NO. 455PA06-2

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

v.

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.

From Wake County

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NEW BRIEF OF DEFENDANTS-APPELLEES
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NO. 455PA06-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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BRIAN L. BLANKENSHIP, THOMAS J. DIMMOCK, and FRANK D. JOHNSON, 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, Appellees.	)	

****
NEW BRIEF OF DEFENDANTS-APPELLEES
****

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS PROPERLY REVERSE THE DECISION OF THE TRIAL COURT AND DETERMINE THAT THE CHALLENGED STATUTE CREATING SUPERIOR COURT DISTRICTS IN WAKE COUNTY DOES NOT VIOLATE ARTICLE I, § 19, OF THE NORTH CAROLINA CONSTITUTION?

II. DID THE COURT OF APPEALS PROPERLY DETERMINE THAT THE TRIAL COURT ERRED BY NOT ADMITTING EVIDENCE PROFFERED BY DEFENDANTS?

III. DID THE COURT OF APPEALS PROPERLY REVERSE THE TRIAL COURT'S DETERMINATION THAT THE GENERAL ASSEMBLY ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT ESTABLISHED THE SUPERIOR COURT DISTRICTS FOR WAKE COUNTY?

STATEMENT OF THE CASE

Plaintiffs are three voters in Wake County. Brian L. Blankenship is a resident of Superior Court District 10-B, Thomas J. Dimmock is a resident of District 10-C and Frank D. Johnson is a resident of District 10-D. They filed this action on December 5, 2005, challenging N.C.G.S. § 7A-41(b)(3)-(6) and the creation of Superior Court districts in Wake County. On December 9, 2005, then-Chief Justice I. Beverly Lake, Jr., designated this matter as "exceptional" pursuant to Rule 2.1 of the General Rules of Practice and assigned the Hon. Donald L. Smith to hear all proceedings in this action. On February 8, 2006, following an expedited discovery, motion, briefing and trial schedule, the trial court entered an order declaring N.C.G.S. § 7A-41(b)(3)-(6) unconstitutional and enjoining future use of the Superior Court districts created in Wake County by those statutes. In that same order, however, the trial court stayed its judgment and order pending appeal.[1] On March 10, 2006, respondents filed their Notice of Appeal. The Record on Appeal was timely filed in the Court of Appeals on July 31, 2006, and was docketed on August 9, 2006. (R p. 1)

This matter was heard by the Court of Appeals on March 19, 2007. On July 3, 2007, a unanimous panel of the Court of Appeals issued its opinion reversing and vacating the decision of the trial court. Judge James A. Wynn, Jr., authored the opinion, in which Chief Judge John C. Martin and Judge Martha A. Geer concurred.

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

Plaintiffs filed a notice of appeal and a petition for discretionary review with this Court on August 7, 2007. Defendants filed a motion to dismiss the appeal for lack of a substantial constitutional question, together with a response to the petition for discretionary review, on August 20, 2007. By order of this Court on October 9, 2008, defendants' motion to dismiss plaintiffs' appeal was allowed and plaintiffs' petition for discretionary review was allowed.

STATEMENT OF THE FACTS[2]

This lawsuit challenges the way in which superior court districts are drawn in Wake County, with plaintiffs alleging that superior court districts must, under the North Carolina Constitution, be proportional in terms of population.[3] The history of superior courts in North Carolina reveals that population proportionality has never been a consideration in establishing superior court districts. The superior court has existed in North Carolina since the earliest days of our republican form of government. The Judiciary Act of 1777 divided the State into six superior court districts: Wilmington, New Bern, Edenton, Halifax, Hillsborough and Salisbury. *See History of the Supreme Court of North Carolina*, 177 N.C. 617, 619 (1919) (Clark, C.J.). Two more districts were created in the following ten years: Morganton in 1782

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

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

and Fayetteville in 1787. *Id.* "In each of these a court was held twice each year by the three judges jointly." *Id.* In 1790, a fourth judgeship was created, and the eight Superior Court districts were grouped into two "ridings": the Eastern Riding (Edenton, Halifax, New Bern and Wilmington) and the Western Riding (Fayetteville, Hillsborough, Morganton and Salisbury). *Id.* It was not until 1806, when the number of Superior Court ridings and the number of Superior Court Judges was increased by statute to six each, that "a Superior Court for the first time was required to be held twice a year in each county by a single judge." *Id.* at 619-20. During all of this time, Superior Court Judges were elected by joint ballot of both houses of the General Assembly and held office "during good behavior." N.C. CONST. of 1776, §13. *See also History of the Supreme Court of North Carolina*, 177 N.C. at 618; John L. Sanders, *A Brief History of the Constitutions of North Carolina*, *in* NORTH CAROLINA GOVERNMENT 1585-1979 (John L. Cheney, Jr. ed., 1981) 795; N.C. CONST. of 1776 *in* NORTH CAROLINA GOVERNMENT 1585-1979 at 812.

