

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 05 CVS 016827

BRIAN L. BLANKENSHIP, THOMAS J.
DIMMOCK, and FRANK D. JOHNSON,

Plaintiffs,

Vs.

GARY BARTLETT, as Executive
Director of the State Board of
Elections, ROY COOPER, as Attorney
General of the State of North Carolina,
and NORTH CAROLINA STATE
BOARD OF ELECTIONS,

Defendants.

JUDGMENT AND ORDER ON REMAND

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THIS MATTER came to be heard and was heard by the undersigned Superior Court Judge on remand pursuant to the decision entered by the Supreme Court of North Carolina on 28 August 2009. Plaintiffs were represented by Donald G. Hunt, Jr. and Kristen G. Atkins of Akins / Hunt, P.C. Defendants were represented by Alexander McC. Peters and Susan K. Nichols of the North Carolina Department of Justice.

This matter was tried as a bench trial on 10 May 2010. The parties have stipulated to most of the facts material to this case, and, based on these stipulations, the affidavits on file, the record, and the arguments of the parties, the court enters the following:

I. Findings of Fact.

A. Procedural Background.

1. On 5 December 2005, plaintiffs, who are citizens, taxpayers, and registered voters in Wake County, commenced a declaratory judgment

action challenging the constitutionality of the Superior Court election districts in Wake County, as established by N.C. GEN. STAT. § 7A-41 (2004).¹ On 9 December 2005, then Chief Justice I. Beverly Lake designated this matter “exceptional” pursuant to Rule 2.1 of the General Rules of Practice and assigned the undersigned emergency superior court judge to hear the case.

2. This matter was tried as a bench trial on 6 and 7 February 2006. On 8 February 2006, the undersigned entered a final judgment and order finding and concluding the Wake County judicial districts are unconstitutional as drawn and granting declaratory judgment and a permanent injunction in favor of plaintiffs. The undersigned, on its own motion, stayed the judgment and order pending appeal.

3. On 10 March 2006, defendants filed notice of appeal to the Court of Appeals of North Carolina. The appeal was argued and heard on 19 March 2007. On 3 July 2007, the Court of Appeals filed its decision reversing the judgment and order entered on 8 February 2006.

4. On 7 August 2007, plaintiffs filed notice of appeal to the Supreme Court of North Carolina based on the constitutional questions presented and, in the alternative, petitioned for discretionary review as to all matters decided adversely to plaintiffs by the Court of Appeals. On 9 October 2008, the Supreme Court filed an order allowing plaintiffs’ petition for discretionary review.

¹ Plaintiffs Blankenship and Dimmock are also duly licensed lawyers authorized to practice law and to seek the office of superior court judge in Wake County Districts 10B and 10C respectively.

5. This case was argued and heard at the Supreme Court on 23 March 2009. On 28 August 2009, the Supreme Court filed its decision reversing the decision by the Court of Appeals. *Inter alia*, the Supreme Court held that (a) intermediate scrutiny is applied when considering equal protection challenges to judicial districts, and (b) plaintiffs made a prima facie showing of considerable disparity between similarly situated judicial districts, triggering defendants' duty to demonstrate significant interests and to show that disparity in voter strength was not substantially greater than necessary to accommodate those interests.

6. The present trial was convened to afford defendants an opportunity to present evidence and argument in accordance with the directives of the Supreme Court.

B. Initial Creation of Wake County Superior Court Districts.

7. In 1987, the North Carolina General Assembly adopted legislation altering the superior court election system enhancing substantially the opportunity of minority residents to elect candidates of their choice to the office of superior court judge. *Inter alia*, this legislation created eight (8) districts with a black voting age population majorities and a ninth district with a combined black and Native American majority in voting age population ("majority-minority districts").² These changes were adopted after the United States Attorney General interposed an objection in 1986 pursuant to Section 5 of the Voting Rights Act (VRA) and following the filing of a private civil action challenging the

² Preclearance Report pp. 207 – 209

previously existing method of electing candidates to the office of superior court judge under Section 2 of the VRA.³ (see generally *Alexander v. Martin*, Civ. Action No. 86-1048-CIV-5 (EDNC Nov. 25, 1987) (*hereinafter referred to as "Alexander litigation"*))

8. The 1987 legislation divided Wake County into four (4) Superior Court districts for the election of five (5) Superior Court Judges. The 1987 Amendment created three single-member districts (Districts 10A, 10C and 10D) and one multi-member district (District 10B). District 10A was a majority-minority district, and the boundaries for all of the superior court districts located in Wake County have not substantially changed since the adoption of the 1987 legislation.

C. The Process for Requesting and Recommending the Assignment of New Superior Court Judgeships by the Administrative Office of the Courts (AOC).

9. The standard process that governs AOC's decision to recommend the creation and allocation of new judgeships has several steps.⁴

10. First, AOC consults with and seeks advice from constituent groups about their needs. *Id.*

11. Second, AOC evaluates the various workload measures available to AOC and, from this process, determines the judicial system's needs for the next two (2) years. *Id.*

12. The needs identified from this analysis form the basis for AOC's expansion budget request in terms of new superior court judgeships.

³ *Id.*

13. In its initial request for new superior court judgeships, AOC does not identify where the resident superior court judgeships should be located.⁵ Rather, in requesting new judgeships, AOC simply focuses on AOC data and workload tables indicating the ideal number of judges that are needed. *Id.*

14. In its 1993 preclearance submission to DOJ, AOC represented the following with reference to the number of judges AOC requests from the General Assembly:⁶

At the superior court level, the policy is to assign judges based on workload. Creation of a resident judgeship in North Carolina also creates an expectation that increased sessions of court will be scheduled in the district. That expectation is reasonable because that is generally what happens. That factor, combined with the fact that resident judges generally spend more time in their home district than in any other district, supports the state's policy of assigning resident judgeships to districts where court is needed the most. That policy ensures that residents of that district have an ability to vote in primaries for judges in a proportion that roughly approximates the judicial work performed there. It is not a one person, one vote correlation, but there is a correlation.

