

NORTH CAROLINA COURT OF APPEALS

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

v.)

From Wake County

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,)
Appellants.)

BRIEF OF DEFENDANTS-APPELLANTS

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From Wake County

BRIEF OF DEFENDANTS-APPELLANTS

QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE EQUAL PROTECTION CLAUSE OF ARTICLE I, § 19, OF THE NORTH CAROLINA CONSTITUTION REQUIRES POPULATION PROPORTIONALITY IN THE ESTABLISHMENT OF SUPERIOR COURT DISTRICTS?

- II. DID THE TRIAL COURT ERR IN NOT TREATING DOCUMENTS SUBMITTED BY THE ADMINISTRATIVE OFFICE OF THE COURTS TO THE U.S. DEPARTMENT OF JUSTICE TO OBTAIN PRECLEARANCE OF 1993 N.C. Sess. Laws 321 AS A RECORD OF REGULARLY CONDUCTED ACTIVITY OR A PUBLIC RECORD OR REPORT?

- III. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE GENERAL ASSEMBLY ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT ESTABLISHED THE SUPERIOR COURT DISTRICTS FOR WAKE COUNTY?

STATEMENT OF THE CASE

Plaintiffs are three voters in Wake County. Blankenship is a resident of Superior Court District 10-B, Dimmock is a resident of District 10-C and Johnson is a resident of District 10-D. They filed this action on December 5, 2005, challenging N.C.G.S. § 7A-41(b)(3)-(6) and the creation of Superior Court districts in Wake County. On December 9, 2005, then-Chief Justice I. Beverly Lake, Jr., designated this matter as “exceptional” pursuant to Rule 2.1 of the General Rules of Practice and assigned the Hon. Donald L. Smith to hear all proceedings in this action. On February 8, 2006, following an expedited discovery, motion, briefing and trial schedule, the trial court entered an order declaring N.C.G.S. § 7A-41(b)(3)-(6) unconstitutional and enjoining future use of the Superior Court districts created in Wake County by those statutes. In that same order, however, the trial court stayed its judgment and order pending appeal.¹

On March 10, 2006, respondents filed their Notice of Appeal. The Record on Appeal was timely filed in the Court of Appeals on July 31, 2006, and was docketed on August 9, 2006. (R p. 1)

STATEMENT OF THE FACTS²

This lawsuit challenges the way in which Superior Court districts are drawn in Wake County, with plaintiffs alleging that Superior Court districts must, under the

¹ On August 1, 2006, plaintiffs moved the trial court, pursuant to N.C.G.S. § 1A-1, Rule 62(c), to lift or modify the stay of the injunction granted in the February 8, 2006, Judgment and Order (“Judgment”). That motion was denied by order of the trial court on August 25, 2006.

² The majority of facts relevant to this case were stipulated to by the parties. (R pp. 64-75; 79-83)

North Carolina Constitution, be proportional in terms of population.³ The Superior Court has existed in North Carolina since the earliest days of our republican form of government. The Judiciary Act of 1777 divided the State into six Superior Court districts: Wilmington, New Bern, Edenton, Halifax, Hillsborough and Salisbury. *See History of the Supreme Court of North Carolina*, 177 N.C. 617, 619 (1919) (Clark, C.J.). Two more districts were created in the following ten years: Morganton in 1782 and Fayetteville in 1787. *Id.* “In each of these a court was held twice each year by the three judges jointly.” *Id.* In 1790, a fourth judgeship was created, and the eight Superior Court districts were grouped into two “ridings”: the Eastern Riding (Edenton, Halifax, New Bern and Wilmington) and the Western Riding (Fayetteville, Hillsborough, Morganton and Salisbury). *Id.* It was not until 1806, when the number of Superior Court ridings and the number of Superior Court Judges was increased by statute to six each, that “a Superior Court for the first time was required to be held twice a year in each county by a single judge.” *Id.* at 619-20. During all of this time, Superior Court Judges were elected by joint ballot of both houses of the General Assembly and held office “during good behavior.” N.C. CONST. of 1776, §13. *See also History of the Supreme Court of North Carolina*, 177 N.C. at 618; John L. Sanders, *A Brief History of the Constitutions of North Carolina*, in NORTH CAROLINA GOVERNMENT 1585-1979 (John L. Cheney, Jr. ed., 1981) 795; N.C. CONST. of 1776 in NORTH CAROLINA GOVERNMENT 1585-1979 at 812.

³ While plaintiffs have maintained throughout this lawsuit that they are only challenging the constitutionality of the Superior Court districts in Wake County, they admitted in their Petition for Discretionary Review Prior to Determination by the North Carolina Court of Appeals, filed in the Supreme Court on August 24, 2006, that, “though plaintiffs only challenged Wake County’s superior court districts, the outcome of this appeal will set boundaries for the establishment of superior court districts throughout the State of North Carolina.” (Pet. at 8)

“The Constitution of 1868 made the Supreme and Superior Courts constitutional offices and beyond repeal by legislative action. It also made the judges elective by the people for the term of eight years.” *History of the Supreme Court of North Carolina*, 177 N.C. at 618. That Constitution specifically provided for the State to be divided into twelve judicial districts. *See* N.C. CONST. of 1868, art. IV, § 12.⁴ The Constitutional Convention of 1875 amended the Constitution by providing for nine rather than twelve judicial districts; it also provided that “the General Assembly may reduce or increase the number of districts” and provided for statewide rotation of judges. *See* NORTH CAROLINA GOVERNMENT 1585-1979, at 879. In 1950, the Constitution was again amended by the voters to provide that

[t]he General Assembly shall divide the State into a number of judicial districts which may be increased or reduced and shall provide for the election of one or more Superior Court Judges for each district.

See 1949 N.C. Sess. Laws 393 (rewriting what was then Article IV, § 10, of the Constitution) *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 937. *See also* 1951 N.C. Sess. Laws p. xxiv (showing Article IV, § 10, as amended).