"The Constitution of 1868 made the Supreme and Superior Courts constitutional offices and beyond repeal by legislative action. It also made the judges elective by the people for the term of eight years." *History of the Supreme Court of North Carolina*, 177 N.C. at 618. That Constitution specifically provided for the State to be divided into twelve judicial districts. *See* N.C. CONST. of 1868, art. IV, § 12.[4] The Constitutional Convention of 1875 amended the Constitution by providing

[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 least 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

for nine rather than twelve judicial districts; it also provided that "the General Assembly may reduce or increase the number of districts" and provided for statewide rotation of judges. *See* NORTH CAROLINA GOVERNMENT 1585-1979 at 879. In 1950, the Constitution was again amended by the voters to provide that

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

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

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

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

N.C. CONST. art. IV, § 7(1) (as amended in 1961) *in* NORTH CAROLINA GOVERNMENT 1585-1979 at 952 (emphasis added). Because Article IV was entirely rewritten by the amendment of 1962, few changes of an editorial or substantive nature were made when the revised Constitution of 1971 was presented to the voters for ratification. *See* NORTH CAROLINA STATE BAR, REPORT OF THE NORTH CAROLINA STATE

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each of the twelve judicial districts "[u]ntil altered by law." *See* NORTH CAROLINA GOVERNMENT 1585-1979 at 856-57.

CONSTITUTION STUDY COMMISSION at 31 (1968). While the provision regarding creation of Superior Court districts was re-numbered as § 9(1) of the 1971 Constitution, the language was not altered by the adoption of the 1971 Constitution.

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

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

See 1987 N.C. SESS. LAWS 509. This plan was enacted partially in response to litigation initiated in 1986 by the North Carolina Association of Black Lawyers and others against Governor James G. Martin. In that action, the plaintiffs alleged that features of North Carolina's system of electing Superior Court Judges had the purpose and effect of abridging nonwhite voting strength in violation of § 2 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.[5] (*See* Stip. Ex. 8, Consent Order in *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. Nov. 25, 1987), R Exhibits, Tab D). *See also Republican Party v. Martin*, 980 F.2d 943, 948 (4th Cir. 1992). Following the enactment of 1987 N.C. SESS. LAWS 509, a consent judgment was entered in *Alexander*. (*See* Stip. Ex. 8)

In 1993, the legislature enacted legislation that provided for the election of two Resident Superior Court Judges from District 10-A, as well as in districts 3-B (Carteret, Craven and Pamlico), 15-A (Alamance), 17-B (Stokes and Surry), 20-B (Stanly and Union), 25-B (Catawba) and 27-B (Cleveland and Lincoln). *See* 1993 N.C. SESS. LAWS 321, § 200.5(b), (d). This statute 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. It was submitted for preclearance by the North Carolina Administrative Office of the Courts to the United States Justice Department and was subsequently precleared by letter dated February 14, 1994. (Stip. 28, R p. 72)

The boundaries of Districts 10-A, 10-B, 10-C and 10-D, as well as other Superior Court districts, were modified in 2001. *See* 2001 N.C. SESS. LAWS 333. Section 2 of that Act suggests that these modifications were made to match precinct boundaries at the time. According to the 2000 Census, District 10-A had a total population of 64,398 residents and these residents elect two (2) Resident Superior Court Judges; District 10-B had a total population of 281,493 residents and these

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[5] Unlike § 5 of the Voting Rights Act, which applies only to forty of North Carolina's 100 counties, § 2 applies to all of North Carolina. (R pp. 80-81, Stips. 35-37)

residents elect two (2) Resident Superior Court Judges; District 10-C had a total population of 158,812 residents and these residents elect one (1) Resident Superior Court Judges; and District 10-D had a total population of 123,143 residents and these residents elect one (1) Resident Superior Court Judge. (Stip. ¶¶ 8-11; R pp. 66-67)

STANDARD OF REVIEW

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

ARGUMENT

Plaintiffs brought this action seeking a declaratory judgment that the Superior Court districts established by NC.G.S. § 7A-41(b)(3)-(6) and located in Wake County – districts 10-A, 10-B, 10-C and 10-D – are unconstitutional as currently drawn; plaintiffs also sought injunctive relief to prohibit elections in 2006 from being held in these districts as currently drawn. Specifically citing the "one person, one vote" principle articulated by the United States Supreme Court, as well as asserting that "the equal protection provisions of Article I, Section 19 of the State Constitution provide North Carolinians this same fundamental right," plaintiffs asserted that "[b]ecause the Superior Court judicial districts established for Wake County, North

Carolina impermissibly dilute the voting power of most of [Wake County's] constituents, they must be declared unconstitutional and elections should not proceed in these unconstitutional districts." (Am. Compl. at 1, "Summary of Complaint"; R p. 33) While plaintiffs' Amended Complaint contains numerous conclusory allegations that the Superior Court districts in Wake County are unconstitutional, nowhere in their Amended Complaint do plaintiffs allege any specific violation of the Equal Protection Clause of Article I, § 19, or any other alleged constitutional defect, other than that "[b]ecause the constituents of District 10-A have greater voting power than the constituents residing in Districts 10-B, 10-C and 10-D, the districts established by N.C. GEN. STAT. § 7A-41(b)(3)-(6) (2004) impermissibly violate the Equal Protection clause of the State Constitution." (Am. Compl., ¶ 21; R p. 36)

