

No. 455PA06-2

TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

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

Plaintiffs Appellants,

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,

Defendants Appellees.

BRIEF OF PLAINTIFFS APPELLANTS

QUESTIONS PRESENTED

- I. DO THE SINGLE-MEMBER AND MULTI-MEMBER DISTRICTS ESTABLISHED FOR THE ELECTION OF SUPERIOR COURT JUDGES RESIDING IN WAKE COUNTY UNCONSTITUTIONALLY DEPRIVE PLAINTIFFS OF EQUAL PROTECTION UNDER THE LAW?

- II. DID THE COURT OF APPEALS IMPROPERLY FIND THE TRIAL COURT IMPERMISSIBLY REFUSED TO ADMIT EVIDENCE AT TRIAL?
- III. IF THE TRIAL COURT IMPROPERLY EXCLUDED ADMISSIBLE EVIDENCE, WHAT IS THE APPROPRIATE REMEDY?

STATEMENT OF THE CASE

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). (R pp. 4-11) 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 an Emergency Superior Court Judge to decide the case. (R p. 12)

This matter was tried as a bench trial on 6 and 7 February 2006. (R p. 84) On 8 February 2006, the trial court entered a final judgment and order concluding the Wake County judicial districts are unconstitutional as drawn and granting declaratory judgment and a permanent injunction in favor of plaintiffs. (*Id.*) The trial court, on its own motion, stayed the judgment and order pending appeal.

On 10 March 2006, defendants filed notice of appeal to the Court of Appeals of North Carolina. The appeal was heard on 19 March 2007. On 3 July 2007, the Court of Appeals filed its decision reversing the trial court's judgment.

On 7 August 2007, plaintiffs filed notice of appeal 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 20 August 2007, defendants filed a motion to dismiss plaintiffs' appeal for lack of substantial constitutional question. On 9 October 2008, this Court filed its order allowing defendants' motion to dismiss and allowing plaintiffs' petition for discretionary review.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiffs' appeal is based on the grant of their petition for discretionary review N.C. GEN. STAT. § 7A-31.

STATEMENT OF THE FACTS

Plaintiffs challenge the constitutionality of the Superior Court election districts for Wake County established by N.C. Gen. Stat. § 7A-41 (2004) (*hereafter "Section 7A-41"*). (R pp. 4-11, 33-41) In the simplest of terms, plaintiffs allege the single-member and multi-member districts in Wake

County violate the Equal Protection Clause of the North Carolina Constitution as set forth in Article I § 19. (*Id.*)

Section 7A-41 divides the State of North Carolina into sixty-six (66) Superior Court election districts, and these districts elect ninety-five (95) Superior Court Judges. (R p. 68) Section 7A-41 divides Wake County into two (2) single-member districts (Districts 10-C and 10-D) and two (2) multi-member districts (Districts 10-A and 10-B). (R p. 66)

The present geographic boundaries for Wake County's judicial districts were first established by a 1987 amendment to Section 7A-41 (*hereafter "the 1987 Amendment"*). (R pp. 69-71) The 1987 Amendment was adopted to resolve a lawsuit alleging North Carolina's system for electing Superior Court Judges had the purpose and effect of abridging nonwhite voting strength in violation of the Voting Rights Act and the Fourteenth Amendment of the federal Constitution. *See Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1987) (*hereafter "the Alexander litigation" or "Alexander"*). (*Id.*)

Inter alia, the settlement brokered in *Alexander* required the creation of two new Superior Court districts in Wake County. (R pp. 70-71) One of these districts was to be a single-member minority majority district, and the

second district was to be a multi-member district with sufficient minority influence to enable a minority member to be elected. (*Id.*)

The 1987 Amendment divided Wake County into four (4) Superior Court districts for the election of five (5) Superior Court Judges. (*Id.*) The 1987 Amendment created three single-member districts (Districts 10-A, 10-C and 10-D) and one multi-member district (District 10-B). District 10-A was a single-member majority minority district, and District 10-B was a multi-member district deemed to have sufficient minority influence. (*Id.*)

Before adopting the 1987 Amendment and creating the new Wake County districts, the General Assembly conducted a careful and reasoned study. (Appdx. p. 18-24) *Inter alia*, it investigated whether the districts would comply with federal and state law, whether these districts would promote compelling State interests, and whether the districts would be commensurate with Wake County's existing and future needs. (*Id.*) The General Assembly conferred with persons who had personal knowledge regarding these matters, and it used objective criteria such as current and projected demographic data and the locations of the residences of the currently elected Superior Court Judges to configure the new districts. (*Id.*) The General Assembly's overall approach was governed by "the basic democratic principle of roughly equal representation by ensuring that the

remaining districts in Wake County [would be] generally the same size in terms of geographic area and population and that the single member majority minority district's population and size should be as close as possible to the other districts in size and population." (*Id.*)

In 1993, the General Assembly amended Section 7A-41 to authorize eight (8) new Superior Court Judges (*hereafter "the 1993 Amendment"*). (R p. 72) Though the 1993 Amendment did not alter the geographic boundaries of Wake County's Superior Court districts, it did assign a second Superior Court Judge to District 10-A making Wake County's single-member majority minority district a multi-member district. (R p. 72) In contrast to the deliberative investigation and analysis undertaken in 1987 and the carefully crafted Amendment resulting from this process, the General Assembly took virtually no such measures prior to adopting the 1993 Amendment, and it made no attempt to narrowly tailor it to promote compelling government interests. (Appdx. p. 18-24).