On November 6, 1962, the voters of North Carolina ratified an amendment to the North Carolina Constitution that rewrote Article IV. *See* 1961 N.C. Sess. Laws 313 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 951-57. Article IV, as amended, provided:

⁴ “The State shall be divided into twelve judicial districts, for each of which a Judge shall be chosen, who shall hold a Superior Court in each county in said District, at last twice in each year, to continue for two weeks, unless the business shall be sooner disposed of.” Section 13 of Article IV specified the composition of each of the twelve judicial districts “[u]ntil altered by law.” *See* NORTH CAROLINA GOVERNMENT 1585-1979 at 856-57.

The 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, § 7(1) (as amended in 1961) *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 952. Because Article IV was entirely rewritten by the amendment of 1962, few changes of an editorial or substantive nature were made when the revised Constitution of 1971 was presented to the voters for ratification. *See* NORTH CAROLINA STATE BAR, REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION (1968), at 31. While the provision regarding creation of Superior Court districts was re-numbered as § 9(1) of the 1971 Constitution, the language was not altered by the adoption of the 1971 Constitution.

The present Superior Court Districts 10-A, 10-B, 10-C and 10-D were created in essentially their present form by 1987 N.C. Sess. Laws 509. That Act established, *inter alia*, the following districts for the five resident Superior Court Judges allocated to Wake County:

- District 10-A as a single member majority-minority district;
- District 10-B as a multi-member district encompassing a geographic area extending from Raleigh to Cary;
- District 10-C as a single member district encompassing a geographic area extending from Northern Wake County to Southeastern Wake County; and
- District 10-D as a single member district encompassing a geographic area largely comprised of North Raleigh.

See 1987 N.C. Sess. Laws 509. This plan was enacted partially in response to litigation initiated in 1986 by the North Carolina Association of Black Lawyers and others against Governor James G. Martin. In that action, the plaintiffs alleged that

features of North Carolina's system of electing Superior Court Judges had the purpose and effect of abridging nonwhite voting strength in violation of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq.*, as amended, and the Fourteenth Amendment of the United States Constitution. (*See* Stip. Ex. 8, Consent Order in *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1987), R Exhibits, Tab D). *See also* *Republican Party v. Martin*, 980 F.2d 943, 948 (4th Cir. 1992). Following the enactment of 1987 N.C. Sess. Laws 509, a consent judgment was entered in *Alexander*. (*See* Stip. Ex. 8) In 1993, the legislature enacted legislation that provided for the election of two Resident Superior Court Judges from District 10-A, as well as in districts 3-B (Carteret, Craven and Pamlico), 15-A (Alamance), 17-B (Stokes and Surry), 20-B (Stanly and Union), 25-B (Catawba) and 27-B (Cleveland and Lincoln). *See* 1993 N.C. Sess. Laws 321, § 200.5(b) and (d). This statute – which also altered the number of District Court districts, judges and magistrates, the number of prosecutorial districts and the number of full-time assistant district attorneys per prosecutorial district, *see* § 200.4 – was submitted for preclearance by the Administrative Office of the Courts and precleared by the United States Justice Department by letter dated February 14, 1994. (Stip. 28, R p. 72)

The boundaries of Districts 10-A, 10-B, 10-C and 10-D, as well as other Superior Court districts, were modified in 2001. *See* 2001 N.C. Sess. Laws 333. Section 2 of that Act suggests that these modifications were made to match precinct boundaries at the time.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appeal of right lies to this Court pursuant to N.C.G.S. § 7A-27(b).

STANDARD OF REVIEW

“It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated.” *Piedmont Triad Reg’l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). This action challenges the constitutionality of N.C.G.S. § 7A-41(b)(3)-(6). A statute “will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)).

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE EQUAL PROTECTION CLAUSE OF ARTICLE I, § 19, OF THE NORTH CAROLINA CONSTITUTION REQUIRES POPULATION PROPORTIONALITY IN THE ESTABLISHMENT OF SUPERIOR COURT DISTRICTS.

ASSIGNMENTS OF ERROR NOS. 1, 2, 3, 6, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 34, 37, 45, 46, 51, 52, 53, 57, 58, 59, 60

(R pp. 93, 94, 96, 98, 99, 100, 101, 102)

Plaintiffs argue, and the trial court held, that the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution requires population proportionality among districts. That clause, which was first placed in the Constitution in 1971 and which echoes the cognate clause of the Fourteenth Amendment to the United States Constitution, states simply: “No person shall be denied the equal protection of the laws” *Cf.* U.S. CONST. amend XIV, § 1 (“nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”) While the federal courts have held that the federal Equal Protection Clause *does* require population

proportionality for legislative districts – the “one person, one vote” principle – those same courts have consistently held that no such equal protection requirement adheres to the election of judges.

Apparently recognizing the complete lack of authority for applying the one person, one vote principle to judicial elections, the trial court avoided imposing such a standard on the creation of Superior Court districts – indeed, the trial court avoided stating *any* standard for what constitutes acceptable proportionality or unacceptable disproportionality among judicial districts. Nevertheless, the trial court held that some proportionality is required. An examination of relevant case law and of North Carolina’s constitutional history demonstrates that there is no support for the trial court’s holding.

A. THE PRINCIPLE OF ONE PERSON, ONE VOTE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION HAS BEEN HELD TO APPLY ONLY TO ELECTIONS OF REPRESENTATIVES.

Plaintiffs began their Amended Complaint by noting that “the United States Supreme Court [has] recognized the fundamental principle of ‘one-person, one-vote’ and held that elective districts established by the several states must ensure that constituents enjoy substantially equal voting power.” (Am. Compl. at 1; R p. 33) The United States Supreme Court has recognized the principle of one person, one vote, stating that “the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.” *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964).