In their brief to this Court, plaintiffs focus on an argument that Wake County's superior court districts are unconstitutional not because of population disproportionality, but rather because they include single-"member" and multi-"member" districts without a compelling State interest in doing so. Plaintiffs contend that this arrangement is prohibited by this Court's decision in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002).[6] Such an argument is not grounded in plaintiffs' Amended Complaint. As noted, the only constitutional defect specifically alleged in the Amended Complaint is that the voting power of voters residing in districts 10-B, 10-C and 10-D is diluted because of population disproportionality with District 10-A. It is also not grounded in the decision of the trial court, which made

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[6] Stephenson, of course, involved legislative redistricting, not the drawing of judicial districts. For reasons shown below, plaintiffs' reliance on Stephenson distorts and misconstrues what this Court held in that case. *See* Argument I.A., *infra*.

no conclusions based on the use of multi-member and single-member districts. The trial court was clear that it found the plan for superior court districts in Wake County unconstitutional because it "creates grossly disproportionate districts" that result in "unequal weighing of votes."[7] (Judgment and Order, Conclusions of Law ¶¶ 26 and 27; R p. 100) Plaintiffs simply did not allege in their Amended Complaint that the superior court districts in Wake County are constitutionally deficient because two elect two judges each and two elect one judge each; all of plaintiffs' allegations centered on how one district – 10-A – is disproportionate to the other three, including the other district that elects two judges (10-B).

Should this Court agree with plaintiffs' claims, it would be the first appellate court in the nation to hold that principles of equal protection require population proportionality in judicial districts. Indeed, the federal and state courts that have been presented with the claim put forward by plaintiffs have been described as being in "rare unanimity" in holding that "[j]udicial officers are not subject to the one person-one vote principle." *In re Cavanaugh*, 65 Pa. Commw. 620, 638, 444 A.2d 1308, 1312 (1982). In making their claims, plaintiffs ignore the role and function of the judiciary, because "judges and prosecutors are not representatives in the same

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[7] The trial court did note that the plan "creates both multi-member and single-member districts." (Judgment and Order, Conclusion of Law ¶ 25; R pp. 99-100) The trial court made no finding or conclusion, however, that this was, in and of itself, a constitutional problem, but rather concluded that "the General Assembly must have a rational factual basis when it assigns districts to judges." (*Id.*) As shown in Arguments II and III *infra*, the trial court's conclusion that the General Assembly did not have a rational factual basis in creating the districts challenged by plaintiffs flowed directly from its erroneous exclusion of some of the documentation prepared for the United States Department of Justice by the Director of the North Carolina Administrative Office of the Courts.

sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964). Similarly, plaintiffs' claims, which are grounded solely in the North Carolina Constitution, ignore our constitutional history and ignore the plain words of our Constitution.[8]

Moreover, the relief that plaintiffs seek in their Amended Complaint – a declaration that the superior court districts in Wake County are unconstitutional due to population disparities – is inconsistent with, and indeed antithetical to, the constitutional violation they claim exists. Plaintiffs purport to limit their claim to those superior court districts lying in Wake County. Should it be determined, however, that North Carolina's Constitution requires a result contrary to that consistently reached elsewhere in the country – that principles of equal protection require population proportionality among judicial districts – then the Court cannot confine its analysis to only four superior court districts in Wake County, but rather must take into account the populations of all superior court districts throughout the State and must require population proportionality among all the districts. "The superior court is one court having statewide jurisdiction." *Richardson v. Richardson*, 261 N.C. 521, 528, 135 S.E.2d 532, 537 (1964). To do what plaintiffs seek would in no way remove population disparities among superior court districts, but rather would only alter those disparities as far as four districts are concerned.

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[8] "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, § 9(1).

The Court of Appeals correctly rejected plaintiffs' arguments. For the reasons that follow, this Court should as well.

I. THE COURT OF APPEALS PROPERLY REVERSED THE DECISION OF THE TRIAL COURT AND DETERMINED THAT THE CHALLENGED STATUTE CREATING SUPERIOR COURT DISTRICTS IN WAKE COUNTY DOES NOT VIOLATE ARTICLE I, § 19, OF THE NORTH CAROLINA CONSTITUTION.

Plaintiffs have argued from the outset of this case that the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution requires population proportionality among districts. The Court of Appeals properly rejected that argument. That clause, which was first placed in the Constitution in 1971 and which echoes the cognate clause of the Fourteenth Amendment to the United States Constitution, states simply: "No person shall be denied the equal protection of the laws . . . ." *Cf.* U.S. CONST. amend. XIV, § 1 ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.") While the federal courts have held that the federal Equal Protection Clause *does* require population proportionality for legislative districts – the "one person, one vote" principle – those same courts have consistently held that no such equal protection requirement adheres to the election of judges. Defendants have been unable to find and plaintiffs do not cite to any state court decision that has parted from federal jurisprudence and held that a state constitutional equal protection clause requires population proportionality among judicial districts.

Apparently recognizing the complete lack of authority for applying the one person, one vote principle to judicial elections, the trial court avoided imposing such

a standard on the creation of Superior Court districts – indeed, the trial court avoided stating *any* standard for what constitutes acceptable proportionality or unacceptable disproportionality among judicial districts. Nevertheless, the trial court held that some proportionality is required. An examination of relevant case law and of North Carolina's constitutional history demonstrates that the Court of Appeals correctly determined that there is no support for the trial court's holding.

