No. 455P06-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

BRIAN L. BLANKENSHIP, THOMAS J. DIMMOCK, and FRANK D. JOHNSON, Appellants/Petitioners,	)	
v.	)	From Wake County COA06-1012
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, Appellees/Respondents.	)	

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MOTION TO DISMISS APPEAL
AND RESPONSE TO PETITION
FOR DISCRETIONARY REVIEW
(N.C.G.S. §§ 7A-30 and -31; N.C. R. App. P. 14 and 15)

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(N.C.G.S. §§ 7A-30 and -31; N.C. R. App. P. 14 and 15)

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME defendants Gary Bartlett, Roy Cooper and the North Carolina State Board of Elections and respectfully submit this Motion to Dismiss the Appeal filed by plaintiffs on 7 August 2007, and to deny plaintiffs' alternative Petition for Discretionary Review pursuant to Rule 14(a) of the North Carolina Rules of Appellate Procedure on the ground that plaintiffs' Notice of Appeal and Petition for

Discretionary Review are not timely. In addition, plaintiffs have failed to show that the cause directly involves a substantial question arising under the North Carolina Constitution, the only grounds that they have alleged to establish their right of appeal. *See* N.C.G.S. § 7A-30(1) (2007). Likewise, plaintiffs have failed to demonstrate that discretionary review is appropriate in this case pursuant to N.C.G.S. § 7A-31(c). Specifically, defendants shows unto the Court the following:

FACTS

A. PROCEDURAL HISTORY

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 5 December 2005 challenging N.C.G.S. § 7A-41(b)(3)-(6) and the creation of Superior Court districts in Wake County. On 9 December 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 8 February 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 10 March 2006, defendants filed their Notice of Appeal. The Record on Appeal was timely filed in the Court of Appeals on 31 July 2006 and was docketed on 9 August 2006. (R p. 1) The case was heard in the Court of Appeals on 19 March 2007. On 3 July 2007, a panel of the Court of Appeals consisting of Chief Judge Martin and Judges Wynn and Geer, filed the court's unanimous opinion, authored by Judge Wynn, reversing and vacating the decision of the trial court.[2] The mandate of the Court of Appeals issued on 23 July 2007. N.C. R. App. P. 32(b).

B. FACTUAL BACKGROUND

This lawsuit challenges the manner in which Superior Court districts have been drawn in Wake County, with plaintiffs alleging that Superior Court districts must,

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[1] On 1August 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 8 February 2006 Judgment and Order ("Judgment"). That motion was denied by order of the trial court on 25 August 2006.

[2] Plaintiffs attached a copy of the slip opinion to their Notice of Appeal and Petition for Discretionary Review; that copy, however, consisted only of odd-numbered pages. In case the copy provided by plaintiffs to the Court was similarly incomplete, a complete copy of the slip opinion is attached to this Motion to Dismiss Appeal and Response to Petition for Discretionary Review.

under the 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. Historical examination shows that Superior Court districts have never been proportional in terms of population, but instead have been created for purposes such as geographical convenience. Under North Carolina's original Constitution, 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. 617, 618 (1919) (Clark, C.J.); John L. Sanders, *A Brief History of the Constitutions of North Carolina*, *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 795 (John L. Cheney, Jr. ed., 1981); N.C. CONST. of 1776 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 812.

"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*

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[3] While plaintiffs have maintained throughout this lawsuit that they are only challenging the constitutionality of the Superior Court districts in Wake County, they note in their Notice of Appeal and Petition for Discretionary Review 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." (Notice and Pet. at 21-22)

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

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[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.

313 *in* NORTH CAROLINA GOVERNMENT 1585-1979, at 951-57. Article IV, as amended, provided:

> 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; emphasis added) *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 to that Article 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 encompassing parts of downtown, eastern and southeastern Raleigh;

- 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 and portions of east 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* dismissing the case with the understanding that it could be reopened if circumstances created by 1987 N.C. Sess. Laws 509 changed. (*See* Stip. 24, R p. 71, and Ex. 8) In 1993, the legislature enacted legislation that provided for the election of two Resident Superior Court Judges from District 10-A (a majority-minority district), 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).[5] 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 14 February 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.

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[5] According to documents submitted by the Administrative Office of the Courts ("AOC") to the United States Department of Justice ("USDOJ") as required by § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, the addition of a second judge to District 10-A was designed to maintain the overall balance of minority judges created by 1987 N.C. Sess. Laws 509 by adding a minority judicial seat in what was then the Second Division of the Superior Court. (*See* Reinhartsen Aff., Ex. A ("1993 Submission") at 156, 158)

REASONS WHY THE APPEAL SHOULD BE DISMISSED

I. THE NOTICE OF APPEAL WAS NOT SERVED IN A TIMELY MANNER.

Pursuant to Rule 14(a) of the North Carolina Rules of Appellate Procedure:

> Appeals of right from the Court of Appeals to the Supreme Court are taken by filing notices of appeal with the Clerk of the Court of Appeals and with the Clerk of the Supreme Court *and serving notice of appeal upon all other parties* within 15 days after the mandate of the Court of Appeals has been issued to the trial tribunal.

