional* injury Respondents 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).

²⁵ *See also Judge v. Quinn*, 623 F. Supp. 2d 933, 934 (N.D. Ill. 2009) *aff’d*, 612 F.3d 537 (7th Cir. 2010), *opinion amended on denial of reh’g*, 387 F. App’x 629 (7th Cir. 2010) (“The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply[.] . . . To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield.”).

Finally, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), does not, as Applicants suggest, Motion at 13, instruct lower courts to categorically “avoid” ordering changes to upcoming elections. In *Purcell*, plaintiffs challenged a new Arizona voter identification law in an election year. *Id.* at 2-3. The district court denied the plaintiffs’ motion for a preliminary injunction that had been filed on the heels of the complaint. *Id.* at 3. After the plaintiffs appealed, and a month before the general election, the Ninth Circuit entered an injunction pending appeal without providing any explanation or rationale for its decision. *Id.* The Court ultimately upheld the district court’s judgment and chastised the Court of Appeals for its failure to “give deference to the discretion of the District Court.” *Id.* at 4-5. It was on this “procedural” basis—in a case that did not involve redistricting—that the Court struck down the Court of Appeals’ injunction. *Id.* Here, by contrast, Respondents filed suit *three years* before the 2016 General Election, and the district court found in Respondents’ favor on the merits after a full trial and thereafter denied Applicants’ motion to stay pending appeal. Applicants’ attempt to sidestep the careful, reasoned judgment of the district court, accordingly, finds no support in *Purcell*.

In any event, *Purcell* merely reiterates in dicta what is not in dispute: “Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls.” 549 U.S. at 4-5. Respondents do not disagree. But the “public interest” is merely one factor relevant to whether a stay pending appeal should be granted, and—as the district

court found—other, weightier public interest considerations cut sharply against Applicants. ECF No. 148 at 4. Any confusion that may result from modifications to the primary election here is greatly outweighed by the constitutional injury suffered by millions of North Carolina citizens—and indeed the justifiable confusion these voters would face if they were forced to vote a third time in unconstitutional districts. One can hardly imagine a greater “incentive to remain away from the polls” than the knowledge that the election itself is unlawful. *See id.* at 5. Indeed, like the threat of voter fraud, racial gerrymandering undermines “[c]onfidence in the integrity of our electoral processes,” “drives honest citizens out of the democratic process,” and “breeds distrust of our government.” *Id.* at 4. Here, Applicants assert no interest in the “integrity of our electoral processes,” only in avoiding the administrative inconvenience of running a constitutional election.

Unlike in *Purcell*, the Court is not considering a motion for preliminary injunctive relief filed in advance of an imminent general election. *Compare* 549 U.S. at 2-3. Rather, the district court issued a final judgment *nine months* before the 2016 General Election. The *primary* election date can and should be moved as necessary to allow for implementation of a remedial plan, as has been done repeatedly in North Carolina²⁶ and other jurisdictions²⁷—and as legislators

²⁶ *See, e.g., Cromartie I*, 133 F. Supp. 2d at 410; *Stephenson*, 582 S.E.2d at 248-49.

²⁷ *See, e.g., Mahan*, 410 U.S. at 332 (noting that district court, in malapportionment case, had “postponed the primary elections, which had been set for June 8, until September 14”); *Republican Party of Adams Cty*, 775 F. Supp. at 981 (describing procedural history of related state court litigation, where court delayed elections to allow for implementation of remedial plan); *Busbee*, 549 F. Supp. 494 (delaying Georgia’s 1982 congressional elections to remedy VRA violation); *Heggins*, 469 F. Supp. at 743 (entering order postponing election until state complied with VRA); *Griffin*, 570 F.2d at 1066 (in case involving 42 U.S.C.

expressly contemplated would be done in the event the district court ruled in Respondents' favor.²⁸

Thus, the public interest factor weighs *against* Applicants here, notwithstanding the proximity of the primary election, and nothing in *Purcell* displaces consideration of the other stay factors—all of which also weigh strongly against Applicants here. The fact that the *Purcell* Court “recognized that practical considerations sometimes require courts to allow elections to proceed despite pending legal challenge,” *Riley v. Kennedy*, 553 U.S. 406, 426 (2008) (citing *Purcell*, 549 U.S. at 5-6), does not mean a losing litigant with little chance of success on the merits of an appeal is entitled to squeeze in one last illegal election as a matter of course.