The record shows the 1987 Amendment was specifically necessary to comply with the federal Voting Rights Act of 1965 (*hereafter "VRA"*). The same is not true with the 1993 Amendment.¹ Prior to trial, the parties

¹ The federal Voting Rights Act of 1965, as amended, is codified at 42 U.S.C. § 1973 *et seq.*, and is intended to protect against denial or abridgement of voting rights on the basis of race or color.

stipulated (a) the State of North Carolina is not a “covered” jurisdiction for purposes of Section 5 of the VRA, and (b) though forty of North Carolina’s counties are “covered” jurisdictions under Section 5 of the VRA, defendants stipulated Wake County is not a “covered” county.² (R pp. 79-82) Furthermore, no evidence suggests an additional judgeship was necessary in District 10-A to comply with the more general provisions of Section 2 of the VRA.³

In 1993, James C. Drennan, the Director of the Administrative Office of the Court (*hereafter* “AOC”), misread Wake County’s workload tables and concluded it may need one of the newly created judgeships. (R pp. 90-91, Appdx. 17 - 23) When the Director later brought this error to the attention of the General Assembly, he was ignored. (*Id.*)

² The primary purpose underlying Section 5 of the Voting Rights Act is to avoid retrogression. To effectuate its objectives, the Voting Rights Act requires jurisdictions “covered” by Section 5 that seek to enact or administer any change in a voting standard, practice, or procedure to submit the proposed change to the United States Department of Justice for preclearance. Neither North Carolina nor Wake County are “covered” jurisdictions for purposes of Section 5.

³ Section 2 of the Voting Rights Act generally provides states may not impose any voting qualification, prerequisite or scheme that impairs or dilutes, on account of race or color, a citizen’s opportunity to participate in the political process and to elect officials of his or her choice. The provisions of § 2 are applicable throughout the United States and as such apply to all of

The General Assembly did not consult with persons with knowledge regarding whether Wake County's workload necessitated an additional Superior Court Judge. (Appdx.22 - 23) There is no evidence it reviewed data relative to Wake County's demographics or workload. To make matters worse, the General Assembly ignored ample unsolicited input it received from sitting Wake County Superior Court Judges indicating Wake County did not need and its workload could not justify an additional judge. (Appdx. p.18-24) These same judges advised the General Assembly District 10-A was a poor fit for a new judge for two primary reasons. (*Id.*) First, given the number of lawyers who resided in District 10-A, the available pool of qualified candidates to fill this position was relatively small as compared to the rest of Wake County. (*Id.*) Second, District 10-A's population was already marginal in terms of voter population per judge, and the addition of a second judge to District 10-A would make this district even more disproportional in comparison to other districts in the county. The General Assembly likewise ignored this information. (*Id.*)

The concerns expressed to the General Assembly in 1993 were proven correct. (Appdx. p.18-24) Shortly after passage of the 1993 Amendment, District 10-A's new judge was not needed in Wake County, and this judge

North Carolina, including Wake County. However, they do not require pre-

became a “rover” who was regularly assigned to hold court outside of Wake County. (*Id.*)

After the 1987 Amendment created the boundaries for Wake County’s Superior Court districts, Wake County experienced a high rate of population growth. (R p. 92, Appdx.18 - 24)Some areas of the county grew dramatically while others have remained unchanged. (*Id.*) This demographic growth and shift created significant population variations within Wake County’s judicial districts that were non-existent in 1987. (*Id.*) A summary of Wake County’s Superior Court districts, the population of these districts, and the comparative voting strength of these districts at the time of trial is 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

(R pp. 66-69, 90-92).

The General Assembly has amended Section 7A-41 several times, most recently in 2005. Though it is entirely possible to create districts for Wake County that (a) are consistent with current Census data, (b) comply with the federal Voting Rights Act, the Federal Constitution, the laws of

clearance.

North Carolina, the North Carolina Constitution, and the settlement agreement reached in the *Alexander* litigation, and (c) do not deprive plaintiffs of Equal Protection, the General Assembly has neglected to do so.

(R p. 94, Appdx.18 - 24)

ARGUMENT

I. BECAUSE THE ARBITRARY AND CAPRICIOUS MULTI-MEMBER AND SINGLE-MEMBER DISTRICTS ESTABLISHED FOR THE ELECTION OF WAKE COUNTY’S SUPERIOR COURT JUDGES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE NORTH CAROLINA CONSTITUTION, THE COURT OF APPEALS ERRED WHEN IT REVERSED THE JUDGMENT OF THE TRIAL COURT.

This Court must principally determine whether the General Assembly’s authority to conveniently establish election districts for the office of Superior Court Judge under Article IV, § 9(1) must yield to the Equal Protection Clause found in Article I, Section 19, and, if so, whether the single-member and multi-member election districts established for Wake County unconstitutionally deprive plaintiffs of Equal Protection. Because the trial court correctly decided these issues, its judgment must be affirmed.

A. Because the Trial Court’s Judgment is Consistent with the Prior Precedents of This Court, Its Judgment Must be Affirmed.

The General Assembly’s authority to create Superior Court election districts is largely found in and limited by two constitutional provisions. 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). Article I, Section 19 of the State Constitution prohibits the General Assembly from denying any person "the equal protection of the laws." N.C. Const. Art. I, § 19.

The General Assembly’s discretion to enact legislation relative to Superior Court districts is not absolute. Rather, its power is primarily subject to three express constitutional limitations. First, the General Assembly must re-district “from time to time” as needed. Second, the districts created must be reasonably “convenient.” Third, the General Assembly’s districting plans may not impermissibly deprive any citizen of Equal Protection.