(Emphasis added.) "Unless a court orders otherwise, its clerk shall enter judgment and issue the mandate of the court 20 days after the written opinion of the court has been filed with the clerk." N.C. R. App. P. 32(b). The written decision of the Court of Appeals was filed on 3 July 2007, so the mandate issued 23 July 2007. Pursuant to Rule 14(a), then, plaintiffs were required to file *and serve* any notice of appeal within 15 days of 23 July 2007, or by 7 August 2007. While the certificate of service attached to plaintiffs' Notice of Appeal and Petition for Discretionary Review suggests that plaintiffs complied with this requirement, they in fact did not.

Attached to this Motion to Dismiss is the affidavit of Frances S. Carraway, Law Office Administrator of the Special Litigation and Education Division of the Attorney General's Office, who received and opened the undersigned's mail on the day that the plaintiffs' Notice of Appeal and Petition for Discretionary Review was

received by this office as counsel for defendants. As can be seen in Exhibit 1 to Ms. Carraway's affidavit, the metered stamp on the envelope in which the Notice of Appeal and Petition for Discretionary Review was mailed establishes that it was actually served on 9 August 2007 – 17 days after the mandate of the Court of Appeals issued – not 7 August 2007 as represented on the certificate of service.[6]

"The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). Because plaintiffs failed to comply with the requirement of Rule 14(a) that they serve all parties with their notice of appeal within 15 days of the issuance of the mandate of the Court of Appeals, this appeal should be dismissed.

II. NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS RAISED.

Plaintiffs' appeal pursuant to N.C.G.S. §7A-30(1) should also be dismissed on the grounds that the plaintiffs have not shown that the decision of the Court of

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[6] Defendants note that 7 August 2007 was a Tuesday and 9 August 2007 was a Thursday. Wednesday, 8 August, was not a federal holiday, so it is not the case that the envelope was deposited with the United States Postal Service after the last pick-up on the last business day before the weekend or before a holiday and so was not postmarked until the next business day. Indeed, the stamp on the envelope is metered, so there is no postmark at all.

Appeals directly involves a substantial and non-frivolous question arising under the Constitution of the United States or of North Carolina. To be able to make an appeal of right, a plaintiff must show that the constitutional question is real and substantial rather than superficial and frivolous; it must be a constitutional question that has not already been the subject of conclusive judicial determination. *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968), *cert. denied*, 393 U.S. 1087, 21 L. Ed. 2d 780 (1969). If a plaintiff cannot make such showing, their appeal must be dismissed. *Thompson v. Thompson*, 288 N.C. 120, 215 S.E.2d 606 (1975).

Plaintiffs in this case have not made such a showing. Every court that has directly examined the question whether the constitutional principle of one person, one vote or an equal protection principle of population proportionality applies to North Carolina judicial elections has held that it does not.[7] The Court of Appeals decision below correctly followed this consistent line of precedent. In *Holshouser v. Scott*,

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[7] Because federal precedent is clear and unanimous in holding that the one person, one vote rule does not apply to judicial elections, plaintiffs have attempted to distance their claim from a one person, one vote claim. Plaintiffs, however, 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) Regardless of whether their claim is a one person, one vote claim or a more general equal protection, population proportionality claim, the fact remains that plaintiffs have never cited to any case that supports their claim.

a federal district court held that the "'one man, one vote' rule does not apply to the [North Carolina] 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 State's judicial districts on one person, one vote grounds. 335 F. Supp. 928, 932 (M.D.N.C. 1971), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972).

Likewise in *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989), this Court examined a statute that permitted several Superior Court judges to hold office longer than four-year terms during a transition from one number of districts to a larger number of districts. In upholding the constitutionality of the statute, this Court noted that the North Carolina Constitution specified the time-line for legislative and executive elections but used more general "from time to time" language for judicial elections. *Id*. at 444, 385 S.E.2d at 476. This Court held that "[t]he distinction between those [legislative and executive] provisions of our Constitution and the provisions . . . concerning judges must have been intentional and further evidences a constitutional intent for flexibility in setting the times for holding judicial elections." *Id*. at 454, 385 S.E.2d at 481. Thus, both federal and State courts have consistently noted the distinction under the North Carolina Constitution between judicial elections and election of legislative and executive officers.

Article I, § 19, of the North Carolina Constitution provides that "[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." (Emphasis added.) Article II, §§ 3(1) and 5(1), by contrast, provide that State legislators "shall represent , as nearly as may be, an equal number of inhabitants." The reason for the Constitutional distinction is clear. As the Court of Appeals below noted, "[b]ecause the principle of 'one person, one vote' is constitutionally required only in the context of elections for representative positions, . . . the rule does not apply to the election of judges, who '*do not represent people*, they serve people.'" *Blankenship v. Bartlett*, No. COA 06-1012, slip op. at 2 (N.C. Ct. App. July 3, 2007) (quoting *Holshouser,* 335 F. Supp. at 932) (emphasis added; footnote omitted)).