15. After budget allocations are made for a number of new judgeships, AOC then makes a recommendation to the General Assembly as to where to assign them.⁷

16. After AOC makes its recommendations as to the assignment of new judgeships to specific districts, one house of the General Assembly, through its Appropriations Subcommittee on Justice and Public Safety, reviews

⁴ Preclearance Report pp.153-155

⁵ Preclearance Report pp. 153-155

⁶ Preclearance Report p.155

⁷ Preclearance Report pp. 154-156.

the recommendation and makes a recommendation to the full Appropriations Committee. The Appropriations Committee reviews the matter, along with other budgetary matters, and presents a budget to the full body. After the budget is passed by that house, it is then sent to the other house, and the process is repeated. If the second house makes changes, there is then a conference committee composed of members of each house, and the conference committee makes a recommendation to both the House and the Senate.⁸

D. A Resident Superior Court Judge is Added to District 10A in 1993.

17. In the years immediately following the adoption of the 1987 legislation, the legislation was generally successful in enabling minority voters to gain a voice in the election of superior court judges while not hindering the superior court system's ability to fairly and impartially administer justice.⁹ At the time of the legislation's adoption, only one black person had been elected to the office of superior court judge. However, in the election years 1986 through 1992, there were fourteen (14) instances in which a minority candidate sought the office of superior court judge.

18. In thirteen (13) of these instances, the minority candidate won, and, in the other instance, the minority candidate died after filing for office and before the election.¹⁰ Ten (10) of the thirteen (13) prevailing candidates were nominated from the nine majority-minority districts created in 1987.¹¹ Three (3) of the thirteen (13) superior court judges were minorities from districts in which

⁸ Preclearance Report p.155

⁹ Preclearance Report p. 209

¹⁰ Preclearance Report pp. 186 – 187

minority voters comprised 17.5%, 23.5%, and 20.8% of the registered voters, respectively.¹²

19. Data from the 1990 Census numbers show the populations of the Wake County resident superior court districts were as follows:

District	White	Black	AI*	Asian*	Other	Total
10A	17,350	35,462	163	432	181	53,588
10B	145,038	23,912	528	4,474	990	174,942
10C	83,072	15,457	212	991	365	100,097
10D	78,551	13,226	245	2,280	451	94,753
Total:	324,011	88,057	1,148	8,177	1,987	423,380

AI = American Indian, Eskimo or Aleut
 Asian = Asian or Pacific
 Islander

20. Extrapolating from the 1990 Census data, the following is the proportion of Wake County voters to resident superior court judges prior to AOC submitting its expansion budget request to the General Assembly in 1993:

Judicial District No.	Residents	No. of Judges Elected	Voting Ratio
10-A	53,588	1	53,588 to 1
10-B	174,942	2	87,471 to 1
10-C	100,097	1	100,097 to 1
10-D	94,753	1	94,753 to 1

From this data, it appears the 1987 legislation caused an appreciable disparity between the weight afforded to the votes cast by voters in Wake County's election of resident superior court judges. In particular, the votes cast

¹¹ *Id.*

¹² *Id.*

by voters in District 10A had almost a two (2) to one (1) advantage in terms of weight as compared to votes cast by voters in Districts 10C and 10D.

The 1990 Census data also reflect the following.

District	White	Black
10B	145,038	23,912
10C	83,072	15,457
10D	78,551	13,226

The 1987 legislation significantly marginalized the voting strength of minorities residing in Districts 10B, 10C, and 10D and greatly limited their ability to elect resident superior court judges of their choice.

21. In 1993, North Carolina was divided into four (4) superior court divisions and forty-four (44) superior court districts or sets of districts, each encompassing one or more counties.¹³ As of 1993, there were eighty-two (82) total resident superior court judges in the State of North Carolina, thirteen (13) of whom were minorities.¹⁴ Thus, minorities constituted 15.85% of North Carolina's total resident superior court judge population.¹⁵

22. In its 1993 budget request to the North Carolina General Assembly, AOC requested ten (10) additional superior court judgeships – eight (8) resident superior court judgeships and two (2) special superior court judgeships.¹⁶

23. After AOC determined it would receive a budget allocation for eight (8) new resident superior court judgeships, AOC recommended that

¹³ Preclearance Report p. 7

¹⁴ Preclearance Report pp. 186 – 187

¹⁵ $13 \text{ minority resident superior court judges} \div 82 \text{ total resident superior court judges} = 0.1585$

each of the State's four (4) superior court divisions receive two (2) new resident superior court judges.¹⁷ The new resident superior court districts recommended by AOC were selected solely on population and caseload, with the only exception being a recommendation that a resident superior court judge should be added to a newly created judicial district, namely District 9-A.¹⁸ AOC did not recommend that one of the new judgeships be added to Wake County, and the record indicates that population, workload, and case loads did not justify the addition of a new resident superior court judge to Wake County.¹⁹

24. In 1993, the appropriations process originated in the Senate, and AOC presented its districting recommendations to the Senate. On 8 April 1993, a formal bill (Senate Bill 810) was introduced that adopted AOC's recommendations.²⁰ The proposed Senate Bill 810 was incorporated into Senate Bill 27, a comprehensive Operations Budget Bill. Both Senate Bill 810 and Senate Bill 27 included AOC's districting recommendations. Senate Bill 27 (and AOC's recommendations by extension) was adopted by the full Senate on 13 May 1993. *Id.*