When an Equal Protection challenge is lodged, the Court must first determine the appropriate level of scrutiny to apply to the challenged enactment. *Department of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001), *cert. denied*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). Though three levels of scrutiny are applied to various types of Equal Protection challenges, only two are implicated by plaintiffs’ case – namely, strict scrutiny and rational basis scrutiny.⁴

⁴ Though the Court of Appeals’ decision does not expressly state which standard it applied, it is reasonably clear it chose to apply rational basis scrutiny.

If a governmental enactment stands to impact a citizen's ability to exercise a fundamental right or if a governmental classification distinguishes between persons on a suspect basis, a strict scrutiny analysis is applied. *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980). Under strict scrutiny, the government must demonstrate the challenged classification is narrowly tailored to promote a compelling governmental interest. *Id.*

When a law does not involve a "suspect class" or a fundamental right, a rational basis analysis is employed. *Id.* Under the rational basis test, the challenged enactment is presumed constitutional; it need bear only some rational relationship to a legitimate governmental interest; and the challenging party bears the burden of proof. *Id.*

The record reflects the trial court properly reconciled Article IV, § 9(1) with Article I, § 19 when it analyzed the multi-member and single-member districts created by Section 7A-41. Finding the General Assembly acted arbitrarily and capriciously when it created, amended and thereafter continued to maintain Wake County's districts irrespective of material demographic changes within the county, the trial court declared Wake

County's districts unconstitutional.⁵ Because the trial court's judgment is consistent with the prior decisions of this Court, it must be affirmed.

“The right to vote is at the foundation of a constitutional republic.” *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13, 269 S.E.2d 142, 150 (1980). The right to vote is not, *per se*, a fundamental liberty interest; however, when citizens are permitted to vote, “the right to vote on equal terms is a fundamental right” protected by the Equal Protection Clause found in Article I, § 16. *Stephenson v. Bartlett*, 355 N.C. 354, 393, 562 S.E.2d 377, 378 (2002)(quoting: *Northampton County Drainage District Number One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990); see also *Preston v. Martin*, 325 N.C. 435, 454, 385 S.E.2d 473, 481(1989); *Texfi Indus., Inc.*, 301 N.C. at 12, 269 S.E.2d at 149 (1980)). Any time a districting plan impacts the voting strength of North Carolina constituents, it implicates the exercise of a fundamental right and is subject to strict scrutiny. *Id.*

In *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), this Court established a bright-line rule prohibiting the General Assembly from using both single-member and multi-member districts in the same county

⁵ Given its findings of arbitrariness and capriciousness, the trial court may be affirmed irrespective of whether this Court applies strict or rational basis scrutiny.

unless it can demonstrate a compelling interest for doing so. This decision largely controls the outcome of plaintiffs' Equal Protection challenge.

In *Stephenson*, the General Assembly enacted a legislative districting plan, and, among other things, it created both single-member and multi-member districts. *Id.* at 358, 562 S.E.2d 381. Plaintiffs filed an action alleging the plan's single-member and multi-member districts deprived them of Equal Protection under Article I, § 16 of the State Constitution. *Id.* This Court affirmed the entry of summary judgment in plaintiffs' favor. *Id.* at 358-59, 562 S.E.2d 381-82.

At the outset of its Equal Protection analysis, this Court considered whether to apply strict scrutiny or a rational basis analysis to plaintiffs' Equal Protection claim. *Id.* at 377, 562 S.E.2d at 393. In choosing strict scrutiny, this Court reasoned:

It is well settled in this State that "the right to vote on equal terms is a fundamental right." The classification of voters into both single-member and multi-member districts within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard.

Id. at 378, 562 S.E.2d at 393-94 (*internal citations omitted*).

The *Stephenson* Court identified a number of problems posed by multi-member and single-member districts. Among other things, it held "multi-member districts may well 'operate to minimize or cancel out the

voting strength of racial or political elements of the voting population.” *Id.* at 379-80. Moreover, voters in single-member districts, surrounded by multi-member districts, suffer electoral disadvantage, and, conversely, voters in multi-member districts invariably suffer the adverse consequences of unwieldy, confusing, and unreasonably lengthy ballots and minimization of minority voting strength. *Id.*

To avoid unequal treatment of voters, this Court established a strict rule prohibiting the use of single-member and multi-member elective districts unless the government can demonstrate a compelling interest. *Id.* at 380-81. The Court stated its ruling as follows: “[T]he use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest.” *Id.* (*emphasis in original*).

This Court’s holding regarding legislative districts in *Stephenson* is unequivocal, and it should be extended to plaintiffs’ Equal Protection challenge to judicial districting plans. Superior Court Judges (like legislators) are subject to popular election. The General Assembly’s districting plan (like the legislative districting plan in *Stephenson*) includes both single-member and multi-member districts. The legal protection

afforded (i.e., Equal Protection) is likewise the same. The fundamental right asserted in *Stephenson* (i.e., the right to vote on equal terms) is identical. The harm posed by the multi-member districts (i.e., minimizing voting strength, electoral disadvantage, unwieldy ballots, and the like) is present in both cases.

In reaching a contrary conclusion, the Court of Appeals ruled the “convenience” standard set forth in Article IV, § 9 should be interpreted in isolation and disjunctively from the Equal Protection clause set forth in Article I, § 16. In effect, the Court of Appeals held, so long as districts are convenient, they are constitutional even if they deprive the voters of the same level of Equal Protection they would otherwise enjoy in all other elections. The precise reasoning of the Court of Appeals was considered and rejected by the *Stephenson* Court.