A. THE DECISION IN *STEPHENSON V. BARTLETT* IS NOT CONTROLLING IN THIS LITIGATION BECAUSE THIS COURT MADE CLEAR THAT ITS DECISION HINGED UPON THE CONCEPT OF REPRESENTATION, AND JUDGES ARE NOT REPRESENTATIVES.

Plaintiffs, perhaps recognizing the challenge they face in stating a cognizable one person, one vote-type claim for judicial elections, instead make the holding in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), the vanguard of their argument to this Court, arguing that Superior Court District 10-A is invalid, at least in part, because it is a multi-member district.[9] Plaintiffs cite the Court's restatement of the settled rule that "the right to vote on equal terms is a fundamental right" requiring the application of a "strict scrutiny" standard, *id.* at 378, 562 S.E.2d at 393, and then proceed to apply the *Stephenson* decision's analysis of the legislative districts challenged in that case. Plaintiffs conclude that although this Court's equal protection holding in *Stephenson* – which provided that multi-member legislative districts can only be created when a compelling state interest exists – was entered in the context of legislative elections, "it is unequivocal, and it should be extended" to

[9] Of course, this argument raises the question of why plaintiffs did not challenge Superior Court District 10-B, also a multi-member district. *See* Am. Compl. ¶¶ 20-21, R p. 36.

their own challenge. (Pls' New Br. at 15) In fact, one need only read the *Stephenson* opinion to understand that the context of legislative elections is essential to the Court's holding and that the *Stephenson* holding has little meaning absent that context. Plaintiffs have failed to establish that they have been denied the right to vote on equal terms for non-representative judicial elections.

In *Stephenson*, the Court analyzed the question of whether multi-member legislative districts violated the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution. The 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 this Court to determine that the issue before it – and more specifically, any remedy that the Court might order – involved the right to vote on equal terms and therefore to conclude that a strict scrutiny standard applied. The Court's analysis of

the issue demonstrated that it was specifically considering voting for legislative 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, 87 S. Ct. 79, 17 L. Ed. 2d 80 (1966), was also firmly rooted in the concept of legislative representation. Clearly, then, the "right to vote on equal terms" as discussed in *Stephenson* was directly related to issues of one person, one vote and of representation. As will be shown infra, judges are not representatives. (*See* Argument I.C.) *Stephenson*, therefore, is not controlling in this case.

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 specific constitutional provisions regarding the creation of legislative districts, Article II, §§ 3(1) and 5(1).[10] 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 Court had 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

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[10] Indeed, plaintiffs go so far as to state that the *Stephenson* plaintiffs actually challenged the use of multi-member districts. This is not so; the *Stephenson* plaintiffs challenged the splitting of county lines in drawing legislative districts, urging "that remedial compliance with the [whole county provisions] *requires* the formation of multi-member legislative districts in which all legislators would be elected 'at-large.'" *Stephenson*, 355 N.C. at 376, 562 S.E.2d at 392. The Court even cited one district proposed by the plaintiffs that would elect *ten* representatives. *Id.* It was in the context of this argument from the *Stephenson* plaintiffs and of the Court's consideration of remedial action that balanced all relevant constitutional provisions that *Stephenson* held that multi-member legislative districts are generally impermissible.

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. While plaintiffs contend that these legislative-districting provisions establish some sort of overall structure that require proportionality in any districting scheme, these provisions establish the parameters for creating legislative districts only and are inapplicable to the creation of Superior Court districts.[11] Article IV, § 9(1), in 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 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). *See also State ex rel. Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473, 485 (1989) ("[O]ur Constitution only requires that any division of the state into judicial districts be 'convenient.'"). While Article II, §§ 3(1) and 5(1), "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 the election of "one *or more* Superior Court Judges" for every Superior Court district. (Emphasis added.) *Stephenson* is not applicable to judicial districts.

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[11] Indeed, a more reasonable and compelling interpretation of the language of Article II, §§ 3(1) and 5(1), is that the drafters of the Constitution were well aware of how to include language regarding population proportionality into the Constitution and could have included such language in Article IV, § 9(1) had they thought it desirable or appropriate. This Court has already recognized that other "distinction[s] between legislative and judicial districts in our Constitution [were] intentional." *State ex rel. Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473, 486 (1989) (holding that, unlike with legislative districts, the Constitution "*does not require*, however, that county boundaries be followed in creating judicial districts" (emphasis added)).

Plaintiffs suggest that it is inconceivable that the people of North Carolina, having reserved to themselves the right to elect judges from districts, did not also reserve the right to vote for judges in districts of proportional population. But the people of North Carolina, assembled in Constitutional Convention in 1868, did exactly that. The Constitution of 1868 was the first to provide for popular election of judges rather than indirect election by the General Assembly. NORTH CAROLINA GOVERNMENT 1585-1979 at 847. That Constitution simultaneously (1) required that the apportionment of the House of Representatives and the Senate be based, at least in part, on a census or other enumeration ordered by the State or by Congress, (2) provided for popular election of judges, and (3) divided the State into twelve Superior Court districts, the smallest of which in terms of population was less than one-third the size of the largest, with one judge being elected from each district.[12] N.C. CONST. of 1868, art. II, §§ 5 and 6, art. IV, §§ 12, 13 and 26, NORTH CAROLINA GOVERNMENT 1585-1979 at 850-51, 856-58, 1041 *et seq.*