25. The record reflects the Senate process pertaining to the passage of Senate Bill 27 had significant minority participation and approval.²¹ For example, the Senate Appropriations Committee referred the bill to an *ad hoc* committee chaired by Senator Frank Balance, a black male, who held a public

¹⁶ Preclearance Report p. 153 and p. 159)

¹⁷ Preclearance Report p. 156

¹⁸ Preclearance Report pp. 31- 32 and p. 156 - 158

¹⁹ Preclearance Report pp. 156 -158 and Donald Stephens Affidavit

²⁰ Preclearance Report pp. 31 – 32 and 156 - 158

hearing pertaining to the proposed creation of District 9-A consisting of Rockingham, Caswell, and Person Counties. *Id.* The bill was approved by a Senate Appropriations Committee where six (6) of thirty-eight (38) members were black and, later, by a full Senate comprised of seven (7) black members.²² The record indicates the only opposition to Senate Bill 27 was a motion made by Senator Alexander Sands, who was elected from a district that included Rockingham County, to have the provisions relating to the creation of new Judicial District 9-A deleted from the bill; however, his motion failed by a vote of four (4) to (38) with a majority of black senators voting against the motion.²³

26. The Senate's bill was received by the House on 13 May 1993 and referred to the House Appropriations Committee which in turn referred the bill to the House Appropriates / Subcommittee on Justice and Public Safety.²⁴

27. On 17 May 1993, House Bill 1487 (entitled "Omnibus Courts Bill") was introduced in the House of Representatives which contained provisions for new court personnel including additional superior court judges; however, House Bill 1487 did not include a provision for the creation of new Judicial District 9A, a district that had received some amount of opposition in the Senate.²⁵ House Bill 1487 was referred to the House Appropriations Committee, but no further action was taken on this bill. *Id.*

²¹ Preclearance Report pp. 31 - 35

²² Preclearance Report pp. 31 - 32 and 156 - 158

²³ Preclearance Report p. 31

²⁴ Preclearance Report p. 32

²⁵ Preclearance Report pp. 31 - 32

28. The House Appropriates Committee adopted a committee substitute for Senate Bill 27 which, *inter alia*, included no provisions for creating a new Judicial District 9A and instead assigned a new judge to "District 10," which refers to the four (4) voting sub-districts in Wake County (i.e., Districts 10A – 10D).²⁶ According to AOC Director Drennan, when he learned the House would not support new Judicial District 9A, he recommended that a judge be placed in District 10, meaning one of the four voting sub-districts located in Wake County. With regard to this recommendation, Director Drennan stated the following: "In making that recommendation, I initially misread the workload table which resulted in my telling the Subcommittee that District 10 was the second most needy district in the Second Division, based on workload. That was not correct, and, when I discovered my error during the conference process, I told the House Leadership and the Senate appropriations leaders about it."²⁷

29. Minutes from the 19 May 1993 House Appropriations Subcommittee on Justice & Public Safety support Mr. Drennan's memory in this regard. These minutes state:²⁸

Mr. Drennan (then acting AOC Director) said the Senate had approved a new District 9A so the eighth Judge was given to that district. The House had not approved that addition. Should the formula be followed, the eighth Judge would go to District 22. However, District 10 has only one Judge and needs another Judge. Mr. Drennan recommended that the committee put the last Judge in District 10 in order to keep two Judges in each division.

Representative Holt explained that the splitting of District 9 was a Senate Bill, which the House had not taken up. To split

²⁶ Preclearance Report pp. 31- 32 and Exhibit 21

²⁷ Preclearance Report p. 156

²⁸ Exhibit 21

District 9 would require the splitting of two Judicial Districts and one Prosecutorial District. The cost would add up to over \$1 million dollars. The House had previously taken the position that they would not recognize any splitting of districts because of the money involved.

Approved Rankings: (7 available in House, 8 in Senate Version)

- | | | |
|--------|--------|---------------------|
| 1) 15A | 4) 25B | 7) 2 |
| 2) 8B | 5) 17B | 8) 10 |
| 3) 20B | 6) 27B | 8) 9A (Senate Only) |

Representative Brubaker, with the endorsement of the Chair, moved to take out 9A, and to decide the other district later, to be determined based on need. The motion was seconded and adopted.

30. On 27 May 1993, the House Appropriations Committee favorably reported its substitute for Senate Bill 27 to the full House, and it was approved.²⁹

31. The record reflects the House process pertaining to the passage of the House substitute for Senate Bill 27 had significant minority participation and approval. Ten (10) of the sixty-seven (67) members of the House Appropriations Committee were black and one was a Native American.³⁰ Eighteen (18) of the one hundred twenty (120) members of the full House were black, and one was Native American.³¹

32. On 3 June 1993, the Senate refused to concur in the House substitute for Senate Bill 27, and a conference committee was named. Four (4) of

²⁹ Preclearance Report p. 32

³⁰ Preclearance Report p. 32

³¹ Preclearance Report p. 32

the twenty-two (22) Senate conferees were black, and four (4) of the twenty-one (21) House conferees were black.³²

33. The Conference Committee submitted a report to both houses recommending, among other things, the inclusion of provisions for a new Judicial District 9A and the personnel to staff it and a total of eight (8) new resident superior court judgeships, including a new judgeship for District 10A.³³ All of the minority members of the Conference Committee signed the Conference Committee Report. *Id.*

34. Thereafter, Senate Bill 27 adopted the recommendations of the Conference Committee, and it passed the Senate and the House on party line votes.³⁴ All minority members of both houses voted for the bill, and it became law on 9 July 1993(Chapter 321 of the 1993 Sessions Laws, *hereafter "the 1993 legislation"*). This statute was pre-cleared by DOJ in a letter dated 14 February 1994.³⁵