In *Stephenson*, the General Assembly’s districting plan created multi-member and single-member districts all within one county. *Id.* at 378. Because these districts complied with the “Whole County Provisions” and proportionality requirements established by Article II, §§ 3(1)-(2) and 5(1)-(2), the General Assembly argued these districts were, *per se*, constitutional. In rejecting the General Assembly’s isolationist argument, this Court, after analyzing and applying multiple canons of constitutional construction, held

it must “construe Article II §§ 3(1)-(2) and 5(1)-(2) *in conjunction with* Article I, § 16 in such a manner to avoid internal textual conflict.” *Id.* at 370-71(*emphasis added*). Once construed in this manner, this Court found the multi-member and single-member legislative districts, though proportionate and wholly contained within a single county, were nonetheless unconstitutional because they deprived citizens of Equal Protection. *Id.* The same holds true here.

The convenience standard set forth in Article IV, § 9(1), though certainly less rigid than the proportionality and “Whole County Provisions” found in Article II, §§ 3(1)-(2) and 5(1)-(2), is, for purposes of Equal Protection, functionally equivalent: It is a limited grant of authority to the General Assembly. The Court of Appeals’ decision impermissibly severs the districting provisions in Article IV, § 9(1) from the Equal Protection Clause in Article I, § 19 and affords “convenience” an unnecessarily narrow, literal and predominate meaning. Had the constitutional framers intended this result, they could have inserted specific text detaching judicial districts from the purview of the Equal Protection clause. By maintaining the previously enacted convenience standard and later adopting the Equal Protection Clause, the framers expressed their intent for these two provisions to be read conjunctively.

When Article IV, § 9(1) and Article I, § 19 are read in the proper conjunctive context, the peoples' intent as expressed in their Constitution is unambiguous. Given the specialized nature of the judiciary, the General Assembly is allowed a limited degree of flexibility to establish judicial districts commensurate with the resources and needs of the State (even if these districts divide county lines, include multi-member districts, and are otherwise slightly disproportionate) provided the need is compelling and Equal Protection is otherwise preserved to the fullest extent possible.

To be clear: Plaintiffs do not contend the General Assembly may never, if necessity compels it, establish multi-member and single-member judicial districts within the same county. Plaintiffs do, however, contend (a) the constitutional grant of the discretion to establish "convenient" districts is not the authority to completely disregard long-standing notions of Equal Protection, and (b) when the General Assembly establishes judicial districts, it may not, absent a compelling state interest, unnecessarily deprive the constituents who reside in these districts of Equal Protection. Once this Court's holding in *Stephenson* is applied to the facts of this case, the outcome is straightforward.

When the geographic boundaries of Wake County's multi-member and single-member districts were first created in 1987, they were narrowly

tailored to promote a compelling governmental interest. Thereafter, Wake County experienced a material demographic growth and shift. Rather than exercising its discretion to make Wake County's districts consistent with these changed circumstances, the General Assembly arbitrarily and capriciously exacerbated matters by creating a second multi-member district in 1993. Thereafter, the General Assembly ignored Wake County's judicial districts for over a decade and never once attempted to draw them into compliance with the Equal Protection Clause. Faced with the legislature's inaction, plaintiffs filed suit, and the trial court found these districts to be unconstitutional.

The discretion to conveniently organize judicial districts from time to time is not the discretion to do so poorly, nor is it the discretion to disregard this function altogether when circumstances materially change. At the time of trial, Wake County's judicial districts visited upon plaintiffs the same type of harm prohibited by this Court's holding in *Stephenson* and did so without promoting any compelling governmental interest. Accordingly, Wake County's multi-member and single-member districts, though perhaps "convenient," are nonetheless unconstitutional. Accordingly, the trial court's judgment should be affirmed.

B. The Trial Court Did Not Apply a One-Person, One-Vote Standard, and the Court of Appeals' Holding to the Contrary Must be Reversed.

At defendants' urging, the Court of Appeals characterized the trial court's judgment as one erroneously hinged on the application of a "one-person, one-vote" standard. Though the Court of Appeals' reversal of the trial court was predicated almost entirely on this interpretation, nothing in the trial court's judgment references application of a "one-person, one-vote" standard. Indeed, the trial transcript reflects the trial court specifically considered and declined to apply it. In explaining the basis of its decision, the court stated:

To begin with, I think it is strict scrutiny, *Stephenson*. But I think there is a compelling state reason. I think the State has a compelling reason to see – to see that minorities hold judicial office. That's very compelling to me, and I want the judgment or order to reflect that, those two things.

I'm not talking about one man one vote. I want to make that clear, but I think the act of the legislature, there must be a rational or practical basis for establishing the residency within a judicial district.

It must be a practical or reasonable basis of establishing the residency of the judicial district. And I don't think we have that here. I think the Constitution requires that.

I think the – what was done was arbitrary and capricious, and I want that in the judgment.

(T 101-102)(*emphasis added*)

Even if this was not the case, the Court of Appeals missed a critical point when it addressed the “one-person, one-vote” standard: The Equal Protection Clause protects citizens against more than unequal weighing of votes. Counties play a vital role in government, and multi-member and single-member districts in the same county cause voters to suffer a variety of harms and disadvantages, only one of which is the unequal weighing of votes. *Stephenson*, 355 N.C. at 379-80. The trial court recognized as much, and, finding no compelling reason to support Wake County’s multi-member and single-member districts, it struck them as unconstitutional.

As defendants repeatedly stated during oral argument below, plaintiffs’ complaint does allege a “one-person, one-vote” standard applies to Superior Court elections; however, defendants miss the mark. Defendants appealed from the trial court’s final judgment, not plaintiffs’ complaint. The trial court did not adopt plaintiffs’ view as expressed in the complaint; its judgment is silent on the issue of “one-person, one-vote;” and the trial transcript reflects the court did not adopt or apply this standard. Because its decision is clearly erroneous, the Court of Appeals must be reversed.

- C. Because Elections of Non-Representative Judicial Officials Must Comport with Traditional Notions of Equal Protection, the Court of Appeals Must be Reversed.