It is beyond dispute that those who drafted and adopted the 1868 Constitution did indeed reserve to themselves the right to elect judges but did not reserve any right to vote for those judges in districts of proportional population. It is also beyond dispute that they understood the principle of population proportionality and the application of the principle in legislative elections. There is nothing in North Carolina's constitutional history to suggest that the drafters of these amendments (or

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[12] The Constitution of 1868, like the current Constitution, also specifically provided that the General Assembly had the power to provide that these twelve judges could be elected by the voters of the respective districts rather than by all of the voters of the State. N.C. CONST. of 1868, art. IV, §§ 26 and 27, NORTH CAROLINA GOVERNMENT 1585-1979 at 858; N.C. CONST. art. IV, § 16.

of the 1971 Constitution) or the voters have ever intended to depart from this understanding. On the contrary, there is much to show that the people of North Carolina have always understood that population proportionality is not the criterion upon which to draw judicial districts and have left it to their representatives in the General Assembly to draw districts with the convenience of judicial functioning in mind. (*See* Argument I.D, *infra.*)

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

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

While plaintiffs now seek to focus on the alleged unconstitutionality of multi-member superior court districts, such was not the focus of their Amended Complaint. Plaintiffs began their Amended Complaint by noting that "the United States Supreme Court [has] recognized the fundamental principle of 'one-person, one-vote' and held that elective districts established by the several states must ensure that constituents enjoy substantially equal voting power." (Am. Compl. at 1; R p. 33) The trial court, while not relying on the one person, one vote principle per se, did decide the case on a theory of disproportionality rather than one of single member- versus multi-member districts. The trial court held that "[t]he current districting plan for the election of superior court judges allocated to Wake County . . . creates grossly disproportionate districts within the same county" that "significantly dilute the strength of plaintiffs'

votes." (R p. 100; Judgment and Order, Conclusion of Law ¶ 26) This disproportionality theory is nothing more than a variation on the principle of one person, one vote.

The United States Supreme Court articulated the principle of one person, one vote for representational governmental bodies, stating that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds v. Sims*, 377 U.S. 533, 560-61, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506, 526 (1964). In *Reynolds*, the Court struck down legislative districts drawn for the Alabama legislature on the grounds that, due to population disparities, those districts violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Court explained its reasoning this way:

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

Id. at 562, 84 S. Ct. at 1381-82, 12 L. Ed. 2d at 527. The Court went on to explain:

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

Id. at 564-65, 84 S. Ct. at 1382-83, 12 L. Ed. 2d at 528-29. For this reason, the Court held

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

Id. at 568, 84 S. Ct. at 1385, 12 L. Ed. 2d at 531 (emphasis added).

In *Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), the United States Supreme Court made clear that its holding in *Reynolds* applied equally to certain political subdivisions of a state. "If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population." *Id.* at 480, 88 S. Ct. at 1118, 20 L. Ed. 2d at 51. The Court concluded by stating: "Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with *general governmental powers over an entire geographic area* not be apportioned among single-member districts of substantially unequal population." *Id.* at 485-86, 88 S. Ct. at 1121, 20 L. Ed. 2d at 54 (emphasis added).

C. It Is Settled under Federal Law That the Principle of One Person, One Vote Does Not Apply to the Election of Judges.

Despite the holdings in *Reynolds*, *Avery* and their progeny, plaintiffs overstate the holdings of the Supreme Court when they allege that the United States Supreme Court has "held that elective districts established by the several states must ensure that constituents enjoy substantially equal voting power." (Am. Compl. at 1; R p. 33) As *Avery* makes clear, it is only elective districts for the election of officials or bodies "with general governmental powers over an entire geographic area" that are subject to the one person, one vote requirement. *Avery*, 390 U.S. at 485-86, 88 S. Ct. at 1121, 20 L. Ed. 2d at 54. The federal courts have made clear that this description does not include an elected judiciary.

In *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807, 93 S. Ct. 43, 34 L. Ed. 2d 68 (1972), for example, the plaintiff challenged North Carolina's scheme of electing Superior Court judges on the grounds that it violated the one person, one vote rule established by the Supreme Court. The majority of the three-judge panel of the Middle District of North Carolina disagreed. In rejecting the plaintiff's claim, the court noted:

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

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

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

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

Holshouser, 335 F. Supp. at 931 (quoting *Stokes*, 234 F. Supp. at 577). The *Holshouser* court then turned to *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio), *appeal dismissed*, 385 U.S. 3, 87 S. Ct. 33, 17 L. Ed. 2d 3 (1966), which dealt with a challenge to Ohio's requirement that each county be allotted at least one judge in the Court of General Jurisdiction. The plaintiffs in that case argued that this requirement violated the one person, one vote principle because it resulted in a disproportionate number of judges among large and small counties. In language again quoted by the *Holshouser* court, the *Buchanan* court rejected this argument, stating that:

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

> subdivisions is of unequal weight. It is the dilution of power in the vote of citizens situated in districts suffering from inadequate representation which brings into play the Equal Protection Clause. . . .
>
> But in determining the reasonableness of a judicial system which permits at least one judge operating a court of general jurisdiction in each county, we must recognize one glaring distinction between the functions of legislators and the functions of jurists. *Judges do not represent people, they serve people.* They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

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

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

> The state judiciary, unlike the legislature, is not the organ responsible for achieving representative government. Nor can the direction that state legislative districts be substantially equal in population be converted into a requirement that a state distribute its judges on a per capita basis.
>
> . . . .
>
> In contrast to legislative reapportionment, population is not necessarily the sole, or even the most relevant, criterion for determining the distribution of state judges. The volume and nature of litigation arising in various areas of the state bears no direct relationship to the population of those areas.