Plaintiffs, however, argue that the principles of *Stephenson v. Bartlett,* 355 N.C. 354, 562 S.E.2d 377 (2002), must be applied to judicial elections. This argument, rejected by the Court of Appeals and not adopted by the trial court, ignores the consistent line of cases that hold that principles of one person, one vote or population proportionality do not apply to judicial elections.[8] *See*, *e.g.*, *Holshouser*,

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[8] Plaintiffs, again trying to distance their claim from a one person, one vote claim or a population proportionality claim and align it with *Stephenson*, characterize the gravamen of this case as having to do with single-member districts vs. multi-

supra; *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095, 34 L. Ed. 2d 679 (1973) (upholding Louisiana districts for Supreme Court justices created without regard to population); *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy Dist.*, 429 U.S. 651, 658, 51 L. Ed. 2d 116, 122 (1977) ("the one-man, one-vote decisions do not apply to the selection of judges"). Thus, plaintiffs have not shown that their constitutional arguments are substantial; they therefore have not met the standards of N.C.G.S. § 7A-30(1), and their appeal should be dismissed.

REASONS WHY THE PETITION SHOULD BE DENIED

Plaintiffs alternatively petition this court for a writ of discretionary review, as well as for review of an evidentiary question related to the 1993 Submission, documents submitted by the AOC to the USDOJ as required by § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Here, plaintiffs' Petition for

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member districts. Indeed, plaintiffs state to this Court: "The trial court's judgment *does not declare* the one-person one-vote standard applicable to judicial elections. Rather, the trial court *did declare*, in light of this Court's holding in *Stephenson*, the General Assembly must have a compelling interest with narrowly tailored means before it can divide the same county into multi-member and single-member Superior Court election districts." (Notice and Pet. at 23) In fact, the trial court held nothing of the sort. *Stephenson* is not mentioned anywhere in the trial court's Judgment and Order (R pp. 84-103), and mention is made of single-member and multi-member districts only insofar as noting that North Carolina and Wake County contain both. (R p. 91, ¶ 21; pp. 99-100, ¶¶ 23, 25)

Discretionary Review in essence merely restates to this Court the arguments made to and rejected by the Court of Appeals. The Petition should be denied.

I. THE PETITION FOR DISCRETIONARY REVIEW WAS NOT SERVED IN A TIMELY MANNER.

Like Rule 14(a) of the North Carolina Rules of Appellate Procedure, Rule 15(b) states:

> A petition for review following determination by the Court of Appeals shall be [filed with the Clerk of the Supreme Court and served on all other parties] within 15 days after the mandate of the Court of Appeals has issued to the trial tribunal.

As has already been shown, *supra*, plaintiffs did not serve the Notice of Appeal and Petition for Discretionary Review on the defendants until 17 days from the date the mandate issued. Accordingly, the Petition is subject to dismissal and should be dismissed. *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999).

II. PLAINTIFFS HAVE NOT ESTABLISHED THAT DISCRETIONARY REVIEW IS PROPER UNDER N.C.G.S. § 7A-31(c).

Plaintiffs have not met the requirements of N.C.G.S. § 7A-31 for discretionary review. In particular, the decision of the Court of Appeals is not in conflict with this Court's decision in *Stephenson v Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) despite plaintiffs' contrary claims. *See* N.C.G.S. § 7A-31(c) (2007). Nor have plaintiffs shown that the matter is of major significance to the legal jurisprudence of

the State or is a matter of significant public interest. Because the plaintiffs have not shown that this case meets any of the criteria for discretionary review pursuant to N.C.G.S. § 7A-31, their Petition for Discretionary Review should be denied.

A. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *STEPHENSON V. BARTLETT*.

Plaintiffs rely heavily on their contention that the decision of the Court of Appeals conflicts with this Court's decision in *Stephenson*. As the Court of Appeals properly determined, however, "that *Stephenson*, while relevant, is not controlling precedent." Slip Op. at 4 n.4. In fact, the *Stephenson* opinion makes clear that the context of legislative elections was essential to this Court's holding; the portions of the *Stephenson* holding on which plaintiffs rely have little meaning absent that context.

In *Stephenson*, this Court analyzed the question of whether multi-member legislative districts violated the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution. This Court stated the issue as follows:

> Article I, Section 19 of the State Constitution provides, in pertinent part, that "no person shall be denied the equal protection of the laws." We observe, as amicus alleges, that voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage *because, at a minimum, they are not permitted to vote for the same number of legislators and may not enjoy the same representational influence or*

> *"clout" as voters represented by a slate of legislators within a multi-member district.* Conversely, voters in multi-member districts invariably suffer the adverse consequences described by the United States Supreme Court: unwieldy, confusing, and unreasonably lengthy ballots; and minimization of minority voting strength.