The Court of Appeals erred when it concluded elections of non-representative judicial officials need not provide Equal Protection to voters. The court's decision in this regard is premised on federal decisions interpreting federal law and a brief discussion of North Carolina's constitutional history. Because neither the federal decisions relied upon by the court nor North Carolina's constitution reflect any intent to insulate judicial elections from Equal Protection, the Court of Appeals must be reversed.

In its decision, the Court of Appeals cited to and partially quoted from a handful of federal cases interpreting the federal Equal Protection Clause. The Court of Appeals cited no federal cases interpreting Equal Protection in the context of state-law challenges to multi-member and single-member districts (and plaintiffs' diligent research discloses none). Even so, the decisions in these federal cases support plaintiffs' claim.

In *Holshouser v. Scott*, plaintiff challenged North Carolina's bifurcated system of electing Superior Court Judges. *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972). At that time, candidates for Superior Court Judge were nominated in primary elections held in local districts. *Id.* at 930. Following these primaries, the nominees faced a state-wide general election. *Id.* at 930. Plaintiff limited his argument

to a challenge under the Fourteenth Amendment to the federal Constitution. *Id.* The majority of the *Holshouser* panel found this system to be constitutional as a matter of federal (but not state) law.

As Court of Appeals correctly stated, the *Holshouser* court ruled North Carolina's judicial elections were not, as a matter of federal law, subject to a "one-person, one-vote" prerequisite. However, the *Holshouser* court did not declare judicial elections may, in all instances, be disproportionate. Instead, the *Holshouser* court rested its decision on the fact that all North Carolinians' votes counted equally. *Id.* at 933. Specifically, it held:

We are unable to find discrimination among voters or an unequal weighing of votes which would amount to arbitrary or capricious action or invidious distinctions. The vote of each person in the statewide election is equal and the voters of every judicial district are permitted to vote for the nominees from all districts. The vote of each person in the judicial district is equal in the primary election. Since every person's vote counts the same in each election the fact that in a statewide election the voters may override the choice of a district does not constitute arbitrary and capricious or invidious distinctions.

Id.

The *Holshouser* case is not similar in fact, issue identification, or law to this case, and its persuasiveness is undermined for this reason. Unlike the system analyzed in *Holshouser*, North Carolina's present election system provides for purely local district-wide primaries and general elections.

Similarly, plaintiffs' case is predicated solely upon the Equal Protection Clause of the State Constitution, not the federal one. Unlike the votes cast in *Holshouser*, plaintiffs proved the votes cast in Wake County's multi-member and single-member districts do not count equally. Indeed, the comparative weight afforded to votes cast in Wake County's various judicial districts is not even close, and the trial court found votes cast in these districts are "grossly disproportionate." The *Holshouser* court did not address the other problems this Court has identified with multi-member and single-member districts. Finally, the trial court reviewed the evidence and found Wake County's districts were arbitrary and capricious, a finding the *Holshouser* court did not make.

In light of its prior precedents, a more reasoned way for this Court to interpret North Carolina's Equal Protection Clause appears in the dissent filed by Judge Craven. He wrote:

I agree with my brothers that judges need not be elected, but if the state chooses to elect them, I think its election scheme must accord to the voters equal protection of the laws. Whether or not judges 'make law,' it *is* clear to me that the judicial branch of government *is* a branch of government. . . . The elected judge serves both the people who nominated him in his own district *and* the people of the state who had no voice in his nomination. . .

In summary, the statutory scheme for election of judges in North Carolina accords the right of nomination in a primary to some of the people with respect to some of the judges and

denies it arbitrarily and capriciously to others. Such a scheme is a denial of equal protection of the laws and is condemned by the Fourteenth Amendment to the Constitution of the United States.

Holshouser at 934–35 (*emphasis in original, internal citations omitted*)

The Court of Appeals reliance on *Wells v. Edwards*, 409 U.S. 1095 (1973), was not appropriate given its history.⁶ In *Wells*, the district court concluded “one-person, one-vote” concepts did not apply to the election of Louisiana’s Supreme Court Justices. *Id.* at 1095. Though the lower court was affirmed *per curiam*, three justices filed a rare dissent. Writing for these justices, Justice White observed the following:

The District Court in this case seized upon the phrase ‘persons. . .to perform governmental functions,’ and concluded that such persons were limited to ‘officials who performed legislative or executive type duties.’ I find no such limiting import in the phrase. Judges are not private citizens who are sought out by litigious neighbors to pass upon their disputes. They are state officials, vested with state powers and elected (or appointed) to carry out government’s judicial functions. As such, they most certainly ‘perform governmental functions.’ . . .

‘The concept of ‘we the people’ under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.’ We have held that a State may dispense with

⁶ Indeed, given its summary affirmation, the precedential effect of *Wells* “extends no further than the precise issues presented and necessarily decided by [this action].” *Anderson v. Celebrezze*, 460 U.S. 780, 784 n. 5, (1983) (*citing Mandel v. Bradley*, 432 U.S. 173, 176 (1977)).

certain elections altogether, and we have suggested that not all persons must be permitted to vote on an issue that may affect only a discernable portion of the public. What I thought the apportionment decisions at least established is the simple constitutional principle that, subject to narrow exceptions, once a State chooses to select officials by popular vote, each qualified voter must be treated with an equal hand and not be subjected to irrational discrimination based on his residence. . .

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

Id. at 1096– 98.

As with *Holshouser*, *Wells* did not address a state-law challenge to multi-member and single-member districts or the types of harm these districts present in addition to disproportionality. To the degree *Wells* is persuasive, the dissent is more similar to this Court's interpretation of the state Equal Protection clause, and it should guide this Court in rendering its decision.