35. Extrapolating from the 1990 Census data, the following is the proportion of Wake County voters to superior court judges as of 1993 after the enactment of the 1993 legislation:

Judicial District No.	Residents	No. of Judges Elected	Voting Ratio
10-A	53,588	2	26,794 to 1
10-B	174,942	2	87,471 to 1
10-C	100,097	1	100,097 to 1
10-D	94,753	1	94,753 to 1

³² Preclearance Report p. 32

³³ Preclearance Report p. 32

³⁴ Preclearance Report p. 32

³⁵ Preclearance Report p. 32

Among other things, the 1993 legislation increased the voting strength of minorities in District 10A, but did nothing to remedy (a) the marginalization of the weight afforded to the votes cast by minority voters in Districts 10B, 10C, or 10D, or (b) the significant disparity between the weight afforded to votes cast in District 10A as compared to voters in Districts 10B, 10C, and 10D. In fact, it increased the existent disparity.

36. Previously, the undersigned has found and otherwise concluded that “[t]he State of North Carolina has a compelling interest in creating judicial districts that do not have the intent or the effect of abridging non-white votes and in establishing judicial districts that assure minorities attain the office of superior court judge.” The undersigned still subscribes and reaffirms these findings and conclusions; however, even these important interests have their limits. The issue before this court is not whether these are important interests or whether majority-minority districts can be an effective tool in furthering these interests – they both are.

Rather, the issues before this court are whether there was any actual need for the State to take action in furtherance of these interests in 1993 (i.e., was further remedial legislation needed to assure minorities attain the office of resident superior court judge) and, if so, whether the State, in furtherance of this interest, ensured that disparity in voter strength occasioned by this action was not substantially greater than necessary to accommodate these interests.

37. During trial, defendants urged the undersigned to find (a) that the addition of a second resident superior court judge to District 10A was a

conscious decision by the General Assembly to establish judicial districts that assure minorities attain the office of superior court judge, and (b) that the addition of a second resident superior court judge to District 10A and the disparity in voter strength occasioned by this addition is not substantially greater than necessary to accommodate the State's interests. The court finds that defendants have failed to meet their burden of proof on these issues for several reasons.

38. Prior to the enactment of the 1993 legislation, there was a significant disparity in voter strength among Wake County's districts. However, the worst case of voter disparity arose in comparing District 10A (53,588 voters electing 1 judge) and District 10C (100,097 voters electing 1 judge). This amounts to slightly less than a two (2) to one (1) disparity in comparative voting strength.

39. Following the enactment of the 1993 legislation, however, the worst case of voter disparity arose in comparing District 10A (53,588 voters electing 1 judge or 26,794 voters to 1 judge) and District 10C (100,097 voters electing 1 judge). This amounts to a disparity of approximately four (4) to one (1) in favor of voters residing in District 10A. Similarly, this legislation increased the disparity between Districts 10A, 10B and 10D by more than three (3) to one (1) in favor of District 10A.

40. Because Wake County's caseload did not require another judge at that time, the newly created judge became a "rover" and was subject to regular assignment outside Wake County upon its creation.³⁶

³⁶ Donald Stephens Affidavit

41. Though defendants characterize the assignment of a second resident superior court judge to District 10A as a "conscious decision" of the General Assembly to create a minority judgeship, the record does not support this contention. None of the minutes or official records presented during trial mention that this was the intention of even a single identified member of the General Assembly or that the necessity of creating a minority judgeship was even discussed, much less voted on or approved.

42. Indeed, the official records of the General Assembly and the record before this court simply indicate that the Senate passed Senate Bill 27 which did not include a new judgeship for Wake County, and the House passed a substitute to Senate Bill 27 that did include a new judgeship for Wake County. It is not known whether the House's substitute bill specifically assigned a new resident superior court judge to District 10A or whether this bill, as the minutes of 19 May 1993 subcommittee meeting indicate, simply stated a resident superior court judge would be added to District 10, meaning one of Wake County's four sub-districts.

Further, if a new resident superior court judge was specifically added to District 10A during the House budgeting process, nothing in the record definitively reflects when this was done, what specific persons were responsible for this decision, what motivated this decision, or why.

43. At best, the record indicates that, after AOC learned the House would not approve new Judicial District 9A, AOC recommended adding a second judge to District 10 (i.e., one of the four Wake County districts) based on

an errant belief that the workload tables justified the addition of a new judgeship to Wake County and that the House concurred in this errant recommendation and agreed to assign a judge to District 10 at some point in time "based on need."³⁷ Thereafter, the substitute House bill was assigned to a conference committee, and the Conference Committee and both houses of the General Assembly approved a compromise bill adding a new judge to District 10A when neither population nor workload supported allocating this judgeship to District 10A.

44. At some point in time before the 1993 legislation was enacted, AOC brought the error of its prior recommendation to add a new Judge to District 10 to the attention of the House and Senate leaders – a recommendation that was predicated on AOC's errant belief as to Wake County's workload and need.

45. The only parts of the record supporting defendants' contention that adding a second judge to District 10A was a conscious decision of the legislature to create a minority judgeship comes in the form of a statement attributed by Director Drennan to an unidentified source. This statement, however, must be placed in proper context.

46. After AOC submitted its initial preclearance report to DOJ on 13 October 1993, DOJ objected. On 13 December 1993, AOC sent a second letter and report to DOJ responding to its objections. In this second submission, Director Drennan states the following: "I was told that the House had made a

³⁷ Preclearance Report p. 156 and Exhibit 21

decision, which was subsequently concurred in by the Senate, to include one minority judgeship among the eight new judges."³⁸ However, neither AOC nor Mr. Drennan made any mention of this conversation or the legislature's supposed intent in the comprehensive preclearance report that AOC submitted to DOJ a mere two months earlier on 12 October 1993.