Simply put, a choice between forcing millions of North Carolinians to vote in yet another election under the unconstitutional enacted plan and taking the administrative steps necessary to hold a constitutional election in 2016—including delaying the congressional primary election as necessary—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.”).

§ 1983 claim, affirming trial court order requiring a new primary be held and postponing the general election).

²⁸ See Knopf, <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article36316269.html>.

IV. CONCLUSION

For the reasons stated above, the Court should deny Applicants' application for a stay pending appeal.

RESPECTFULLY SUBMITTED, this 16th day of February, 2016



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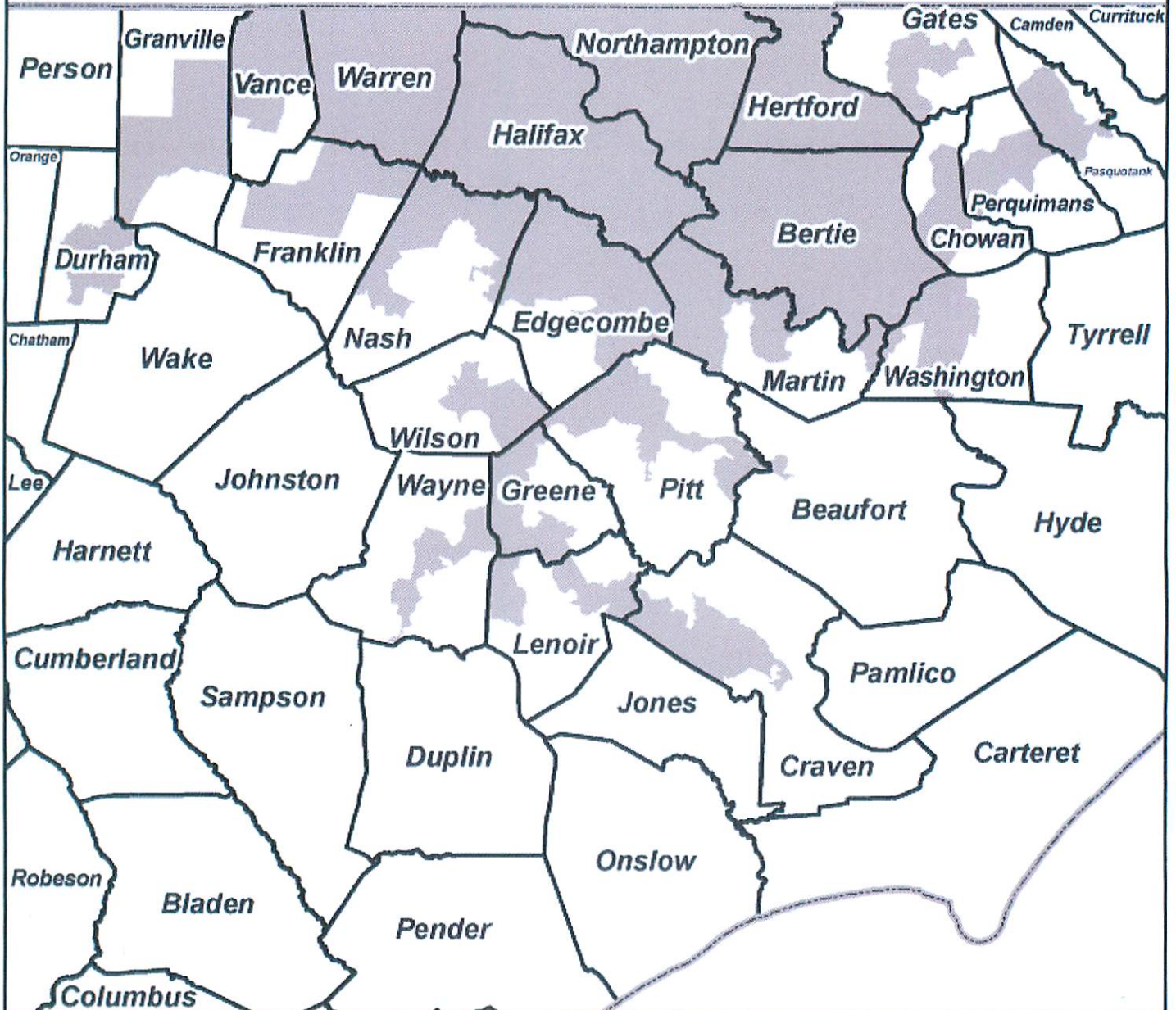
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Appendix A