In *Reynolds*, the Court struck down legislative districts drawn for the Alabama legislature on the grounds that, due to population disparities, those districts violated

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court explained its reasoning this way:

Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 562. The Court went on to explain:

State legislatures are, historically, the fountainhead of representative government in this country. . . . But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.

Id. at 564-65. For this reason, the Court held

that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for *state legislators* is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Id. at 568 (emphasis added).

In *Avery v. Midland County*, 390 U.S. 474 (1968), the United States Supreme Court made clear that its holding in *Reynolds* applied equally to certain political subdivision of a state. "If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population." *Id.* at 480. The Court concluded by stating: "Our decision today is only

that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with *general governmental powers over an entire geographic area* not be apportioned among single-member districts of substantially unequal population.” *Id.* at 485-86 (emphasis added).

B. IT IS SETTLED UNDER FEDERAL LAW THAT THE PRINCIPLE OF ONE PERSON, ONE VOTE DOES NOT APPLY TO THE ELECTION OF JUDGES.

Despite the holdings in *Reynolds*, *Avery* and their progeny, plaintiffs overstate the holdings of the Supreme Court when they allege that the United States Supreme Court has ‘held that elective districts established by the several states must ensure that constituents enjoy substantially equal voting power.’” (Am. Compl. at 1; R p. 33) As *Avery* makes clear, it is only elective districts for the election of officials or bodies “with general governmental powers over an entire geographic area” that are subject to the one person, one vote requirement. *Avery*, 390 U.S. at 485-86. The federal courts have made clear that this description does not include an elected judiciary.

In *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff’d*, 409 U.S. 807, (1972), for example, the plaintiff challenged North Carolina’s scheme of electing Superior Court judges on the grounds that it violated the one person, one vote rule established by the Supreme Court. The majority of the three-judge panel of the Middle District of North Carolina disagreed. In rejecting the plaintiff’s claim, the court noted:

We find no case where the Supreme Court, a Circuit Court, or a District Court has applied the “one man, one vote” principle or rule to the judiciary. To hold with the plaintiff here and invalidate the election procedure permitted by these statutes, this court would be plowing new ground, and extending the “one man, one vote” principle far beyond the fields heretofore entered by the Supreme Court.

Holshouser, 335 F. Supp. at 930-31. The Court then examined three cases it viewed as instructive on the issue presented.

First, the court looked at *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964), quoting with approval this language:

[E]ven assuming some disparity in voting power, the one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency. Moreover there is no way to harmonize selection of these officials on a pure population standard with the diversity in type and number of cases which will arise in various localities, or with the varying abilities of judges and prosecutors to dispatch the business of the courts. An effort to apply a population standard to the judiciary would, in the end, fall of its own weight.

Holshouser, 335 F. Supp. at 931 (quoting *Stokes*, 234 F. Supp. at 577). The *Holshouser* court then turned to *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3 (1966), which dealt with a challenge to Ohio's requirement that each county be allotted at least one judge in the Court of General Jurisdiction. The plaintiffs in that case argued that this requirement violated the one person, one vote principle because it resulted in a disproportionate number of judges among large and small counties. In language again quoted by the *Holshouser* court, *see*, the *Buchanan* court rejected this argument, stating that:

plaintiffs have attempted to draw a close analogy to the legislative reapportionment cases, but they have failed to grasp the thrust of that line of authority. The first principle inherent in our republican form of government is that individual citizens submit to rule by legislative fiat enacted by a majority of a popularly elected legislative body working within a constitutional framework. When the representatives to that legislative body are malapportioned among the several districts within the political unit, then the voting strength of the individual citizens in these subdivisions is of unequal weight. It is the dilution of power in

the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause. . . .

But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. *Judges do not represent people, they serve people.* They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

Buchanan, 249 F. Supp. at 865 (emphasis added).

Next, the *Holshouser* court, *see* 335 F. Supp. at 932, considered *New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967), quoting that case's holding that:

The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.

. . . .

In contrast to legislative reapportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

Rockefeller, 267 F. Supp. at 153-154.

Finally, the *Holshouser* court provided its own analysis.

While *Buchanan* and *Rockefeller* deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular

constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.

We hold that the one man, one vote rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down this election procedure and these statutes.

Holshouser, 335 F. Supp. at 932. The holding in *Holshouser*, which was affirmed by the Supreme Court, was confirmed the following year in *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973). It is unquestionably now settled law. *See, e.g. Rodriguez v. Bexar County*, 385 F.3d 853 (5th Cir. 2004). *See also Chisom v. Roemer*, 501 U.S. 380, 403 (1991). *Id.*, 501 U.S. at 411 (Scalia, J., dissenting) (“It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment’s requirement of ‘one person, one vote.’”)

C. THE EQUAL PROTECTION CLAUSE OF ARTICLE I, § 19, OF THE NORTH CAROLINA CONSTITUTION SHOULD NOT BE INTERPRETED DIFFERENTLY FROM THE FEDERAL CONSTITUTION WITH RESPECT TO THE PRINCIPLE OF ONE PERSON, ONE VOTE AND JUDICIAL ELECTIONS.

While it is well-established that the principle of one person, one vote as required by the Equal Protection Clause of the Fourteenth Amendment does not apply to judicial elections, there is no appellate case law addressing the question of whether the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution would nevertheless require population proportionality among Superior Court districts as plaintiffs claim. Nevertheless, there is no basis for determining that the Equal Protection Clause of North Carolina’s Constitution should be interpreted differently from the Equal Protection Clause of the United States Constitution with regard to

population proportionality among Superior Court districts, and the trial court erred when it deviated from well-established precedent.