Stephenson, 355 N.C. at 377, 562 S.E.2d at 393 (emphasis added; citations omitted). It was the fact that voters in single member districts "are not permitted to vote for the same number of legislators and may not enjoy the same representational influence or 'clout' as voters represented by a slate of legislators within a multi-member district" that caused the Court to determine that the issue before it involved the right to vote on equal terms and therefore to conclude that a strict scrutiny standard applied. This Court's analysis of the issue demonstrated that it was not considering the context of voting for public officials generally, but rather was specifically considering the context of voting for representatives:

> Article II, Sections 3(1) and 5(1) begin by stating that "each Senator [or Representative] shall represent, as nearly as may be, an equal number of inhabitants." These words embody the principle of "one-person, one-vote." The proviso that follows in each section adds "the number of inhabitants that each Senator [or Representative] represents being determined for this purpose by dividing the population of the district that he [or she] represents by the number of Senators [or Representatives] apportioned to that district." These provisos arguably contemplate multi-member districts by stating that, for apportionment purposes, each member of the General Assembly from such

> a district represents a fraction of the voters in that district. The principle of "one-person, one-vote" is preserved because the number of voters in each member's fraction of the multi-member district is the same as the number of voters in a single-member district.
>
> However, in practice, these theoretical divisions within such districts do not work because every Representative or Senator from such a district represents and is supported by every resident in the district, not just those voters making up the fraction of the district comprising the theoretical constituency. Members do not "divide the population of the district that he [or she] represents" to determine their "true" constituency. As a consequence, those living in such districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative. Thus, although the people have mandated in their Constitution that all North Carolinians enjoy substantially equal voting power, *Northampton Cty. Drainage Dist. No. One*, 326 N.C. at 746, 392 S.E.2d at 355, the same Constitution contains language which appears to deny voters in single-member districts their right to substantially equal legislative representation. Accordingly, and consistent with the analysis found elsewhere in this opinion, we hold that the language quoted above purporting to allow multi-member districts is effective only within a limited context. We conclude that, while instructive as to how multi-member districts may be used compatibly with "one-person, one-vote" principles, Article II, Sections 3(1) and 5(1) are not affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power.

Id. at 378-79, 562 S.E.2d at 394. Notably, the one case cited by *Stephenson* in support of this equal protection analysis, *Kruidenier v. McCulloch*, 258 Iowa 1121, 142 N.W.2d 355, *cert. denied*, 385 U.S. 851, 17 L. Ed. 2d 80 (1966), was also firmly

rooted in the context of legislative representation. Clearly, then, the "right to vote on equal terms" as discussed in *Stephenson* was directly related to representational functions, not to judicial functions. *Stephenson*, therefore, is not controlling in this case, which deals with judicial, not representation elections.[9]

Plaintiffs also fail to recognize that *Stephenson* was not a simple application of Article I, § 19, but rather was an analysis of the interplay between that constitutional provision and the constitutional provisions regarding criteria for legislative districts set forth in Article II, §§ 3(1) and 5(1). Noting that "a constitution cannot be in violation of itself, and that all constitutional provisions must be read *in pari materia*," *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 394 (citations omitted), the task before this Court in *Stephenson* was to reconcile and give effect to the requirements of Article I, § 19, regarding the right to vote for representation on equal terms, *and* to the provisions of Article II, §§ 3(1) and 5(1) that "arguably contemplate multi-member districts." *Id.* at 379, 562 S.E.2d at 394. The creation of Superior Court districts, however, is not governed by the provisions of Article II, §§ 3(1) and 5(1) – those provisions deal only with legislative districts. Article IV, § 9(1), in

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[9] Plaintiffs' attempts to link "judicial philosophy, temperament, work ethic and other qualities" with elections of representatives are inapt. There is no reason why consideration of such factors in the election of judges turn judges into representatives of specific and definable groups of people.

language much more direct than that found in Article II, §§ 3(1) and 5(1), provides 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*." N.C. CONST. art. IV, § 9(1) (emphasis added). *See also State ex rel. Martin*, 325 N.C. at 461, 385 S.E.2d at 485 ("[O]ur Constitution only requires that any division of the state into judicial districts be 'convenient.'"). While Article II, §§ 3(1) and 5(1), only "arguably contemplate multi-member districts," *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394, Article IV, § 9(1), specifically directs that the General Assembly "shall" provide for multiple judges from one district when it calls for the election of "one or more Superior Court Judges" for every Superior Court district. This also distinguishes the issue presented in this case from *Stephenson*.

The decision of *Stephenson* unquestionably is predicated upon the idea of equal representation, a principle not applicable to judicial elections. Plaintiffs' reliance on *Stephenson* is therefore misplaced.

B. The Decision of the Court of Appeals Does Not Involve Legal Principles of Major Jurisprudence to the State Nor Is this Case a Matter of Significant Public Interest.