To further support its decision, the Court of Appeals compared the Constitution's legislative districting provisions with its judicial districting provision and held: "[W]e find the distinction between these constitutional provisions 'must have been intentional' and 'evidences an intent' not to

require population proportionality in state judicial elections.” When the State Constitution and its history are thoroughly analyzed, a contrary intent is plainly revealed.

In 1962, the Article IV, § 9(1) was amended to permit the General Assembly to conveniently establish judicial districts, and it has remained unchanged since this date. In 1964, the United States Supreme Court held the federal Constitution requires the principle of “one-person, one-vote” to be applied in all legislative elections. *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). In 1967, Article II §§ 3(1) and 5(1) were amended to require strict proportionality in legislative elections. Shortly thereafter, the United States Supreme Court continued to hold the federal Equal Protection Clause requires votes in elections to be proportionate absent a compelling state interest. *See e.g. Baker v. Carr*, 369 U.S. 831 (1966).

In 1971, the state Constitution was amended to add the Equal Protection Clause, and it is nearly identical to its federal counterpart. The framers of the 1971 amendment were undoubtedly aware of how the federal Equal Protection Clause had been interpreted by the United States Supreme Court, and, by adopting a state equivalent without carving out any exceptions as to its applicability to the rest of the Constitution’s articles, they

expressed their intent make all provisions of the Constitution subject to Equal Protection, including Article IV, § 9(1).

Similarly, the State Constitution, on the whole, expresses an unequivocal intent for the judiciary to act as an independent and co-equal branch of government. Unless reversed, the decision of the Court of Appeals would allow the legislature to accomplish indirectly something the Constitution prohibits directly: The adoption of laws undermining the independence of the judiciary and eliminating the check it has on the exercise of legislative power.

The State Constitution establishes three (3) separate co-equal branches of state government and declares each governmental division “shall forever be separate and apart from each other.” N.C. Const. Article I, § 6. The State Constitution vests all judicial power in an independent General Court of Justice. N.C. Const. Art. IV, § 1. Though the Constitution declares the General Court of Justice is “a unified judicial system for purposes of jurisdiction, operation and administration,” it plainly establishes the independent office of Superior Court and vests it with general jurisdiction and original jurisdiction throughout the State. N.C. Const. Article IV, §§ 2, 9(1)-(3), 12(3) and 16.

The State Constitution specifically prohibits the General Assembly from treading upon the independence of the judiciary through legislative fiat. N.C. Const. Article IV, § 1 (“The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of government.”) To further protect the independence of the judiciary, the General Assembly is only allowed to remove Superior Court Judges from office for “mental or physical incapacity.” N.C. Const. Article IV, § 17(1). The purpose of this structure is to maintain inter-governmental independence and to provide traditional checks and balances among them – especially between the legislature and the judiciary.

Almost two centuries before the present version of the State Constitution was ratified, North Carolina’s judiciary recognized its inherent duty to declare unlawful enactments of General Assembly unconstitutional. *See generally: Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787).⁷ In recognition of this inherent power, the General Assembly has specifically conferred original and exclusive jurisdiction upon Superior Court Judges to provide redress for unconstitutional enactments. N.C. GEN. STAT. § 7A-245.

⁷ Thus, approximately sixteen years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), North Carolina’s courts were among the first to recognize the doctrine of judicial review.

The State Constitution authorizes the citizens of North Carolina to “alter or abolish their Constitution and form of government whenever it may be necessary to their safety and happiness.” N.C. Const. Art. I, § 3. Though the citizens of North Carolina have amended the present version of the State Constitution many times since 1868, they have zealously safeguarded their right to select Superior Court Judges through popular election.

The Court of Appeals offers no sound legal or policy reason why voters and the votes they cast in judicial elections should be afforded less protection or dignity than when they vote in legislative and executive elections. In essence, the Court of Appeals created a two-tiered system of justice and determined the same citizens who have repeatedly established the judiciary as popularly elected, separate, and co-equal branch of government also authorized the General Assembly to deprive them of Equal Protection and nullify the judiciary’s effectiveness by drawing election districts in such a way as to all but assure judges who are sympathetic to the legislature will be elected. Extending the appellate court’s reasoning to its ultimate conclusion best demonstrates its infirmity.

Article IV, § 16 requires Superior Court judges to be elected on either a state-wide or a district-wide basis. The General Assembly has authorized 95 Superior Court judges, and Article IV, § 9(1) permits the General

Assemble to conveniently apportion these judges around the State. Under the Court of Appeals' reasoning, the General Assembly is lawfully empowered to assign all but one of these judges to a one multi-member district and assign the remaining judge to a one single-member district encompassing the remainder of the State.⁸ Though this hypothetical districting plan would comply with Article IV, § 16's mandate of district-wide or state-wide elections, it would unquestionably result in the unequal application of the law.

When it held Superior Court Judges are non-representative governmental officials who do not act in a politically responsive manner or make decisions in accordance with the views of a constituency, the Court of Appeals also ignored the role judges occupy in North Carolina's governmental and electoral affairs and did not take into account the rules attendant to judicial campaigns.

While judges are not representatives in the truest sense (i.e., they do not advocate the interests of their constituents), they are elected governmental officials nevertheless. Once elected, judges' actions impact the lives of the people who elect them, and their judicial philosophy,

⁸ During argument in the trial court, defendants conceded this type of result would be entirely permissible under their view of the law. (T pp. 78-80)

temperament, conduct in and out of office, residency, education, experience, and a whole host of other factors are undoubtedly important to the voters who elect them. Though reasonable minds may differ as to the appropriateness of North Carolina's system of electing judges, this is the system the people have consistently chosen and maintained for over two hundred years, and it is the function and duty of the court to protect this system when, as here, necessity compels it.