47. The undersigned does not find this reported conversation to be persuasive or dispositive on the issue of what the General Assembly intended in 1993 when it added a second resident superior court judge to District 10A. Indeed, in his 13 December 1993 letter to DOJ, Director Drennan himself points out the difficulty of ascertaining legislative intent (and his inability to derive it) when he wrote:

The questions you posed, in many instances, involved information about the legislative process, as opposed to the substance of the decisions made by the Legislature. Many of the details of that process are not documented. Most of the deliberations about these issues occurred in the appropriations process. Records are kept in that process to make sure that money decisions are properly documented and financial details can be determined later. But they are not documented with the same degree of care as are congressional or legislative redistricting decisions. . .

To the extent that the inquiries are concerned with legislative intent, it is a question that cannot easily be answered with finality or precision. Legislative intent is the sum of the individual decisions of 170 people. Their motives are private, unless they choose to reveal them.

48. To the degree this conversation took place, the undersigned declines to impute what one unidentified person may have told Director Drennan about the intentions of the General Assembly to the entirety of the General

³⁸ Preclearance Report p. 156

Assembly. From the record before the court, it appears a second judge was added to District 10A at some part of the legislative process, but the court is not persuaded that it was the product of a conscious, deliberate, or uniform intention of the legislature to create an additional majority-minority judgeship.

The issue in this case is not whether, in the abstract, creating minority judgeships can be an important governmental interest or whether this is what the legislature intended in 1993. Rather, the issue before the court is whether the additional judgeship created in 1993 was legitimately necessary to promote an actual important governmental interest and whether this judgeship created no more disparity in voter strength than was substantially necessary to promote this actual interest – i.e., was a new minority judgeship justified and, if so, should this judge have been assigned to District 10A versus some other district.

49. To the degree defendants suggest a second judgeship needed to be added or was added to prevent the plaintiffs in the *Alexander* litigation from re-opening their case, the undersigned finds this contention to be unsupported by the record and declines to make this finding.

50. Among other things, AOC's 13 October 1993 preclearance report states that the process leading up to the adoption of the 1993 legislation was the subject of "extraordinary publicity and public discussion and debate."³⁹ Yet, the record contains no evidence indicating a re-opening of the *Alexander* litigation was even discussed, much less threatened, or that a second judge

³⁹ Preclearance Report p. 33

needed to be added to a majority-minority district to avoid this result. Moreover, AOC itself stated the following in its 13 October 1993 preclearance submission:⁴⁰

There is no past or pending litigation concerning the proposal to create a new 9A Judicial District or to realign the present 17A and 9th Districts, or concerning the creation of any additional superior court judgeships or district court judgeships. None of these proposals responded to any threatened litigation.

51. Defendants have failed to prove and the record does not reflect that legislative action was reasonably needed in 1993 to further the interest of having minorities attain the office of superior court judge. As indicated *supra.*, thirteen (13) minorities attained the office of resident superior court judge following the enactment of the 1987 legislation, and three (3) of these judges resided in districts that were not majority-minority districts.

Further, AOC's 13 December 1993 preclearance submission states the following:⁴¹

The nine judicial districts in which minority-majority districts are located already rank high in their number of superior court judges on the basis of the workload and population based needs of those districts, and thus low in their need for additional judges. Other districts in which minority voters are not in the majority, but constitute a significant majority, have the capacity to elect minority judges in the next few years, as incumbent judges reach retirement age and minority lawyers acquire additional experience and public recognition in the interim.

52. Further, since all but one of the new resident superior court judgeships and both of the special superior court judgeships created by the 1993 legislation were to be initially filled by gubernatorial appointment, the State's interest in having minorities attain the office of superior court judge could have

⁴⁰ Preclearance Report p. 35

been promoted by other means that would have caused less disparity among voters.⁴²

53. The State's interest in providing meaningful opportunities for minorities to attain the office of superior court judge is not the only relevant interest when it comes to creating and assigning new superior court judgeships. The AOC preclearance submissions identify other important State interests that are promoted by creating and allocating new superior court judgeships based on population and workload. Population and workload are objective factors that tend to promote a number of important interests such as (a) avoiding undue politicization of the allocation of judgeships, (b) furthering the central purposes of judicial rotation, (c) recognizing the interests of the voters of each district in selecting a fair portion of superior court judges that is proportionate to their need for judicial resources, and (d) recognition of the special relationship resident superior court judges have to their districts of residence.⁴³ Defendants have failed to show how the State's interest in having more minorities elected in 1993 outweighs these other important interests. Further, defendants have failed to show a second judgeship was added to District 10A to promote these interests.

54. To the degree defendants have argued the addition of a second resident superior court judge to District 10A was necessary to comply with the federal Voting Rights Act ("VRA"), the record and the evidence in this case does not support this finding, and the undersigned declines to so find.

⁴¹ Preclearance Report p. 142

⁴² Preclearance Report p. 159

⁴³ Preclearance Report pp. 167 - 170

55. In its prior order dated 8 February 2006, the undersigned found the following facts: "It is possible to create districts for the election of superior court judges allocated to Wake County, North Carolina (a) that are consistent with current Census data, (b) that comply with the federal Voting Rights Act, the Federal Constitution, the laws of North Carolina, the North Carolina Constitution, and the settlement agreement reached in the *Alexander* litigation, and (c) that do not significantly dilute the strength afforded to plaintiffs' votes." On appeal, defendants did challenge this finding, and the Supreme Court of North Carolina did not address it. Notwithstanding, defendants have failed to present sufficient evidence that would cause the undersigned to modify or rescind this finding.