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

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

> While *Buchanan* and *Rockefeller* deal with the apportionment of judges rather than their election, they nevertheless point up the many pitfalls and briar patches which the courts will encounter if

> the one man, one vote principle is made applicable to the judiciary. The function of judges, contrary to some popular views of today, is not to make, but interpret the law. They do not govern nor represent people nor espouse the cause of a particular constituency. They must decide cases exclusively on the basis of law and justice and not upon the popular view prevailing at the time.
>
> We hold that the one man, one vote rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down this election procedure and these statutes.

Holshouser, 335 F. Supp. at 932. The holding in *Holshouser*, which was affirmed by the United States Supreme Court, was confirmed the following year in *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095, 93 S. Ct. 904, 34 L. Ed. 2d 679 (1973). It is unquestionably now settled law. *See, e.g., Rodriguez v. Bexar County*, 385 F.3d 853 (5th Cir. 2004). *See also Chisom v. Roemer*, 501 U.S. 380, 403, 111 S. Ct. 2354, 2368, 115 L. Ed. 3d 348, 368 (1991); *id.* at 411, 111 S. Ct. at 2372, 115 L. Ed. 2d at 373 (Scalia, J., dissenting) ("It is precisely because we do not *ordinarily* conceive of judges as representatives that we held judges not within the Fourteenth Amendment's requirement of 'one person, one vote.'")

When legislative districts are disproportional in population, the harm is readily discernable: The votes of voters residing in larger districts are diluted by the votes of voters in smaller districts, and constituents in larger districts will have a harder time competing for their representatives' attention than will constituents in smaller districts. No similar harm can be discerned with regard to judicial districts, where judges are called upon not to represent constituents but to apply the law and decide

impartially whatever cases may come before them. The Court of Appeals correctly rejected plaintiffs' arguments to the contrary.

D. The Equal Protection Clause of Article I, § 19, of the North Carolina Constitution Should Not Be Interpreted Differently from the Federal Constitution with Respect to the Principle of One Person, One Vote and Judicial Elections.

While it is well-established that the principle of one person, one vote as required by the Equal Protection Clause of the Fourteenth Amendment does not apply to judicial elections, this case is the first to present the question of whether the Equal Protection Clause of Article I, § 19, of the North Carolina Constitution would nevertheless require population proportionality among Superior Court districts as plaintiffs claim. There is no basis for concluding that the Equal Protection Clause of North Carolina's Constitution should be interpreted differently from the Equal Protection Clause of the United States Constitution with regard to population proportionality among Superior Court districts; the Court of Appeals properly determined that the trial court erred when it deviated from well-established precedent.

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

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

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

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

As noted *supra*, this language was placed in the Constitution by amendment in 1962, the same year that the United States Supreme Court announced the one person, one vote principle in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). In 1966, North Carolina's legislative districts for the State House and Senate were held unconstitutional based on federal one person, one vote requirements, as were the state constitutional provisions then governing the drawing of State House districts. *See Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd per curiam*, 383 U.S. 831, 86 S. Ct. 1237, 16 L. Ed. 2d 298 (1966). At that time, the Constitution provided for Senate Districts to be drawn, based on population, after each decennial census,

while members of the House of Representatives were "to be elected by the counties respectively, according to their population, and each county shall have at least one Representative in the House of Representatives, although it may not contain the requisite ratio of representation." *See* 1967 N.C. SESS. LAWS p. xv (showing Article II, §§ 4 and 5 prior to amendment). Some form of population requirement for Senate Districts has existed in the Constitution since 1835 and for the House since 1868. *See* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION: WITH HISTORY AND COMMENTARY 80-81 (1993).

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

Subsequently, the North Carolina State Constitution Study Commission completed a comprehensive review and revision of the State Constitution, which resulted in submission to and ratification by the voters of what has been called the 1971 Constitution. *See Stephenson v. Bartlett*, 355 N.C. at 367, 562 S.E.2d at 388 (Orr, J., concurring in part).

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

> representatives; prepared by experts, it was referred to the General Assembly, which then presented it to the voters.

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

This constitutional history and comparison of provisions is instructive with regard to the claim raised by plaintiffs. While the Constitution was amended in 1968 specifically to base "representation in both the Senate and House of Representatives upon the requirement of 'one- person, one-vote,'" *Stephenson*, 355 N.C. at 367, 562 S.E.2d at 387 (Orr, J, concurring in part), no similar amendment was made to Article IV, § 9(1), concerning Superior Court districts, either in 1968 or in the adoption of the 1971 Constitution. Obviously, those who drafted the 1968 amendments, as well as the Constitution Study Commission that prepared the 1971 Constitution, understood the implications of *Drum* and other cases requiring adherence to the principle of population proportionality and incorporated that principle into our constitutional provisions regarding legislative districts, yet no similar effort was made to incorporate the principle into the provision regarding Superior Court districts.