Without question, the composition and election of the judiciary is important to State of North Carolina and its people. As already noted *supra*, however, this action did not raise any truly new questions; rather, the Court of Appeals applied well-established principles of jurisprudence and followed unanimous precedent in determining that principles of equal protection do not require population proportionality in judicial elections. Indeed, had the Court of Appeals held otherwise, it would have been the first court in the country to do so. Under such circumstances, discretionary review is neither appropriate nor necessary in order to settle important questions of law.

With regard to the evidentiary question concerning the consideration to be given the report made by the 1993 Submission in compliance with federal law, plaintiffs' primary argument seems to focus not on the Court of Appeals' decision that the trial court erred by limiting its consideration of the report[10], but rather on the

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[10] Plaintiffs attempt to characterize the trial court's consideration of limited portions of the report as no different from any trial, where the trier of fact decides what to believe and what not to believe, or what it relevant and what is not relevant. That is not what the trial court did here, however. The trial court stated that it would consider the report "so far as it may be material or relevant" (T p. 13, line 9), but specifically refused to make any findings of fact based on the report on the grounds that statements in the report were hearsay or were not made on personal knowledge.

fact that the Court of Appeals considered the report itself rather than remanding the case for further consideration by the trial court. While the Court of Appeals *could* have remanded the case for that purpose, it was not, as plaintiffs claim, required to do so. "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). The Court of Appeals applied the correct standard of *de novo* review in deciding whether the trial court refused to consider the 1993 Submission to be a public record or report and in assessing what the 1993 Submission showed. This evidentiary question does not rise to a level warranting issuance of this Court's writ of discretionary review.

For these reasons, plaintiffs have failed to establish any entitlement to discretionary review.

ISSUES TO BE BRIEFED

Should this Court grant defendant's Petition, defendants intend to brief all issues briefed by plaintiffs.

(T p. 13, lines 10-14; T p. 31, line 25 - p. 32, line 2)

CONCLUSION

For the foregoing reasons, defendants respectfully pray that plaintiffs' Notice of Appeal be dismissed and that plaintiffs' Petition for Discretionary Review be dismissed or denied.

Respectfully submitted, this the 20th day of August, 2007.

ROY COOPER
Attorney General

Electronically Submitted,
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **MOTION TO DISMISS APPEAL AND RESPONSE TO PETITION FOR DISCRETIONARY REVIEW** 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
[**X**] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Donald G. Hunt. Jr.
Jamie L. Vavonese
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134 N. Main St.
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Counsel for Plaintiffs

This the 20th day of August, 2007.

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

NO. COA06-1012

NORTH CAROLINA COURT OF APPEALS

Filed: 3 July 2007

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

v. Wake County
No. 05 CVS 016827

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.

Court of Appeals

Appeal by defendants from judgment and order entered 8 February 2006 by Judge Donald L. Smith in Superior Court, Wake County. Heard in the Court of Appeals 19 March 2007.

Slip Opinion

Akins, Hunt & Fearon, P.C., by Donald G. Hunt, Jr., for plaintiffs-appellees.

Attorney General Roy Cooper, by Special Deputy Attorneys General Alexander McC. Peters, Susan K. Nichols, and Karen E. Long, for defendants-appellants.

WYNN, Judge.

In *Stephenson v. Barlett,* our Supreme Court held that the North Carolina Constitution guarantees that "the right to vote on equal terms is a fundamental right" in the context of representative positions.[1] Here, Plaintiffs contend that the

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[1] 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (citation and quotation omitted), *reh'g denied*, 357 N.C. 470, 587 S.E.2d 342 (2003). Likewise, the federal 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

holding in *Stephenson* extends beyond representative positions to include the election of judges. Because the principle of "one person, one vote" is constitutionally required only in the context of elections for representative positions,[2] we conclude that the rule does not apply to the election of judges, who "do not represent people, they serve people."[3] Accordingly, we reverse the judgment of the trial court.

On 6 December 2005, Plaintiffs Brian Blankenship, Thomas J. Dimmock, and Frank D. Johnson, who are citizens, taxpayers, and registered voters in Wake County, filed this lawsuit against the North Carolina State Board of Elections and Attorney General to challenge the constitutionality of the Superior Court districts in Wake County, as established by North Carolina General Statute § 7A-41 (2004). Plaintiffs argue that the current judicial districting plan for Wake County violates the Equal Protection Clause of the North Carolina State Constitution because the districts are disproportionate in terms of population.

Section 7A-41 divides Wake County into four judicial

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single-member districts of substantially unequal population." *Avery v. Midland County*, 390 U.S. 474, 485-86, 20 L. Ed. 2d 45, 54 (1968) (emphasis added).

[2] *See Holshouser v. Scott*, 335 F.Supp. 928, 932 (M.D.N.C. 1971) ("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."), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972).