56. Even if this were not the case, AOC's preclearance materials make it reasonably clear a second judge was not added to District 10A for purposes of complying with the VRA. In responding to DOJ's objections to the 1993 legislation, AOC stated the following:⁴⁴

Request No. 2 implies that more of the additional judges could have been allocated to districts in which minority voters constitute a majority, if the state abandoned the use of population and caseload criteria, at least to the extent necessary to do so. Maintaining the opportunity of minority voters to select superior court judges of their choice is a factor that has been and continues to be considered by local political leaders and by the General Assembly. So far, however, it has not been assumed that compliance with the Voting Rights Act requires the allocation [of] a certain percentage of all new superior court judgeships to the superior court nominating districts in which minority voters are in the minority.

...

⁴⁴ Preclearance Report pp. 169 - 170

We submit that the State's interest in maintaining its population and caseload based method of allocating superior court judges outweighs any marginal or uncertain improvement in the ability of minority voters to select judges of their choice that might be accomplished by abandoning that method.

57. Nowhere in the record does it appear that one of the new judgeships had to be assigned to a majority-minority district to comply with the VRA.

58. Defendants have also failed to establish to the court's satisfaction that the convenience attendant to assigning a second resident superior court to District 10A was substantively considered by the legislature. Further, to the degree convenience was considered by the legislature, defendants have failed to prove to the satisfaction of the court that the second judgeship allocated to Wake County was any more convenient than assigning this judgeship to a different district somewhere else within the State. The record reflects the judge appointed to this district was not needed, was not justified by population or workload, and he became a rover who frequently held sessions of court in places other than Wake County.

59. To the degree defendants have suggested the Wake County districts advance other important governmental interests such as the legislature's consideration of geography, population density, number of citizens in the district eligible to be judges, and/or the number and types of legal proceedings in a given area, the court finds defendants have failed to establish to the court's satisfaction that the legislature was attempting to promote any of these interests in assigning a new judgeship to District 10A.

60. For these and other reasons, the undersigned finds defendants have failed to prove by the greater weight of the evidence that the 1993 legislation advanced important governmental interests at the time it was enacted. Though the undersigned could end its analysis here, the court finds it appropriate to address the second issue on which defendants bear the burden of proof in this case: namely, that the disparity in voter strength created by the 1993 legislation was not substantially greater than necessary to accommodate the State's important interests.

61. As indicated *supra*, the 1987 legislation caused a significant disparity in relative voter strength among Wake County's four (4) superior court districts, and the 1993 legislation effectively doubled this disparity. The record in this case is bereft of any credible evidence suggesting the General Assembly engaged in even cursory, much less deliberate, efforts to determine whether it could promote its interests in ways that would result in substantially less voter disparity among Wake County's superior court districts.

62. Though there were a total of nine (9) majority-minority districts in North Carolina at the time the 1993 legislation was enacted, the record is silent with regard to voter disparity had a second resident superior court judge been added to a majority-minority district other than District 10A in 1993.

63. The record is silent with regard to voter disparity had other districts within the State been reconfigured to create a tenth majority-minority district as compared to simply adding a second resident superior court judge to District 10A in 1993.

64. Given the totality of the record, the undersigned finds defendants have failed to identify or prove that, when the 1993 legislation was enacted, the General Assembly intentionally sought to promote an actual and existing important governmental interest by the addition of a second resident superior court judge to District 10A and further failed to prove that the disparity in voter strength created by the 1993 legislation was not substantially greater than was necessary to accommodate the State's important interests.

E. Following the Enactment of the 1993 Legislation, Voter Disparity in Wake County Increases Substantially and the General Assembly Takes No Action to Remedy this Gross Disparity.

65. Since 1987 and since 1993, the General Assembly has amended superior court judicial districts several times. However, despite these amendments, Wake County has remained divided into the same four (4) superior court districts created in 1987 despite the fact that there has been a substantial change in circumstances that did not exist when these districts were created and a second superior court judge was added to District 10A in 1993.

66. After the 1987 legislation created the boundaries for Wake County's Superior Court districts and a second judge added to District 10A in 1993, Wake County experienced a high rate of population growth. Some areas of the county grew dramatically while others have remained unchanged. This demographic growth and shift created significant population variations within Wake County's judicial districts that were non-existent in 1987 and in 1993. A summary of Wake County's Superior Court districts, the population of these

districts, and the comparative voting strength of these districts as of 2005 was as follows:

Judicial District No.	Residents	No. of Judges Elected	Voting Ratio
10-A	64,398	2	32,199 to 1
10-B	281,493	2	140,746 to 1
10-C	158,812	1	158,812 to 1
10-D	123,143	1	123,143 to 1

67. Given the disparities reflected in the above table, residents of District 10A have approximately four (4) times as much voting power as residents of District 10D, approximately four and one-half (4½) times as much voting power as residents of District 10B, and approximately five (5) times as much voting power as residents of District 10C.

68. As of the date of this hearing, over twenty-two (22) years have elapsed since the boundaries of Wake County's superior court districts were first created by the enactment of the 1987 legislation and over nineteen (19) years have elapsed since a second resident superior court judge was added to District 10A. Irrespective of whether these legislative enactments may have promoted an important governmental interest when they were adopted, the General Assembly has an obligation to re-district from time to time to account for changes in circumstances, and defendants have failed to prove that Wake County's districting plan currently promotes an important governmental interest. Defendants have likewise failed to prove that Wake County's present districting plan causes no greater disparity in voter strength than is substantially necessary to accommodate the State's important interests. See N.C. Const. Art. IV § 9(1)

The record in this case is bereft of any credible evidence suggesting that, after the 1993 legislation was enacted, the General Assembly engaged in any efforts at any point in time to determine whether the current districting plan continues to promote important governmental interests or whether it could promote its important interests in ways that would result in substantially less voter disparity either after the 1993 legislation was enacted or after the 2000 Census data was released.