Rucho-Lewis Congress 3 - District 1

Virginia



State County District

0 5 10 20 30 40 50 60 70 Miles

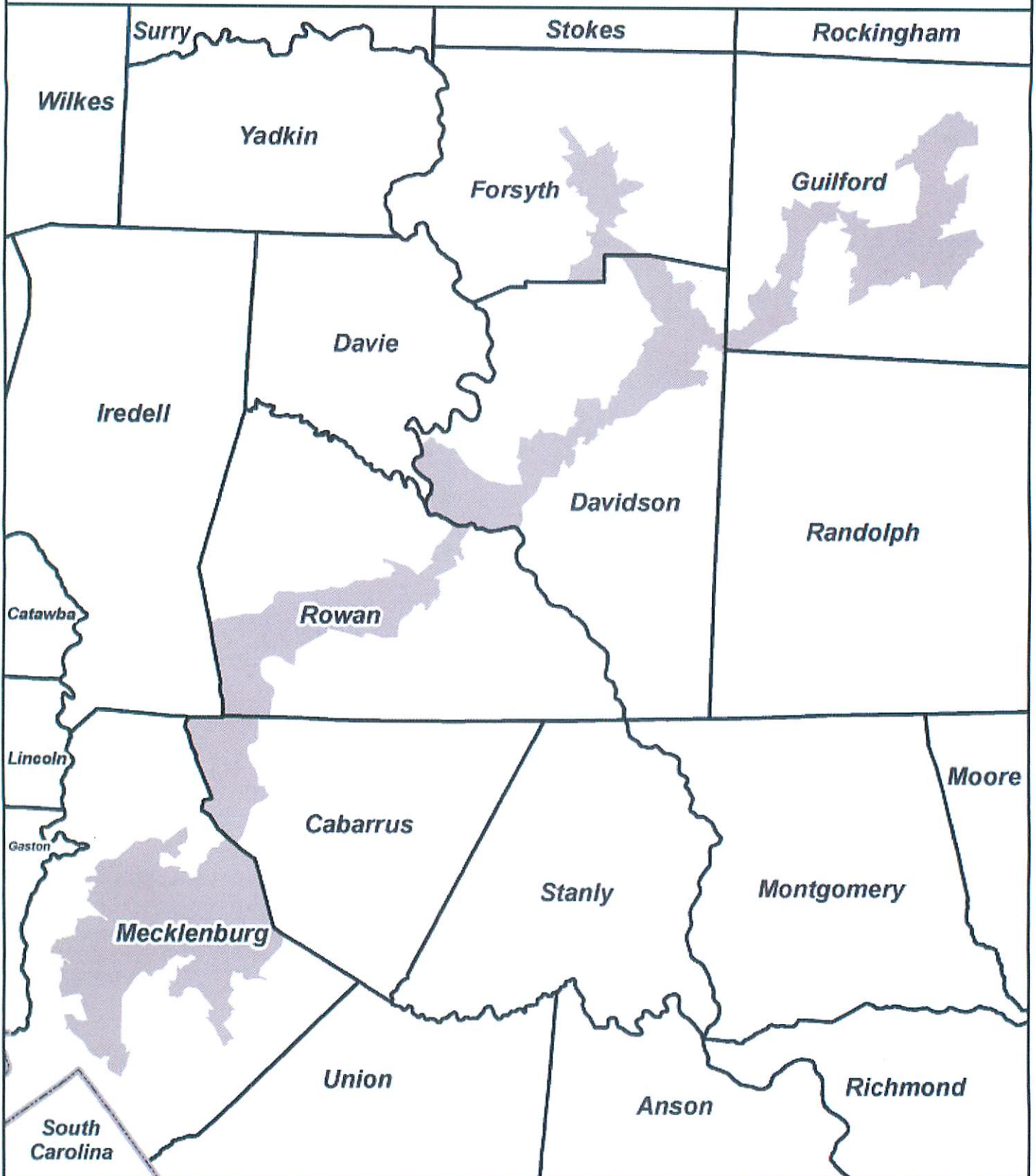


Created by the NC General Assembly, 07/26/2011

PLAINTIFF'S
EXHIBIT
P52
1:13-cv-949

Appendix B

Rucho-Lewis Congress 3 - District 12



State County District

0 2.5 5 10 15 20 25 30 35 Miles



Created by the NC General Assembly, 07/26/2011

PLAINTIFF'S
EXHIBIT
P53
1:13-cv-949

Appendix C

**GENERAL ASSEMBLY OF NORTH CAROLINA
EXTRA SESSION 2002**

**SESSION LAW 2002-21 EXTRA SESSION
SENATE BILL 2**

AN ACT TO SET THE DATE FOR THE 2002 PRIMARY AS SEPTEMBER 10, 2002,
TO ALLOW THE STATE BOARD OF ELECTIONS TO ISSUE TEMPORARY
ORDERS, GUIDELINES, AND DIRECTIVES FOR THE 2002 PRIMARIES AND
ELECTIONS, TO PROVIDE THAT IN 2002 ONLY THERE SHALL NOT BE A
SECOND PRIMARY, AND RELATING TO OTHER ELECTIONS THAT HAD
BEEN ON THE 2002 PRIMARY BALLOT.

The General Assembly of North Carolina enacts:

SECTION 1.(a) Notwithstanding G.S. 163-1(b), the date of the primary election in 2002 shall be September 10, 2002.

SECTION 1.(b) In order to accommodate the scheduling of the 2002 primary on September 10, 2002, and in order to comply with the requirements of Section 5 of the Voting Rights Act of 1965 and any court orders, and in order to comply with any objections interposed under Section 5, the State Board of Elections may issue temporary orders that may change, modify, delete, amend, or add to any statute contained in Chapter 163 of the General Statutes, any rules contained in Title 8 of the North Carolina Administrative Code, or any other election regulation or guideline that may affect the 2002 primaries and general elections. These temporary orders are only effective for the 2002 primary and 2002 general election. These orders shall include a primary election schedule.

SECTION 1.(c) Notwithstanding G.S. 163-111 or any local act, in 2002 only, the result of the primary shall be determined by a plurality and no second primary shall be held. Any runoff election for local office that might by local act have been held on the date of the second primary shall instead be held on the date of the general election. If there is a tie in a primary in 2002, the result shall be determined in accordance with G.S. 163-111(f) under the same rule as if there had been a tie in a second primary.

SECTION 1.(d) The authority to adopt orders also extends to any elections originally scheduled to be held on May 7, 2002, any elections ordered by the State Board of Elections to be held on the date of a county primary that were originally scheduled to be held on May 7, 2002, or any elections to be held on the date of the second primary. If any municipality had its election scheduled under G.S. 160A-23.1(d)(2) to be on the date of the second primary in 2002, the election shall instead be held on the date of the general election in 2002.