In interpreting the meaning of a word or phrase used in a constitutional provision, our courts have often attempted to ascertain the intention of those by whom the constitution was adopted. *Elliott v. Board of Equalization*, 203 N.C. 749, 166 S.E. 918 (1932); *Collie v. Commissioners*, 145 N.C. 170, 59 S.E. 44 (1907). Also, the courts of this State have looked to interpretations of similar words or phrases in the U.S. Constitution. Although decisions of the Supreme Court of the United States construing federal constitutional provisions are not binding on our courts in interpreting cognate provisions in the North Carolina Constitution, they are, nonetheless, highly persuasive. *Watch Co. v. Brand Distributors*, 285 N.C. 467, 206 S.E.2d 141, (1974).

Stam v. State, 47 N.C. App. 209, 213-14, 267 S.E.2d 335, 339-40 (1980), *aff'd in part and rev'd, on other grounds, in part*, 302 N.C. 357, 275 S.E.2d 439 (1981). The federal decisions holding the principle of population proportionality inapplicable to the judiciary should be considered “highly persuasive,” especially given the thorough analysis of the question provided by the federal courts, including the three-judge panel in *Holshouser*.

An analysis of the history of the relevant constitutional provisions demonstrate that it was not the intention of those who drafted and adopted the Constitution to require population proportionality among judicial districts. The constitutional provision governing the creation of Superior Court districts – Article IV, § 9(1) – provides, in pertinent part:

The General Assembly shall, from time to time, divide the State into a convenient number of Superior Court districts and shall provide for the regular election of one or more Superior Court Judges for each district.

As noted *supra*, this language was placed in the Constitution by amendment in 1962, the same year that the United States Supreme Court announced the one person, one

vote principle in *Baker v. Carr*, 369 U.S. 186 (1962). In 1966, North Carolina's legislative districts for the State House and Senate were held unconstitutional based on federal one person, one vote requirements, as were the state constitutional provisions then governing the drawing of State House districts. *See Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd per curiam*, 383 U.S. 831 (1966). At that time, the Constitution provided for Senate Districts to be drawn, based on population, after each decennial census, while members of the House of Representatives were "to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation." *See* 1967 N.C. Sess. Laws p. xv (showing Article II, §§ 4 and 5 prior to amendment). Some form of population requirement for Senate Districts has existed in the Constitution since 1835 and for the House since 1868. *See* JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION: WITH HISTORY AND COMMENTARY* 80-81 (1993).

As a result of the decision in *Drum*, in 1967 the legislature enacted proposed constitutional amendments to redefine the manner in which it should draw new legislative districts after each decennial census and to incorporate the one person, one vote principle. 1967 N.C. Sess. Laws 640; *see also* ORTH, *supra* at 81. Under the Constitution as amended, each Senator or Representative "shall represent, as nearly as may be, an equal number of inhabitants." 1967 N.C. Sess. Laws 640, § 1.

Subsequently, the North Carolina State Constitution Study Commission completed a comprehensive review and revision of the State Constitution, which resulted in submission to and ratification by the voters of what has been called the

1971 Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 367, 562 S.E.2d 377, 388 (2002) (Orr, J., concurring in part).

The 1971 Constitution, the state's third, was not . . . a product of haste and social turmoil. It was instead a good government-measure, long matured and carefully crafted by the state's lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it. . . . Unlike its two predecessors, the latest constitution was not drafted by elected representatives; prepared by experts it was referred to the General Assembly, which then presented it to the voters.

ORTH, *supra* at 20. Notably, the 1971 Constitution left unchanged the language quoted *supra* from the 1962 and 1968 amendments regarding the requirements for drawing Senate, House and Superior Court districts. *See* N.C. CONST. art I, §§ 3(1) and 5(1), and art. IV, § 9(1).

This constitutional history and comparison of provisions is instructive with regard to the claim raised by plaintiffs. While the Constitution was amended in 1968 specifically to base “representation in both the Senate and House of Representatives upon the requirement of ‘one- person, one-vote,’” *Stephenson*, 355 N.C. at 367, 562 S.E.2d at 388 (Orr, J, concurring in part), no similar amendment was made to Article IV, § 9(1), concerning Superior Court districts, either in 1968 or in the adoption of the 1971 Constitution. Obviously, those who drafted the 1968 amendments, as well as the Constitution Study Commission that prepared the 1971 Constitution, understood the implications of *Drum* and other cases requiring adherence to the principle of population proportionality and incorporated that principle into our constitutional provisions regarding legislative districts, yet no similar effort was made to incorporate the principle into the provision regarding Superior Court districts.

Instead, Article IV, § 9(1), continues to provide that “[t]he General Assembly shall, *from time to time*, divide the State into *a convenient number* of Superior Court

districts and shall provide for the regular election of one or more Superior Court Judges for each district.” (Emphasis added.) Not only does this provision not incorporate a population proportionality requirement, it stands in stark contrast to the provisions regarding legislative districts. While legislative districts are required to be redrawn “at the first regular session convening after the return of every decennial census of population, taken by order of Congress,” N.C. CONST. art. II, §§ 3 and 5, the legislature is only required to divide the State into Superior Court districts “from time to time.”⁵ Had those who drafted and those who adopted the Constitution intended that Superior Court districts be required to reflect, in any way, population proportionality, then the legislature would have been required to redraw Superior Court districts more often than “from time to time.” Logically, the Constitution would have required that Superior Court districts be redrawn at the least after every census, as is required for legislative districts.

Likewise, Article IV, § 9(1), unlike the constitutional provisions governing legislative districts, makes no mention of the population of the districts drawn, but rather simply requires the legislature to “divide the State into a convenient number of Superior Court districts,” leaving great discretion to the legislature as to how to draw those districts. Neither the Equal Protection Clause of Article I, § 19, nor any other constitutional provision imposes the additional requirement on the General

⁵ Since 1835, the North Carolina Constitution has required that the apportionment of the House of Representatives (then the House of Commons) be based on a census or other enumeration ordered by the State or by Congress. *See* 1835 Amendments to the Constitution of 1776 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 818. Similar provisions were included in the Constitution of 1868 for both the House and Senate. N.C. CONST. of 1868, art. II, §§ 5 and 6 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 850-51.