69. Though the 2000 Census data reflect a substantial change in circumstances as compared to the 1990 Census data, defendants have presented no evidence as to what, if any, impact these changed circumstances have had on the State's important governmental interests. Similarly, defendants have presented no evidence as to what, if anything, the General Assembly has done to ensure that, in light of these changed circumstances, voter disparity is not substantially greater than is reasonably necessary to promote one or more important governmental interests.

70. To the degree defendants have suggested the Wake County districts have been maintained to advance other important governmental interests such as the legislature's consideration of VRA compliance, geography, population density, number of citizens in the district eligible to be judges, and/or the number and types of legal proceedings in a given area, the court finds defendants have failed to establish to the court's satisfaction that the legislature was attempting to promote any of these interests in assigning a new judgeship to District 10A.

71. Given the totality of the record, the undersigned finds defendants have failed to identify or prove that the current districting plan for Wake County promotes a specific important governmental interest and further failed to prove that the disparity in voter strength occasioned by the current districting plan is not substantially greater than is necessary to accommodate the State's important interests.

72. Though the State of North Carolina has an important interest in creating judicial districts that do not have the intent or the affect of abridging non-white votes and in establishing judicial districts that assure minorities attain the office of superior court judge, the undersigned finds that, when the General Assembly created Wake County's current districting plan in 1993 and thereafter continued to maintain this districting plan without modification, the General Assembly failed to discharge its obligation to organize and re-organize the judiciary from time to time as circumstances may require.

73. The current districting plan for the election of superior court judges allocated to Wake County, North Carolina creates unequal weighing of votes. The votes of residents in Wake County, North Carolina under the current districting plan do not count equally in the election of superior court judges allocated to Wake County, and, given the substantially and grossly disproportionate weight afforded to the votes in the various judicial districts in Wake County, the court finds that these districts were established and thereafter maintained in a manner that was and is arbitrary and capricious.

F. Additional Findings of Fact Based on Stipulations Filed With the Court.

74. For purposes of this trial, all evidence previously admitted into evidence during other sessions of court remained in evidence and was considered by the undersigned.

75. According to the records maintained by the North Carolina State Board of Elections, the current Wake County resident superior court judges reside in the following precincts: (a) Abraham Penn Jones – Wake County Precinct 01-28, (b) Michael R. Morgan – Wake County Precinct 01-13, (c) Howard E. Manning, Jr. – Wake County Precinct 01-04, (d) Paul C. Ridgeway – Wake County Precinct 01-07, (e) Paul G. Gessner – Wake County Precinct 14-02, and (f) Donald W. Stephens – Wake County Precinct 01-30.

76. No elections are presently scheduled in Wake County Superior Court in 2010 for the reason that the terms of the judges therein are set to expire as follows: (a) Abraham Penn Jones – 2012, (b) Michael R. Morgan – 2012, (c) Howard E. Manning, Jr. – 2016, (d) Paul C. Ridgeway – 2014, (e) Paul G. Gessner – 2014, and (f) Donald W. Stephens – 2012.

77. The 2010 Census is, as of the date of this trial, being conducted. It is anticipated that the United States Census Bureau will begin releasing data usable for redistricting purposes to the North Carolina General Assembly in February 2011 and will have released all data usable for redistricting purposes by the end of April 2011 and every ten (10) years thereafter.

78. Unless specifically modified, qualified, or rescinded by this order and judgment or by the decision entered by the Supreme Court of North

Carolina on 28 August 2009, the undersigned adopts and incorporates the findings of fact appearing in the order and judgment entered in this matter on 8 February 2006.

Based on the foregoing findings of fact, the undersigned makes the following:

II. Conclusions of Law.

1. This civil action is properly before the court, having been remanded for further proceedings by the 28 August 2009 decision of the North Carolina Supreme Court.

2. Pursuant to the decision of the North Carolina Supreme Court, this court is to apply intermediate scrutiny to plaintiffs' challenge to the constitutionality of N.C. GEN. STAT. § 7A-41.

3. Under the intermediate scrutiny standard as outlined by the Supreme Court and applicable to plaintiffs' challenge, plaintiffs must make a *prima facie* showing of considerable disparity between similarly situated superior court districts in Wake County in order to trigger constitutional review. Such a showing in turn triggers the State's duty to show significant or important interests unrelated to vote dilution that justify the General Assembly's creation of the four districts within Wake County and to show that the disparity in voter strength between those districts is not substantially greater than necessary to accommodate the State's interests.

4. The Supreme Court has held that plaintiffs had made the requisite *prima facie* showing of considerable disparity between the four superior court

districts in Wake County, triggering the State's duty to show that the challenged statute advances important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests.

5. During trial, plaintiffs argued the State can only meet its burden by clearly, positively, and unmistakably making it appear beyond a reasonable doubt that the challenged statute advances important governmental interests unrelated to vote dilution and do not weaken voter strength substantially more than necessary to further those interests. However, the undersigned concludes the standard of the greater weight of the evidence is applicable, and the court applies this standard.

6. The State of North Carolina is not a covered jurisdiction for purposes of VRA § 5. Though forty (40) of this State's one hundred (100) counties, are covered jurisdictions and are subject to § 5 requirements, Wake County is not one of the covered counties in North Carolina. See 42 U.S.C. § 1973c; 28 C.F.R. § 51.4 and pt. 51 App. at 96-97(2002)(App. 1-3). It was not necessary to add a second resident superior court judge to District 10A to comply with VRA.