[3] *Id.* at 932 (quoting *Buchanan v. Rhodes*, 249 F.Supp. 860, 865 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3, 17 L. Ed. 2d 3 (1966)).

districts: 10-A, 10-B, 10-C, and 10-D. Under the statute and according to the 2000 U.S. Census, the six resident Superior Court Judges allotted to Wake County are elected as follows: Two in District 10-A, with 64,398 residents; two in 10-B, with 281,493 residents; one in District 10-C, with 158,812 residents; and one in 10-D, with 123,143 residents. Plaintiffs contend that the disproportionate size of the districts and number of judges elected, particularly of District 10-A, unconstitutionally dilute the voting power of each individual Wake County resident. In their initial complaint, Plaintiffs sought, *inter alia*, a declaratory judgment that the judicial districts are unconstitutional and an injunction enjoining and restraining Defendants from holding any election for the office of Superior Court Judge in Wake County.

On 9 December 2005, then Chief Justice I. Beverly Lake of the North Carolina Supreme Court designated this matter as "exceptional" pursuant to Rule 2.1 of the General Rules of Practice and assigned an Emergency Superior Court Judge to hear the case. After expedited discovery and motions, the trial court entered a judgment and order on 8 February 2006, concluding that the Wake County judicial districts are unconstitutional as drawn and granting declaratory judgment and a permanent injunction to Plaintiffs. The trial court stayed the judgment and order pending appeal.

Defendants timely appealed, arguing that the trial court erred by (I) concluding that the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution requires population

proportionality in the establishment of Superior Court districts; (II) not treating documents submitted by the Administrative Office of the Courts to the United States Department of Justice to obtain pre-clearance of 1993 N.C. Session Laws 321 as a record of regularly conducted activity or a public record or report; and (III) concluding that the General Assembly acted arbitrarily and capriciously when it established the Superior Court divisions for Wake County. We agree with all of Defendants' arguments.

I.

Defendants first argue that the trial court erred by concluding that the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution requires population proportionality in the establishment of Superior Court districts. Defendants contend that the principle of "one person, one vote" does not apply to judicial elections under either the United States Constitution or our North Carolina State Constitution. We agree, noting that this is a question of first impression to our State's appellate courts.[4]

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[4] In their brief, Plaintiffs assert that "[t]he only significant difference between this case and *Stephenson* [*v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002)] is that the *Stephenson* plaintiffs, in addition to their equal protection challenge, also alleged that the General Assembly's districting plan violated the 'Whole County Provisions' found in [North Carolina Constitution] Article II, § 3(1)-(2) and 5(1)-(2)."

Stephenson, however, involved districts and elections for a different type of office altogether, namely, for legislative positions, such that some voters "may not enjoy the same representational influence or 'clout'" as others. 355 N.C. at 377, 562 S.E.2d at 393. Given that judicial elections do not implicate the same concerns, nor the same statute and constitutional section, we conclude that *Stephenson*, while relevant, is not controlling precedent, and this is indeed a

The Equal Protection Clause, first placed in our State Constitution in 1971, declares that "[n]o person shall be denied the equal protection of the laws[.]" N.C. Const. art. I, § 19. The United States Supreme Court has held that the cognate Equal Protection Clause of the Fourteenth Amendment to the federal constitution requires that the principle of "one person, one vote" govern legislative districting and apportionment. *See Reynolds v. Sims*, 377 U.S. 533, 565-66, 12 L. Ed. 2d 506, 529 (1964) ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). Our state Supreme Court has likewise concluded that "the right to vote on equal terms is a fundamental right" guaranteed by the Equal Protection Clause. *See Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (citations omitted) (case brought by citizens and registered voters to challenge legislative redistricting plans approved by the North Carolina General Assembly), *reh'g denied*, 357 N.C. 470, 587 S.E.2d 342 (2003).

Nevertheless, federal courts including the United States Supreme Court have drawn a distinction between the requirement of "one person, one vote" in elections for representative positions and those for judicial positions:

> [E]ven assuming some disparity in voting

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question of first impression.

> 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 v. Scott, 335 F. Supp. 928, 931 (M.D.N.C. 1971) (quoting *Stokes v. Fortson*, 234 F. Supp. 575 (N.D. Ga. 1964)), *aff'd mem.*, 409 U.S. 807, 34 L. Ed. 2d 68 (1972). Significantly, in *Holshouser*, the Middle District Court of North Carolina could "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." *Id.* at 930. Indeed, in *Wells v. Edwards*, the United States Supreme Court affirmed a district court's rejection of a claim based on the "one person, one vote" principle applied to the election of Louisiana Supreme Court justices. *See* 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095, 34 L. Ed. 2d 679 (1973).[5]

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[5] Plaintiffs assert that "the Fourth Circuit Court of Appeals largely adopted the *Wells* dissent as law in the context of electing North Carolina superior court judges." The relevant language from the Fourth Circuit states that the court "would be compelled to conclude that the election of superior court judges in North Carolina implicates the goal of equal protection and issues of fair and effective representation." *Republican Party of North Carolina v. Martin*, 980 F.2d 943, 953 (4th Cir. 1993),

Of course, we recognize that when "construing and applying our [state] laws and the Constitution of North Carolina, [North Carolina appellate courts are] not bound by the decisions of federal courts, including the Supreme Court of the United States." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-450, 385 S.E.2d 473, 479 (1989). Still, in our discretion, "we may conclude that the reasoning of such decisions is persuasive." *Id.* at 450, 385 S.E.2d at 479. Indeed, as this Court has previously noted, "[a]lthough 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." *Stam v. State*, 47 N.C. App. 209, 214, 267 S.E.2d 335, 340 (1980) (citation omitted), *aff'd in part and rev'd on other grounds in part*, 302 N.C. 357, 275 S.E.2d 439 (1981).