Assembly that Superior Court districts be relatively proportional in population. History shows that there has never been any understanding otherwise.

The Equal Protection Clause of Article I, § 19, was not expressly incorporated into the Constitution until its revision in 1971 (when, again, the principle of population proportionality was well-understood by those who drafted that revision). Nevertheless, the concept was inherent in the Constitution prior to being expressly added. *See S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971). The provisions relied on in holding that equal protection was “inherent” in our Constitution – particularly the “law of the land” clause – were included in the Constitution of 1868, which first provided for popular election of judges. N.C. CONST. of 1868, art. I, §§ 7 and 17 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 847. That same Constitution provided that North Carolina “shall be divided into twelve judicial districts,” *Id.* at art. IV, § 12 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 856, and actually specified the composition of those twelve districts “[u]ntil altered by law.” *Id.* at art. IV, § 13 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 857. Notably, the districts range widely in population, with the largest, the Seventh District, having a population of 128,931, more than three times that of the smallest district, the Twelfth District, with a population of 36,934.⁶ While the districts are not at all proportional with regard to population, they are relatively proportional in terms of the number of counties in each district: six counties (two districts), seven counties (six districts) or eight counties (four districts). Clearly, what the Constitutional Convention of 1868 considered relevant in drawing Superior Court

⁶ Population data for the twelve districts can be derived from NORTH CAROLINA GOVERNMENT 1585-1979, at 857 and 1041 *et seq.*

districts was not population proportionality but providing the twelve Superior Court judges with a relatively equal number of court sessions and a geographically manageable district in which to travel.⁷ In other words, the Constitutional Convention considered the convenience of the judiciary, not proportionality or disparity of population, to be the relevant factor in drawing Superior Court districts and clearly did not believe that proportionality of population was required by any other provision of the Constitution it adopted. The proposition that the Equal Protection Clause of Article I, § 19, requires proportional population among Superior Court districts is simply not supported by either the current text of the Constitution or by our constitutional history; it is refuted by them.

Unlike the federal Constitution, the Constitution of North Carolina is not a grant of authority to the legislative branch but a limitation of the legislature's power and authority. Our Supreme Court has often said that “[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.” *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner*, 269 N.C. at 595, 153 S.E.2d at 150). This is so because the acts of the legislature are effectively the acts of the people.

All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.

⁷ Aside from providing for twelve judicial districts, Article IV, § 12, of the 1868 Constitution also provided that “a Judge” would be chosen for each district, “who shall hold a Superior Court in each county in said District, at least twice in each year, to continue for two weeks, unless the business shall be sooner disposed of.” N.C. CONST. of 1868, art. IV, § 12 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 856. The Constitution of 1868 did not provide for rotation of judges among districts.

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). See also *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests “with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people’s elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution.*” (citation omitted)). “[I]f there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action.” *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (citations omitted).

The statute challenged by plaintiffs – N.C.G.S. § 7A-41 – is, therefore, presumed valid unless it can be shown beyond a reasonable doubt that it conflicts with the Constitution or exceeds the express limitation of legislative power contained in the Constitution. Neither the Equal Protection Clause of Article I, § 19, nor any other provision of our Constitution provides reason for the courts of North Carolina to depart from the “highly persuasive” federal decisions that hold, with “rare unanimity,” that the principle of one person, one vote does not apply to judicial elections. *In re Cavanaugh*, 65 Pa. Commw. 620, 638, 444 A.2d 1308 (1982); *Stam*, 47 N.C. App. at 213-214, 267 S.E.2d at 339-40. History clearly shows that North Carolina framers were of the same unanimity. For these reasons, the trial court erred by granting judgment to plaintiffs and declaring that Article I, § 19, required population proportionality among Superior Court districts in Wake County.

D. THE TRIAL COURT’S ATTEMPT TO LIMIT THE EFFECT OF ITS RULING TO WAKE COUNTY OR TO FOUR SUPERIOR COURT DISTRICTS, RATHER THAN RECOGNIZING THAT ANY PROPORTIONALITY REQUIREMENT MUST BE APPLIED STATEWIDE, DEMONSTRATES THAT THE TRIAL COURT’S RULING IS NOT ROOTED IN ESTABLISHED LAW.

The trial court held that the Equal Protection Clause requires population proportionality among Superior Court districts, but inexplicably held that such proportionality applied only to the four districts in Wake County. By so doing, the trial court both ignored the nature of the Superior Court and failed to ground its holding in any workable principle of population proportionality. It held, in effect, that Superior Court districts in Wake County must be proportional to each other but not to any other Superior Court districts in the State.

Superior courts are not county courts. “The superior court is one court having statewide jurisdiction.” *Richardson v. Richardson*, 261 N.C. 521, 528, 135 S.E.2d 532, 537 (1962). The essence of a population proportionality principle is that each voter must have equal weight to other voters in the relevant jurisdiction.

If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population.

Avery, 390 U.S. at 480. If the principle of vote dilution based on population disparity is to be applied to the Superior Court, a single court of statewide jurisdiction, then the principle that equal weight must be given to voters in *all* Superior Court districts throughout the State must also be applied. The trial court failed to acknowledge this critical concept.