SECTION 1.(e) The orders shall provide for candidate filing for member of the State Senate and State House of Representatives to open as soon as practicable.

SECTION 1.(f) The State Board of Elections may set a period of time for unaffiliated candidates who wish to obtain ballot access by petition, under the provisions of G.S. 163-122, for legislative races in districts used in new legislative filings, to obtain and submit signed petitions for such purpose. Any unaffiliated candidate for a legislative seat, in a district used under a previously approved legislative redistricting plan, who had submitted a petition in a timely manner under the provisions of G.S. 163-122, shall have the right under any State Board plan to have any valid voter signatures contained in the previously approved petition, that meet the residency

requirements of the new district, to be considered a part of any new petition to obtain ballot access for a legislative seat in that new district.

SECTION 1.(g) The authority granted by this section shall be exercised only when needed to ensure the orderly and timely operations of the electoral process, the public good, and any valid interest of voters, candidates, and officeholders in order to accommodate the compressed schedule necessitated by holding the primary elections at such a late date. All orders of the State Board issued under this section shall be presumed to be reasonable and to serve the public interest.

SECTION 1.(h) Orders issued under this section are not rules subject to the provisions of Chapter 150B of the General Statutes. Orders issued under this section shall, however, be published in the North Carolina Register as quickly as possible.

SECTION 1.(i) The times to publish notice of a bond referendum required by G.S. 159-61(c) shall not apply to any bond referendum held on the date of the 2002 statewide primary. The local government unit holding the bond referendum on that date shall comply with the times to publish notice of the election prescribed by the State Board of Elections pursuant to this section.

SECTION 1.(j) The provisions of G.S. 159-61(b) that provide that a bond referendum may not be held within 30 days before or 10 days after a statewide primary, election, or referendum shall not apply to any bond referendum previously called to be conducted on a date that is within 30 days before or 10 days after the date selected as the date for the 2002 statewide primary.

SECTION 1.(k) As used in this section, "order" also includes guidelines and directives.

SECTION 1.(l) Any orders issued under this section become void 10 days after the final certification of all elections that were originally scheduled to be held in 2002. This section expires 10 days after the final certification of all elections that were originally scheduled to be held in 2002.

SECTION 1.1. Notwithstanding G.S. 163-106(h), any person who filed a notice of candidacy under G.S. 163-106(c) during the filing period in 2002 for an office other than member of the State Senate or member of the State House of Representatives and did not withdraw that notice of candidacy before the filing deadline may not file a notice of candidacy as a member of the State Senate or member of the State House of Representatives unless either of the following applies:

- (1) If that person was declared the nominee of the party under G.S. 163-110, that person resigns the nomination (in which case the vacancy in nomination shall be filled in accordance with G.S. 163-114).
- (2) If that person is in a contested primary, that person withdraws the notice of candidacy. That notice of candidacy may be withdrawn notwithstanding the requirements of G.S. 163-106(e) that it be withdrawn prior to the filing deadline for that office. In the case of any such withdrawal, the appropriate board of election shall reopen filing for three days under the usual procedures of G.S. 163-112 notwithstanding the time of and reason for the withdrawal.

SECTION 2. If any members of any county board of education are elected at the primary election and take office under a local act in July after the primary, in 2002 only, they shall instead take office on the same day in December after the primary, and the terms of any such member which would otherwise expire in July of 2002 are extended accordingly.

SECTION 3. This act is effective when it becomes law.
In the General Assembly read three times and ratified this the 16th day of
July, 2002.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 3:01 p.m. this 16th day of July, 2002

CERTIFICATE OF SERVICE

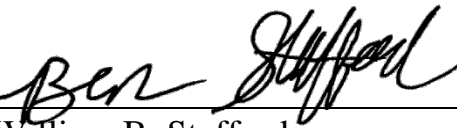
I certify that on February 16, 2016, a copy of this document was served by electronic mail and by UPS overnight delivery on each of the following:

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