When "interpreting our Constitution - as in interpreting a statute - where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Preston*, 325 N.C. at 449, 385 S.E.2d at 478-79 (citation omitted). Additionally, we emphasize

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cert. denied, 510 U.S. 828, 126 L. Ed. 2d 60 (1993).

Nonetheless, we observe that the Fourth Circuit also stated it was bound by the *Wells* decision, and the rejection of the notion that the Equal Protection Clause is not implicated in judicial elections was based on the question of impermissible vote dilution, not on the principle of "one person, one vote"; as such, any position on the necessity of population proportionality was dicta. *See id.* at 954; *see also Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208, 210-12 (5th Cir. 1980) (recognizing distinction between claims grounded in one-person, one-vote and those based on vote dilution in a challenge to method of electing judges).

that "[a]ll 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." *Id.* at 448-49, 385 S.E.2d at 478 (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961)).

In *Preston*, our Supreme Court construed a state statute related to the election, districts, and terms of office for various Superior Court judgeships. 325 N.C. at 443, 385 S.E.2d at 475. Discussing the constitutionality of postponing the election dates for certain judgeships, the Court noted that our state Constitution specified the timeline for legislative and executive elections, but used more general "from time to time" language for judicial elections. *Id.* at 454, 385 S.E.2d at 481. The Court concluded that "[t]he distinction between those [legislative and executive] provisions of our Constitution and the provisions before us in this case concerning judges must have been intentional and further evidences a constitutional intent for flexibility in setting the times for holding judicial elections." *Id.* We find that reasoning to be applicable to the instant case.

Here, North Carolina General Statute § 7A-41, establishing the Superior Court judicial districts in North Carolina, as well as the number of judges assigned to each district, was passed into law pursuant to Article IV, Section 9 of the North Carolina Constitution. According to that Section, "[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) (emphasis added).

By contrast, the constitutional provisions governing the election of state senators and representatives require that those officials "shall represent, as nearly as may be, an equal number of inhabitants." N.C. Const. art. II, §§ 3(1), 5(1). That population proportionality requirement was added through an amendment in 1968, proposed by the General Assembly and approved by voters to conform with the judicial rulings on "one person, one vote." *See* John L. Sanders, Director of the Institute of Government, University of North Carolina at Chapel Hill, *Our Constitutions: A Historical Perspective*, at http://statelibrary.dcr.state.nc.us/nc/stgovt/preconst.htm#1971. None of this language – not the requirement for proportionality for state legislative elections, nor the lack thereof with respect to state judicial elections - was changed in the 1971 North Carolina Constitution, which was adopted by voters after comprehensive review and revision. *Id.*

Accordingly, we find that the distinction between these constitutional provisions "must have been intentional" and "evidences a constitutional intent" not to require population proportionality in state judicial elections. *See Preston*, 325 N.C. at 454, 385 S.E.2d at 481. We therefore hold that the trial court erred by concluding otherwise.

II.

Next, Defendants contend that the trial court erred by not

treating documents submitted by the Administrative Office of the Courts (AOC) to the United States Department of Justice (USDOJ) to obtain pre-clearance of 1993 N.C. Session Laws 321 as a record of regularly conducted activity or a public record or report. We agree.

At the beginning of the trial, Plaintiffs' counsel sought to strike the affidavit of Paul Reinhartsen, AOC Research Specialist for Legal Services, including the attached Exhibit A, which was a copy of the documentation submitted to and received from the USDOJ with regard to preclearance for the proposed state law adding a judgeship to District 10-A. Plaintiffs' counsel argued that Exhibit A included hearsay and information about which the author, AOC Director James C. Drennan, had no personal knowledge. Counsel for the State Board of Elections responded that Exhibit A was a "public record, prepared by public officials and pursuant to their statutory obligation[,]" and was therefore "an exception to the hearsay rule." After a lengthy discussion with both parties as to the nature and contents of the exhibit, the trial court reiterated that he would "let it in, but [he would] be very careful, . . . to make sure [he] base[d] no findings on anything contained in [the AOC exhibit] that is hearsay or is made without personal knowledge."

North Carolina Rule of Evidence 803(8) provides that "Public Records and Reports" are not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(8) (2005). Such records are defined, *inter alia*, as "[r]ecords, reports, statements, or data

compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to which matters there was a duty to report, . . . unless the sources of information or other circumstances indicate lack of trustworthiness." *Id*.