Pursuant to N.C.G.S. § 7A-41, there are currently ninety-five resident Superior Court Judges in North Carolina. Those ninety-five resident Superior Court Judges are

elected from sixty-six Superior Court districts, with some districts electing more than one judge. (Stip. 14, R p.68) Exhibit 6 to the Jointly Proposed Stipulations adopted by the Court shows the population, according to the 2000 Census, of each of North Carolina's sixty-six Superior Court districts (except for districts 12-A, 12-B, 12-C, 14-A and 14-B⁸), as well as the number of Resident Superior Court Judges elected from each district and the "ideal population" for districts, given that there are ninety-five Resident Superior Court Judges.⁹ (Stip. 15, R p. 68) As can be seen from Exhibit 6, the populations of North Carolina's Superior Court districts range widely, from 89.12% greater than the "ideal population" (District 26C, Mecklenburg County) to -66.00% less than the "ideal population" (District 10-A). (R Exhibits, Tab D-6) If plaintiffs are correct that proportional population is required among Superior Court districts, then there is no basis for limiting that holding to only one county, or four districts, of a statewide Superior Court with sixty-six districts. If plaintiffs are correct, *all* Superior Court districts in North Carolina must be proportional to each other. If plaintiffs are correct, regular redrawing of Superior Court districts would be required, presumably at least as often as following every decennial Census to avoid population disparities resulting from changes in population. The Constitution, however, requires

⁸ Because the statutory district boundary definitions for districts 12-A, 12-B, 12-C, 14-A and 14-B do not comport with current census geographic information, it is not possible, using the General Assembly's redistricting database and the 2000 census information, to state with accuracy the population of these districts. (Stip. 15, R p. 68)

⁹ The "ideal population" for each district is obtained by dividing the total population, according to the 2000 census, of North Carolina by ninety-five (the total number of Resident Superior Court Judges) and then, for each Superior Court district, multiplying the quotient by the number of Resident Superior Court Judges elected from that district. (Stip. 15, R p. 68)

that Superior Court districts be revised only “from time to time.” N.C. CONST. art. IV, § 9(1).

Plaintiffs’ attempt to limit their claim of vote dilution to only four districts is simply untenable, as is the trial court’s attempt to limit its holding to only four districts. Either the North Carolina Constitution prohibits population disparities among Superior Court districts or it does not. Defendants have shown it does not. But should the Court agree with plaintiffs that it does, then such a prohibition would of necessity be applicable throughout the State.

II. THE TRIAL COURT ERRED IN NOT TREATING DOCUMENTS SUBMITTED BY THE ADMINISTRATIVE OFFICE OF THE COURTS TO THE U.S. DEPARTMENT OF JUSTICE TO OBTAIN PRECLEARANCE OF 1993 N.C. SESS. LAWS 321 AS A RECORD OF REGULARLY CONDUCTED ACTIVITY OR A PUBLIC RECORD OR REPORT.

ASSIGNMENT OF ERROR NO. 12

(T pp. 13, 31-32)

Defendants proffered below the affidavit of Paul Reinhartsen, Research Specialist for Legal Services for the Administrative Office of the Courts (“AOC”). (R pp. 76-78; Exhibits to R, Tab E) Exhibit A to his affidavit was a copy of the documentation submitted to and received from the United States Department of Justice (“USDOJ”) with regard to the preclearance submission of 1993 N.C. Sess. Laws 321, §§ 200.4, 200.5 and 200.6 (“Chapter 321”), the act that added a second resident Superior Court judgeship to District 10-A. (*See* Reinhartsen Aff., Ex. A (“1993 Submission”)). The trial court stated that it would consider the affidavit “so far as it may be material or relevant” (T p. 13, line 9; App. at 1), but refused to fully consider the documentation in Exhibit A, of which Reinhartsen was custodian, on the grounds that statements in that documentation was hearsay or not made on personal

knowledge. (T p. 31, line 25 - p. 32, line 2; App. at 2-3) This led the trial court to ignore AOC's rationale for requesting the additional judgeship in District 10-A and its representations to USDOJ as to why the additional judgeship was created.

The North Carolina Rules of Evidence provide that the prohibition against hearsay evidence is not applicable to records of regularly conducted business activity or to reports of public agencies prepared in accordance with the agency's responsibilities. N.C.G.S. § 8C-1, Rules 803(6) and (8) (App. at 4). The AOC was required by State law to submit Chapter 321 to USDOJ for preclearance under the Voting Rights Act. *See* N.C.G.S. § 120-30.9C. There simply can be no question that the report submitted by AOC pursuant to the requirements of that statute was admissible under N.C.G.S. § 8C-1, Rules 803(6) and 803(8). The trial court erred by limiting its consideration of the 1993 Submission. This error was material as shown in Argument III *infra*.

III. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE GENERAL ASSEMBLY ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT ESTABLISHED THE SUPERIOR COURT DISTRICTS FOR WAKE COUNTY.

ASSIGNMENTS OF ERROR NOS. 7, 11, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 41, 42, 45, 47, 49, 50, 55, 56, 57, 58, 59

(R pp. 94, 100, 101, 102)

The trial court found that, "when the General Assembly created the judicial districts for Superior Court judges assigned to Wake County, North Carolina, it acted arbitrarily and capriciously." (Judgment, Conclusion of Law ¶ 25; R pp. 99-100. *See also* Conclusions of Law ¶ 26-27; R p. 100) The record in this case not only will not support this holding, it refutes it.

Because Chapter 321, §§ 200.4, 200.5 and 200.6, contained amendments to Chapter 7A of the General Statutes that made numerous changes regarding voting in counties covered by § 5 of the Voting Rights Act, Chapter 321's changes to Chapter 7A were submitted to USDOJ for preclearance. (*See R p. 112.*)

In his initial submission to the USDOJ, James C. Drennan, then-Director of AOC, described the history of the creation, pursuant to 1987 N.C. Sess. Laws 509, of majority-minority districts, including District 10-A. (*See Stips. 17-24, R pp. 69-71*) With regard to the selection of which districts received new judgeships in the 1993 legislation, Drennan explained:

These districts were selected for new judgeships on the basis of a formula which takes into consideration the population of the district and its weighted caseload, and of other factors relevant to the state's overall needs for additional superior court judges.