Instead, Article IV, § 9(1), continues to provide that "[t]he General Assembly shall, *from time to time*, divide the State into *a convenient number* of Superior Court judicial districts and shall provide for the regular election of one or more Superior Court Judges for each district." (Emphasis added.) Not only does this provision not incorporate a population proportionality requirement, it stands in stark contrast to the

provisions regarding legislative districts. While legislative districts are required to be redrawn "at the first regular session convening after the return of every decennial census of population, taken by order of Congress," N.C. CONST. art. II, §§ 3 and 5, the legislature is only required to divide the State into Superior Court districts "from time to time."[13] Had those who drafted and those who adopted the Constitution intended that Superior Court districts be required to reflect, in any way, population proportionality, then the legislature would have been required to redraw Superior Court districts more often than "from time to time." Logically, the Constitution would have required that Superior Court districts be redrawn at the least after every census, as is required for legislative districts.

Article IV, § 9(1), unlike the constitutional provisions governing legislative districts, makes no mention of the population of the districts drawn, but rather simply requires the legislature to "divide the State into a convenient number of Superior Court judicial districts," leaving great discretion to the legislature as to how to draw those districts. Neither the Equal Protection Clause of Article I, § 19, nor any other constitutional provision imposes the additional requirement on the General Assembly that Superior Court districts be relatively proportional in population. History shows that there has never been any understanding otherwise.

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

The Equal Protection Clause of Article I, § 19, was not expressly incorporated into the Constitution until the constitutional revision of 1971 (when, again, the principle of population proportionality was well-understood by those who drafted that revision). Nevertheless, the concept was inherent in the Constitution prior to being expressly added. *See S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971). The provisions relied on in holding that equal protection was "inherent" in our Constitution – particularly the "law of the land" clause – were included in the Constitution of 1868, which first provided for popular election of judges. N.C. CONST. of 1868, art. I, §§ 7 and 17 *in* NORTH CAROLINA GOVERNMENT 1585-1979 at 847. That same Constitution provided that North Carolina "shall be divided into twelve judicial districts," *Id.* at art. IV, § 12 *in* NORTH CAROLINA GOVERNMENT 1585-1979 at 856, and actually specified the composition of those twelve districts "[u]ntil altered by law." *Id.* at art. IV, § 13 *in* NORTH CAROLINA GOVERNMENT 1585-1979 at 857.

Notably, the districts ranged widely in population, with the largest, the Seventh District, having a population of 128,931, more than three times that of the smallest district, the Twelfth District, with a population of 36,934.[14] While the districts were not at all proportional with regard to population, they were relatively proportional in terms of the number of counties in each district: six counties (two districts), seven counties (six districts) or eight counties (four districts). Clearly, what the Constitutional Convention of 1868 considered relevant in drawing Superior Court

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

districts was not population proportionality but providing the twelve Superior Court judges with a relatively equal number of court sessions and a geographically manageable district in which to travel.[15]

In other words, the Constitutional Convention considered the convenience of the judiciary, not proportionality or disparity of population, to be the relevant factor in drawing Superior Court districts and clearly did not believe that proportionality of population was required by any other provision of the Constitution it adopted. The proposition that the Equal Protection Clause of Article I, § 19, requires proportional population among Superior Court districts is simply not supported by either the current text of the Constitution or by our constitutional history. In fact, the current text and history refute any idea that population proportionality among superior court districts is constitutionally required.[16]

Unlike the federal Constitution, the Constitution of North Carolina is not a grant of authority to the legislative branch but a limitation of the legislature's power and authority.

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

[16] Another indication that population proportionality was never considered for Superior Court districts is the constitutional provision that resident Superior Court judges serve eight year terms. N.C. CONST. art. IV, § 16. Surely, the framers of the Constitution would not have provided for judges to be elected for eight year terms from districts that would have to be redrawn every ten years, after decennial census.

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

State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). Plaintiffs, then, are simply wrong when they describe "the convenience standard set forth in Article IV, § 9(1)," as "a limited grant of authority to the General Assembly." (Pls' New Br. at 17) To the contrary, what plaintiffs call "the convenience standard" is a *limitation* on the General Assembly's otherwise plenary authority to draw superior court districts as it wishes. This Court has often said that "[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. at 334, 410 S.E.2d at 889 (quoting *Gardner*, 269 N.C. at 595, 153 S.E.2d at 150). This is so because the acts of the legislature are effectively the acts of the people. *State ex rel. Martin*, 325 N.C. at 448-49, 385 S.E.2d at 478. *See also Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (The legislative power rests "with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution.*" (citation omitted) (emphasis added)). "[I]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *Baker*, 330 N.C. at 338, 410 S.E.2d at 891 (citations omitted).

The statute challenged by plaintiffs – N.C.G.S. § 7A-41 – is, therefore, presumed valid unless it can be shown beyond a reasonable doubt that it conflicts

with the Constitution or exceeds the express limitation of legislative power contained in the Constitution. Neither the Equal Protection Clause of Article I, § 19, nor any other provision of our Constitution provides reason for the courts of North Carolina to depart from the "highly persuasive" federal decisions that hold, with "rare unanimity," that the principle of one person, one vote does not apply to judicial elections. *In re Cavanaugh*, 65 Pa. Commw. at 638, 444 A.2d at 1312; *Stam*, 47 N.C. App. at 213-214, 267 S.E.2d at 339-40. History clearly shows that North Carolina framers were of the same unanimity. For these reasons, the Court of Appeals properly held that the trial court erred by granting judgment to plaintiffs and declaring that Article I, § 19, required population proportionality among Superior Court districts in Wake County.