To educate the electorate, candidates for judicial office are authorized to campaign, and their campaigns are political in nature. This was not the case when *Holshouser* was decided in 1971. Prior to 1997, the Code of Judicial Conduct prohibited judges and judicial candidates from engaging in most all political activities. (CJC Canons 6 and 7 (1996)) They could not act as delegates at political conventions, make speeches in support of political parties or candidates, solicit donations, or speak on any topic other than their identity, qualifications, and present occupation. (*Id.*)

In 1997, this Court amended the Code of Judicial Conduct to allow judges and judicial candidates greater flexibility in elective politics. (CJC Canon 7, (1997)) The amended Code lifted many prohibitions precluding political activity in judicial races such as soliciting donations and expressing points of view. These changes were deemed so significant then Chief Justice

Burley Mitchell remarked: “I think [the revisions to the Code] will probably cause judicial elections to look more like elections for the General Assembly or council of state, with some of the same tactics.” *North Carolina Lawyers’ Weekly*, (28 July 1997)

After the 1997 revisions, this Court amended the Code of Judicial Conduct a second time in 2003. The stated purpose of the 2003 amendments was “to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary, and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and the laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity.” (CJC Preamble to Canon 7 (2003)) These amendments governed the conduct of judges and judicial candidates at the time of trial, and they permitted a variety of purely political activities such as personally soliciting campaign donations, attending and speaking at political party gatherings, and “engag[ing] in any other constitutionally protected political activity.” (*Id.*)

In addition to depriving voters of Equal Protection, the multi-member and single-member districts in Wake County have an unequal and negative impact on those who wish to campaign for and be elected to the office of

Superior Court Judge. Two of the named plaintiffs are licensed lawyers, and, as such, they are authorized to run for Superior Court Judge. These plaintiffs reside in Districts 10-B and 10-C, the two largest districts created for Wake County both geographically and by population. Candidates in these Districts undoubtedly face a more daunting and costly task as compared to other candidates who, by happenstance reside, in smaller districts with smaller numbers of voters. Similarly, the candidates in multi-member districts have twice as much chance of being elected to office in comparison to candidates in single-member districts. Thus, these plaintiffs and all similarly situated candidates are deprived of Equal Protection on two levels – when they vote and when they run for office.

II. DID THE COURT OF APPEALS ERR WHEN IT CONCLUDED THE TRIAL COURT FAILED TO PROPERLY ADMIT EVIDENCE AT TRIAL?

After concluding Superior Court elections are not subject to a “one-person, one-vote” standard, the Court of Appeals held the trial court erred when it failed to “treat documents submitted by [AOC] to the United States Department of Justice (USDOJ). . .as a public record or report.” In order to understand the appellate panel’s error, a brief description of the AOC documents is in order.

Prior to trial, defendants filed the affidavit of Paul Reinhartson, an AOC research specialist. (T pp. 8-9, 29) Hundreds of pages of various documents were attached to this affidavit, and these documents were prepared by various identified and unidentified persons. Though the Court of Appeals implies all of these documents were created in connection with VRA pre-clearance of District 10-A, they were not. District 10-A is not a covered jurisdiction for purposes of the VRA. (R pp. 79-82) Because District 10-A is not a covered jurisdiction for purposes of the VRA, there was no need to pre-clear it. This is why the AOC pre-clearance documents barely address District 10-A. In actuality, the overwhelming majority of the AOC documents pertained specifically to multiple other judicial election districts requiring pre-clearance, including several District Court districts. (T p. 16)

Plaintiffs objected to the introduction of the AOC documents on various grounds. (T pp. 8-13) In support of their objection, plaintiffs argued most of the AOC documents had nothing to do with District 10-A, and, to the degree they did, the declarants lacked sufficient personal knowledge regarding the matters reported. (*Id.*) Defendants countered plaintiffs' objection by arguing the AOC documents should be admitted under the public record exception to the hearsay rule. (T pp. 26-28) The trial court agreed with defendants and stated:

But we're sitting here without a jury. There's a presumption that if I admit something that's not relevant or not material, that it won't affect the outcome of this trial, unless I make a finding based on incompetent or irrelevant evidence. . .

All right. Then, I'll tell you what I'm going to do. I'm going to admit [the AOC pre-clearance documents] insofar as [they] may be material or relevant.

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

(T pp. 12-13)(*see also* T p. 33 (“But I want it to be clear that I’ve admitted it.” *Referring to the AOC documents*)) Because the AOC documents were admitted into evidence, the Court of Appeals was clearly erroneous when it ruled these documents were impermissibly excluded from evidence.

III. ASSUMING THE TRIAL COURT COMMITTED AN EVIDENTIARY ERROR, DID THE COURT OF APPEALS ERR WHEN IT FAILED TO REMAND THIS MATTER TO THE TRIAL COURT AND INSTEAD SUBSTITUTED ITS OWN FACTUAL DETERMINATIONS FOR THOSE OF THE TRIAL COURT?

The appellate panel's true rub with the AOC documents was not whether they were admitted into evidence (they were plainly were). The main thrust of the panel's decision centered on its belief the trial court afforded the AOC documents less weight than the members of the panel thought deserving. To cure this perceived evidentiary slight, the panel used its *de novo* evidentiary ruling as a vehicle to overrule all of the trial court's factual findings and substitute them with those of the panel, all without ever

finding the trial court abused its discretion. Because this was not appropriate, the Court of Appeals' decision should be reversed.