7. In pertinent part, Article IV, Section 9(1) provides "[t]he General Assembly shall, from time to time, divide the State into a convenient number of Superior Court judicial districts and shall provide for the election of one or more Superior Court Judges for each district." N.C. Const. Art. IV, § 9(1).

8. Article I, Section 19 of the North Carolina Constitution provides, that "[n]o person shall be denied the equal protection of the laws." N.C. Const. Art. I, § 19.

9. Pursuant to N.C. Gen. Stat. 7A-41, Wake County, North Carolina is divided into four districts that elect six (6) resident superior court judges. Districts 10-A and 10-B are multi-member districts, and the residents of each of these districts elect two (2) resident superior court judges. Districts 10-C and 10-D are single-member districts, and the residents of each these districts elect one (1) resident superior court judge.

10. The court concludes that, when the General Assembly created and allocated a second resident superior court judgeship to Wake County District 10A, it did so without promoting an important governmental interest unrelated to vote dilution and without causing substantially more disparity among voters as was necessary to promote an important governmental interest.

11. The court concludes that, when the General Assembly continued to maintain the current districts and judgeships assigned to Wake County, North Carolina, it failed to reasonably comply with its constitutional obligation to organize superior court districts "from time to time" as circumstances may necessitate and that the maintenance of these judgeships and districts did not and does not promote an important governmental interest unrelated to vote dilution and without causing substantially more disparity among voters as was necessary to promote an important governmental interest.

12. The current districting plan for the election of superior court judges allocated to Wake County, North Carolina created grossly disproportionate districts within the same county when this districting plan was enacted in 1993, and it currently establishes grossly disproportionate districts within the same county. The disproportionate districts in Wake County significantly dilute the strength of plaintiffs' votes, and defendants failed to prove by the greater weight of the evidence that these districts promoted an important governmental interest when they were created or that they currently promote an important governmental interest unrelated to vote dilution. Accordingly, the court concludes that, when the General Assembly created and thereafter continued to maintain the resident superior court districts for Wake County, it did so arbitrarily, capriciously, and unconstitutionally.

13. The current districting plan for the election of superior court judges allocated to Wake County, North Carolina creates unequal weighing of votes. The votes of residents in Wake County, North Carolina under the current districting plan do not count equally in the election of superior court judges allocated to Wake County, North Carolina. In addition to failing to prove these districts promote important governmental interests, the court finds defendants have failed to prove by the greater weight of the evidence that these districts do not weaken voter strength substantially more than necessary to further important governmental interests. Accordingly, the court concludes these districts were established and thereafter maintained in a manner that was and is arbitrary, capricious, and unconstitutional.

14. N.C. GEN. STAT. § 7A-41(b)(3) – (6) create the districts for the election of superior court judges allocated to Wake County, North Carolina, and it denies plaintiffs equal protection of the law under N.C. Const. Article I, § 16. For this reason, N.C. Gen. Stat. 7A-41, as it applies to Wake County, North Carolina, is unconstitutional.

15. Though this court has the authority to designate new districts for superior court judges allocated to Wake County, North Carolina, the court concludes that redistricting is primarily a responsibility assigned to the legislative branch of government and the courts should only exercise its authority to designate new districts as an absolute last resort. For these reasons, the court concludes that the North Carolina General Assembly should first be given a reasonable amount of time to cure the constitutional infirmities described in this order.

16. Unless specifically modified, qualified, or rescinded by this order and judgment or by the decision entered by the Supreme Court of North Carolina on 28 August 2009, the undersigned adopts and incorporates the conclusions of law appearing in the order and judgment entered in this matter on 8 February 2006. Further, the undersigned adopts and incorporates by references the legal conclusions appearing in the decision entered by the Supreme Court of North Carolina on 28 August 2009.

III. Decree.

Based on the foregoing findings of fact and conclusions of law, it is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs' request for declaratory relief pursuant to N.C. GEN. STAT. § 1-253 is ALLOWED, and, to the extent N.C. GEN. STAT. § 7A-41(b)(3) – (6) creates the districts for the election of superior court judges allocated to Wake County, North Carolina, this part of the statute is declared unconstitutional and void for the reasons stated herein.

2. Plaintiffs' motion for a permanent injunction pursuant to N.C. GEN. STAT. § 1A-1, Rule 65 is DENIED without prejudice pending future orders of this court.

3. The court retains jurisdiction over this cause for the purpose of reviewing any new superior court districts and entering appropriate orders concerning new districting plans. The court further retains jurisdiction over this cause to hold such hearings and enter such orders as may be necessary should there be a change in circumstances and to consider and implement any remedies that are reasonably necessary and enter such orders as may be necessary to cure the constitutional infirmities described in this order.

4. Counsel for both parties are directed to promptly report to the undersigned all material developments concerning the establishment of new districts for superior court judges assigned to Wake County, North Carolina. Further, counsel for both parties are directed to promptly report to the

undersigned when the United States Census Bureau releases all data from the 2010 Census that is usable for redistricting purposes.

The parties hereto in open court and through counsel agreed that any judgment could be signed out of term, out of district.

This the 28th day of May, 2010.


DONALD L. SMITH
SUPERIOR COURT JUDGE PRESIDING

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing Judgment and Order in the above captioned action upon all other parties to this cause by placing copies thereof in the United States Mail, postage prepaid, addressed to the party or attorney for said party.

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This the 28th day of May, 2010.



DONALD L. SMITH
SUPERIOR COURT JUDGE PRESIDING