(1993 Submission at 15) When USDOJ initially denied preclearance and requested additional information, including the criteria for creating new judgeships and choosing the districts for those new judgeships, (*id.* at 113-16), Drennan explained that the new judgeships “were based primarily on the basis of workload needs. Where workload was not a factor, a desire to add a judge in a minority district was a major factor.” (*Id.* at 118)

In elaboration, he noted that AOC originally asked the legislature for sixteen new Superior Court judgeships in the 1993-95 biennium. (*Id.* at 153) When budget constraints suggested that the legislature would provide only eight new Superior Court judgeships, AOC recommended the districts to which those new judgeships should be assigned, with two of the eight new judgeships to be assigned to each of the State's (then) four Superior Court judicial divisions. (*Id.* at 156) With specific regard to District 10-A, Drennan stated:

The recommendation to put the judge in District 10 was based on my recommendation. In making that recommendation, I initially misread the workload table which resulted in my telling the [House] 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. I was told that the House had made a decision, which was subsequently concurred in by the Senate, to include one minority judgeship among the eight new judges.

Since District 10-A was in the first set of districts in the Second Division on the caseload tables that contained a minority district, it would have been the logical choice to place the minority judgeship. As a result, the House version of the budget from the beginning included a judgeship in District 10A, initially based on my misreading of the tables and thereafter based on a conscious decision to create a judgeship in a minority district.

(*Id.* at 156) Drennan also represented to USDOJ that

[t]he superior court judgeship for District 10A is not supported by the caseload tables, but as indicated, it is the first minority district in the Second Division, which is where the judgeship is needed. Also, as indicated earlier, I originally recommended the 10th District to the House as an alternative to District 9A.

(*Id.* at 158) It is clear that a great deal of consultation took place between AOC and the legislature concerning the addition of a Superior Court judgeship to District 10-A, with the original suggestion for this new judgeship coming from the Director of AOC himself.

Even when it was discovered, when the appropriations bill was in conference committee to resolve differences between the versions of that bill as passed by the House and Senate, that the caseload table did not necessarily support the addition of a new judgeship in District 10-A, the legislature still desired to include that judgeship among the eight Superior Court judgeships it was creating. Just six years earlier, the *Alexander* litigation had alleged that North Carolina's method of electing Superior

Court judges violated of § 2 of the Voting Rights Act and had been resolved by the enactment of 1987 N.C. Sess. Laws 509 and its creation of nine Superior Court districts with majority African-American or Native-American populations. (Stip. 24, R p. 71; 1993 Submission at 10); *see also Republican Party v. Martin*, 980 F.2d 943, 948 (4th Cir. 1992). The Consent Order dismissing *Alexander* specifically reserved

plaintiffs' and plaintiff-intervenors' right to move for reconsideration of this consent judgment in light of the circumstances of the future operation of the method of election contained in Chapter 509 or in light of other material changes in circumstances. This consent judgment is entered also without prejudice to the right of any party to move to reopen this action should the North Carolina General Assembly amend Chapter 509.

(Stip. 24, R p.71; R Exhibits, Tab D-8) Chapter 321, § 200.5, did amend Chapter 509 by (1) creating a new Superior Court district, and (2) adding eight new Superior Court judgeships and increasing the total number of Resident Superior Court Judges from 80 to 88.

Without question, the General Assembly had a reasonable basis for believing that if it increased the total number of resident Superior Court judgeships by 10%, without providing that at least one of the new judgeships would be elected from one of the nine "minority districts," North Carolina would be left vulnerable to an attack under § 2 of the Voting Rights Act. This could come through the reopening of the *Alexander* litigation or the filing of new litigation. Additionally, the inclusion of a new judgeship in District 10-A supported the State's showing in its § 5 preclearance submission under the Voting Rights Act that Chapter 321, § 200.5, did not have the purpose of retrogression for members of a racial minority group.¹⁰ (See Stips. 36-38,

¹⁰ Of course, any judicial decision that alters the districts created by 1987 N.C. Sess. Laws 509, could make the State vulnerable to a § 2 attack under the Voting Rights Act. It should also be noted that Chapter 321 included District 10-A in the

R pp. 80-81) The Director of AOC believed that District 10-A was “the logical choice to place the minority judgeship.” (1993 Submission at 156.)

Such concerns clearly demonstrate that the addition of a new Superior Court judgeship in District 10-A was neither arbitrary nor capricious, an exceedingly difficult standard for plaintiffs to meet. *See State ex rel. Martin*, 325 N.C. 438, 450 n.2, 385 S.E.2d 473, 479 n.2 (1989) (“continued compliance with the Voting Rights Act’ . . . [is] a public purpose”).¹¹ “State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside [as arbitrary or capricious] if any state of facts reasonably may be conceived to justify it.” *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). *See also Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780 (1989), *cert. denied*, 493 U.S. 954 (1989); *Jones v. Weyerhaeuser Co.*, 141 N.C. App. 482, 539 S.E.2d 380 (2000), *appeal dismissed and disc. rev. denied*, 353 N.C. 525, 549 S.E.2d 858 (2001). These concerns can only be viewed as a compelling state interest – ensuring compliance with federal law and avoiding litigation under the Voting Rights Act. “[E]very presumption favors the validity of a statute. It will not be declared invalid unless its

Second Judicial Division, which also includes several counties covered by § 5 of the Voting Rights Act. *See* 1993 N.C. Sess. Laws 321 § 200.4. (*See also* Stip. 37, R pp. 80-81.) Rotation of judges within a division made the make-up of the Second Judicial Division as a whole relevant to preclearance; indeed USDOJ specifically raised a question about this. (*See* 1993 Submission at 124, 167-170.)