This Court has consistently held:

When trial by jury is waived and issues of fact are tried by the court, it is required to give its decision in writing with findings of fact and conclusions of law. Its findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. The trial judge becomes both judge and juror, and it is his duty to consider and weigh all competent evidence before him. He passes upon the credibility of witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)(*internal citations omitted*) The trial court was not required to accept any of the affidavits or public records in this case as true, and it was free to believe or disbelieve some or all of them. See *City of Charlotte v. Cook*, 348 N.C. 222, 498 S.E.2d 605, (1998); *Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E.2d 359 (1979)(*citing State v. Smarr*, 121 N.C. 669, 28 S.E. 549 (1897); and *York v. Northern Hosp. Dist.*, 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Once a trial court determines the facts established by the evidence, "it is not for an appellate court to determine *de novo* the weight and credibility

to be given to evidence disclosed by the record on appeal.” *Coble v. Coble*, 300 N.C. 708, 712-13, 160 S.E.2d 185, 189 (1980). A trial court’s discretionary factual findings may only be overruled upon an express finding of an abuse of discretion, and appellate courts may only make such a finding when the trial court’s determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 495 S.E.2d 700 (1998). *State v. Cummings*, 361 N.C. 438, 648 S.E.2d 788, (2007)(quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

The trial court did not abuse its discretion, and, to the degree the appellate court’s decision can be interpreted to find as much, it must be reversed. The trial court received and reviewed the AOC documents prior to trial. (T pp. 8-10) Over plaintiffs’ objection, the court admitted all of the AOC documents into evidence. (T pp. 12-13, 33) After admitting the AOC documents into evidence, the trial court (a) judged their relevance, materiality, and credibility, (b) assigned the weight to them it thought deserving, and (c) weighed them along side all of the other conflicting

evidence in the record.⁹ The trial court was required to do no more.

Given the disclaimers contained in the AOC documents, the trial court's reluctance to accept them hook, line and sinker was reasonable. The dearth of substantive evidentiary value associated with the AOC documents is best summarized by Director Drennan in a letter dated 13 December 1993.

He wrote:

To put this response in context, there are a few basic points that are addressed in our responses to several of your questions that I want to emphasize.

The questions you posed, in many instances, involved information about 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. It was not thought to be necessary...

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. . .

⁹ Despite the reservations initially expressed during trial, the court actually made a number of factual findings derived solely from the AOC documents and actually declined to adopt findings from these documents proposed by plaintiffs. (R pp. 90-91, T pp. 108-09)

Much of the information contained in this submission is secondhand; it reflects my best effort at reconstructing events of several months ago, as well as conversations with others about those same events.

(Appdx. p. 14 - 17)

By framing Part II of its decision as “a trial court evidentiary error,” the Court of Appeals was able to artfully by-pass the more strenuous abuse of discretion hurdle and proceed to overrule and substitute the trial court’s factual determinations on a *de novo* basis. The case was characterized by the court as “complex,” and the evidence before the trial court was in substantial conflict. (T p. 47) It was the role of the trial court to resolve incongruities in the evidence before it by exercising reasonable discretion. The trial court did so, and its factual findings should have been (and should be) treated as conclusive and binding on appeal.

When the appellate panel rejected and substituted the trial court’s factual findings across-the-board, it assigned weight, credibility, relevance and materiality to the AOC documents the trial court thought undeserving and rejected all other evidence that conflicted with the AOC documents. This resulted in the panel making a number of factual determinations on issues contested at trial, and the correctness of its findings are, at best, up to debate and, at worst, incorrect. The following are but two examples.

The appellate panel found a new judge was added to District 10-A due to “heavy caseloads.” However, at trial, defendants conceded they had no idea what these caseloads were, and plaintiffs presented uncontested evidence showing Wake County’s caseload did not justify an additional judge. (T p. 24, Appdx. 19 - 20)

Similarly, the panel found a new judge was added to District 10-A to comply with the VRA. At trial, plaintiffs argued no specific evidence indicated a judge was added to District 10-A to comply with the VRA. (T pp. 62, 84-85). When pressed by the trial court, defendants conceded they were aware of no specific evidence, and, though given the opportunity, presented none either by submission or by argument other than counsel’s own supposition. (T p. 23, 66-67)

If this Court concludes the trial court made an evidentiary error of law, it should order this matter remanded so the trial court can review the AOC documents in a manner specified by this Court’s future order and enter a new judgment based on this review. The propriety of this remedy has been explained as follows:

Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions;

conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). If error occurred, the trial court should be permitted to conduct such additional proceedings as may be necessary with regard to the AOC documents, and the parties should be given the chance to present additional evidence and argument to the degree it is necessary. The goal of appellate review is to assure cases are decided properly, and, if the trial court made an evidentiary error, it should be afforded the opportunity to do so.

CONCLUSION

For the foregoing reasons this court should reverse court of appeals and remand this case for further proceedings.

Respectfully submitted, this 12th day of December 2008.

AKINS/HUNT, P.C,

DONALD G. HUNT, JR.
KRISTEN G. ATKINS-MOMOT
Attorneys for Plaintiffs Appellants
134 N. Main Street, Suite 204
Post Office Box 266
Fuquay-Varina, NC 27526
(919) 552-2020 (Telephone)
(919) 552-3221 (Facsimile)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the appellee certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software, Microsoft Word.

DONALD G. HUNT, JR.
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing brief on counsel for the defendants appellees by depositing a copy enclosed in a first-class postage-paid wrapper into a depository under the exclusive care and custody of the United States Postal Service this 12th day of December 2008, addressed as follows:

Alexander McC. Peters
Susan K. Nichols
Karen E. Long
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602

DONALD G. HUNT, JR.
COUNSEL FOR APPELLANT