Here, Exhibit A was prepared by the Director of the AOC, pursuant to his statutory duty to gain preclearance from the USDOJ under the Voting Rights Act. *See* N.C. Gen. Stat. § 120-30.9C (2005) ("The [AOC] shall submit to the Attorney General of the United States . . . all acts of the General Assembly that amend, delete, add to, modify or repeal any provision of Chapter 7A of the General Statutes of North Carolina which constitutes a 'change affecting voting' under Section 5 of the Voting Rights Act of 1965."). Exhibit A falls within this language; it was a copy of the documentation sent by the AOC to the USDOJ pursuant to its statutory duty under N.C. Gen. Stat. § 120-30.9C.

We hold that the trial court should have considered Exhibit A in its entirety, as the hearsay rule did not apply to its contents. Accordingly, the trial court erred by admitting the exhibit on only a limited basis.

III.

Finally, Defendants argue that the trial court committed error by concluding that the General Assembly acted arbitrarily and capriciously when it established the Superior Court districts for Wake County. We agree.

In light of the AOC affidavit and Exhibit A discussed above,

it is evident that the General Assembly consulted with the AOC prior to enacting the statute that established a new judgeship in District 10-A. Exhibit A contains analysis as to population and caseload of judicial districts, as well as the AOC Director's recommendations for where to create new judgeships. Although the record also contains concerns expressed with respect to an additional judgeship for Wake County, and indications that the General Assembly did not engage in wide consultations, basing their decision on the recommendation of the AOC Director was not "arbitrary and capricious." Rather, passage of the statute creating the new judgeship in District 10-A followed investigation and analysis and, as such, was the result of logical reasoning.

According to the United States Supreme Court:

> The constitutional safeguard [of the Equal Protection Clause of the Fourteenth Amendment] is offended only if [a law's] classification [of groups of citizens] rests on grounds wholly irrelevant to the achievement of the State's objective. 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, 425-26, 6 L. Ed. 2d 393, 399 (1961); *see also Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351 (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).

The concerns addressed by the General Assembly's enactment of N.C. Gen. Stat. § 7A-41, creating the new judgeship in District 10-A, included heavy caseloads and maintaining minority districts, as well as compliance with federal law and the Voting Rights Act. Such issues are compelling state interests, and the state of facts presented by the record reasonably justify the General Assembly's action to address those interests.

We conclude that the creation of the Wake County Superior Court judicial districts was not arbitrary and capricious, nor was it "clearly, positively, and unmistakably" unconstitutional sufficient to strike down the statute. *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443, 528 S.E.2d 905, 907 (2000) (quotation and citation omitted); *see also Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("[A statute] will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." (quotation and citation omitted)).

Reversed and vacated.

Chief Judge MARTIN and Judge GEER concur.

No. 455P06-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

BRIAN L. BLANKENSHIP, THOMAS J. DIMMOCK, and FRANK D. JOHNSON, Appellants/Petitioners,	)	
v.	)	From Wake County COA06-1012
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, Appellees/Respondents.	)	

****

AFFIDAVIT OF FRANCES S. CARRAWAY

****

FRANCES S. CARRAWAY, being first duly sworn, deposes and says:

1. I am over 18 years of age, legally competent to give this affidavit and have personal knowledge of the facts set forth in it.

2. I am Law Office Administrator of the Special Litigation and Education Division of the Attorney General's Office.

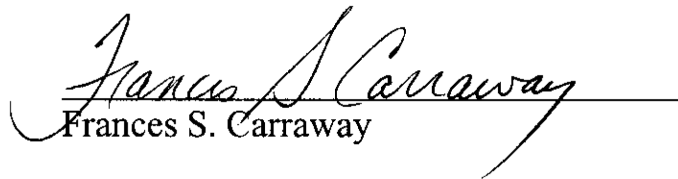
3. On Monday, 13 August 2007, I received and opened the mail addressed to attorneys in the Special Litigation section of the Attorney General's Office.

Included in that day's mail was a copy of the Notice of Appeal and Petition for Discretionary Review in this case, sent from the law offices of AKINS/HUNT, P.C., in Fuquay-Varina, addressed as follows:

Alexander McC. Peters, Esq.
C/O: NCDOJ
Post Office Box 629
Raleigh, NC 27612-0629

4. A copy of that portion of the envelope in which the copy of the Notice of Appeal and Petition for Discretionary Review in this case was sent to Alexander McC. Peters, showing the address label and the metered stamp, is attached to this affidavit as Exhibit 1. As can be seen from this copy, the metered stamp shows that the envelope was mailed on 9 August 2007.

This concludes my affidavit, this the 20th day of August, 2007.



Frances S. Carraway

Subscribed and sworn to before me

This the 20th day of August, 2007.

Notary Public

My commission expires: June 3, 2012

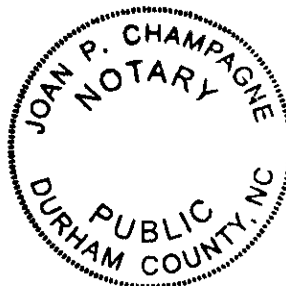


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EXHIBIT
1