¹¹ The trial court did hold that, “though the State of North Carolina may have a compelling interest in establishing minority majority districts, the General Assembly must have a rational factual basis when it assigns districts to judges.” (Judgment, Conclusion of Law 25; R pp. 99-100) Nevertheless, the trial court apparently did not consider the representations of AOC to the legislature to provide it with “a rational factual basis” and determined that the legislature acted arbitrarily and capriciously when it followed the suggestion of the Director of AOC.

unconstitutionality be determined beyond reasonable doubt.” *Baker*, 330 N.C. at 334, 410 S.E.2d at 889 (quoting *Gardner*, 269 N.C. at 595, 153 S.E.2d at 150). Because plaintiffs dispute the validity of statutes duly enacted by the General Assembly, they are directly challenging the people of North Carolina. The burden rests with them to establish that the statutes are “clearly, positively, and unmistakably” unconstitutional. *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443, 528 S.E.2d 905, 907 (2000). Their challenge can succeed only if they show, beyond a reasonable doubt, that the provisions they protest are prohibited by the Constitution. *Baker*, 330 N.C. at 334, 410 S.E.2d at 889. Plaintiffs have failed to meet this burden, and the trial court erred in holding otherwise.

CONCLUSION

For the foregoing reasons, defendants respectfully pray that the judgment below be reversed.

Respectfully submitted, this the 11th day of September, 2006.

ROY COOPER
Attorney General

Electronically Submitted,
Alexander McC. Peters
Special Deputy Attorney General
State Bar No. 13654
apeters@ncdoj.gov

Susan K. Nichols
Special Deputy Attorney General
N.C. State Bar No. 9904
snichols@ncdoj.gov

Karen E. Long
Special Deputy Attorney General
State Bar No. 8874
klong@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh NC 27602
Telephone: 919.716.6900

CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect 12), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This 11th day of September, 2006.

Electronically Submitted,
Alexander McC. Peters
Special Deputy Attorney General

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the Foregoing **BRIEF OF DEFENDANTS-APPELLANTS** in the above titled action upon all other parties to this cause by:

- Hand delivering a copy hereof to each said party or to the attorney thereof;
- Transmitting a copy hereof to each said party via facsimile transmittal;
or
- Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Donald G. Hunt. Jr.
Jamie L. Vavonese
AKINS, HUNT & FEARON, P.C.
134 N. Main St.
P.O. Box 266
Fuquay-Varina, North Carolina 27526

Counsel for Plaintiffs

This the 11th day of September, 2006.

Electronically Submitted,
Alexander M.C. Peters
Special Deputy Attorney General

APPENDIX

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1 not relevant or not material, that it won't affect the
2 outcome of this trial, unless I make a finding of fact
3 based on incompetent or irrelevant evidence, isn't
4 that the rules?

5 MR. HUNT: Yes, your Honor.

6 MR. PETERS: Yes, your Honor.

7 THE COURT: All right. Then, I'll tell you
8 what I'm going to do. I'm going to admit Exhibit A,
9 insofar as it may be material or relevant.

10 Right now, I don't anticipate any findings
11 of fact based on Exhibit A. But if I do, you can call
12 it to my attention, and I'll probably strike that
13 finding of fact.

14 MR. HUNT: Thank you, your Honor. I'll just
15 note for the record our objection stands.

16 THE COURT: And by the way -- by the way, I
17 would like to keep this underlined --

18 MR. HUNT: If the Court would like for me to
19 identify for the record what I handed up, I'll be glad
20 to do so.

21 THE COURT: All right, do that.

22 MR. HUNT: Exhibit A to Paul Reinhartsen's
23 affidavit was Bate stamped, that means that they were
24 assigned page numbers that are consistent throughout
25 the body of the document, which may not be consistent

1 basis of our objection.

2 THE COURT: You don't know that I'm
3 accepting it as anything.

4 MR. HUNT: So it's not a public record.

5 THE COURT: Let me just say this. If he had
6 been told that by the Speaker of the House, so what?

7 MR. HUNT: Correct, and our point --

8 THE COURT: Or by the President Pro Tem of
9 the Senate, so what? It's still of the same
10 consequence.

11 MR. HUNT: Correct. And I think all we're
12 saying is we're not imputing whether a majority/
13 minority district is a good or a bad public policy
14 decision. What we're saying is that when you make
15 that decision, you cannot go stick the judge in
16 District 10-A with 60,000 voters to the disadvantage
17 of everybody else in Wake County. Not when Judge
18 Stephens' affidavit makes it quite clear that you
19 could have just shifted the district lines altogether
20 to accomplish the same purpose and make everybody
21 else's vote count roughly equally.

22 THE COURT: Right. I'm going to stick with
23 the ruling I made later -- I mean earlier. I'm going
24 to let it in, but I'm going to be very careful, and I
25 want both of you to make sure I base no findings on

1 anything contained in there that is hearsay or is made
2 without personal knowledge.

3 And you're going to get -- both of you are
4 going to get your shot later on, you'll find that out.

5 All right. Let's go ahead now with getting
6 the evidence in. I have ruled conditionally on
7 Exhibit A.

8 MR. HUNT: And we have introduced the
9 stipulations, and we'll be getting the new set of
10 stipulations concerning --

11 THE COURT: Now, these new set are the ones
12 that I suggest, which tells how we modified the
13 election of the judges after drawing the districts --

14 MR. PETERS: In 1987.

15 THE COURT: -- in '86 or '87.

16 MR. PETERS: Right.

17 THE COURT: So I want y'all to have a chance
18 to look at that, and I hope that will be coming in
19 with just another stipulation.

20 MR. PETERS: That's what I would anticipate.

21 THE COURT: We've got your first set of
22 stipulations, then your next set, which were amended.

23 MR. HUNT: The VRA stipulations, your Honor.

24 THE COURT: Yep. And now we're going to be
25 getting the stipulations on how the judges were

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GENERAL STATUTES OF NORTH CAROLINA
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*** ANNOTATIONS CURRENT THROUGH JUNE 23, 2006 ***

CHAPTER 8C. EVIDENCE CODE
§ 8C-1. RULES OF EVIDENCE
ARTICLE 8. HEARSAY

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

N.C. Gen. Stat. § 8C-1, Rule 803 (2006)

Rule 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(6) Records of Regularly Conducted Activity. -- A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

....

(8) Public Records and Reports. -- Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law-enforcement personnel, or (C) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

....

HISTORY: 1983, c. 701, s. 1.