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

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

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

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

Avery, 390 U.S. at 480, 88 S. Ct. at 1118, 20 L. Ed. 2d at 51. If the principle of vote dilution based on population disparity is to be applied to the Superior Court, a single court of statewide jurisdiction, then the principle that equal weight must be given to voters in *all* Superior Court districts throughout the State must also be applied. The trial court failed to acknowledge this critical concept.

Pursuant to N.C.G.S. § 7A-41, there are currently ninety-five resident Superior Court Judges in North Carolina. Those ninety-five resident Superior Court Judges are elected from sixty-six Superior Court districts, with some districts electing more than one judge. (Stip. 14, R p.68) Exhibit 6 to the Jointly Proposed Stipulations adopted by the Court shows the population, according to the 2000 Census, of each of North Carolina's sixty-six Superior Court districts (except for districts 12-A, 12-B, 12-C, 14-A and 14-B[17]), as well as the number of Resident Superior Court Judges elected

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

from each district and the "ideal population" for districts, given that there are ninety-five Resident Superior Court Judges.[18] (Stip. 15, R p. 68) As can be seen from Exhibit 6, the populations of North Carolina's Superior Court districts range widely, from 89.12% greater than the "ideal population" (District 26C, Mecklenburg County) to -66.00% less than the "ideal population" (District 10-A). (R Exhibits, Tab D-6) If plaintiffs are correct that proportional population is required among Superior Court districts, then there is no basis for limiting that holding to only one county, or four districts, of a statewide Superior Court with sixty-six districts. If plaintiffs are correct, *all* Superior Court districts in North Carolina must be proportional to each other. If plaintiffs are correct, regular redrawing of Superior Court districts would be required, presumably at least as often as following every decennial Census to avoid population disparities resulting from changes in population.[19] The Constitution, however, requires that Superior Court districts be revised only "from time to time." N.C. CONST. art. IV, § 9(1).

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

[19] Such redistricting of judicial districts would be complicated by the fact that "[e]ach regular Superior Court Judge shall reside in the district for which he is elected," N.C. CONST. art. IV, § 9,and is elected for an eight year term. N.C. CONST. art. IV, § 16. These eight year terms are staggered. N.C.G.S. § 7A-41(d). Thus, demographic changes could result in a judge who had served two years of his eight-year term being redistricted out of his district. This potential for an administrative quagmire demonstrates that the framers of the Constitution never intended for population proportionality among judicial districts.

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

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE TRIAL COURT ERRED BY NOT ADMITTING EVIDENCE PROFFERED BY DEFENDANTS.

In the trial court, defendants proffered the affidavit of Paul Reinhartsen, Research Specialist for Legal Services for the Administrative Office of the Courts ("AOC"). (R pp. 76-78; Exhibits to R, Tab E) Exhibit A to his affidavit was a copy of the documentation submitted to and received from the United States Department of Justice ("USDOJ") with regard to the preclearance submission of 1993 N.C. SESS. LAWS 321, §§ 200.4, 200.5 and 200.6 ("Chapter 321"), the act that added a second resident Superior Court judgeship to District 10-A. (*See* Reinhartsen Aff., Ex. A ("1993 Submission")). The trial court stated that it would consider the affidavit "so far as it may be material or relevant" (T p. 13, line 9; App. at 1), but refused to fully consider the documentation in Exhibit A, of which Reinhartsen was custodian, on the ground that statements in that documentation was hearsay or not made on personal knowledge. (T p. 31, line 25 - p. 32, line 2; App. at 2-3) This led the trial court to ignore AOC's reasons for requesting the additional judgeship in District 10-A and its

representations to USDOJ as to why the additional judgeship was created. The Court of Appeals properly determined that the trial court erred with regard to this evidence.

The North Carolina Rules of Evidence provide that the prohibition against hearsay evidence is not applicable to records of regularly conducted business activity or to reports of public agencies prepared in accordance with the agency's responsibilities. N.C.G.S. § 8C-1, Rules 803(6) and (8) (App. at 4). The AOC was required by State law to submit Chapter 321 to USDOJ for preclearance under the Voting Rights Act. *See* N.C.G.S. § 120-30.9C. There simply could be no question that the report submitted by AOC pursuant to the requirements of that statute was admissible under N.C.G.S. § 8C-1, Rules 803(6) and 803(8). The Court of Appeals correctly determined that the trial court erred by admitting this evidence only on a limited basis.

III. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S DETERMINATION THAT THE GENERAL ASSEMBLY ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT ESTABLISHED THE SUPERIOR COURT DISTRICTS FOR WAKE COUNTY.

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

Plaintiffs' argument that the trial court correctly found the challenged statutes to be arbitrary and capricious is predicated upon two fallacies: first, that the trial court actually fully admitted the Reinhartsen affidavit and its Exhibit A into evidence, and second, that an abuse of discretion standard applies on appellate review of a finding that the General Assembly acted arbitrary and capriciously in enacting legislation. As to the first fallacy, the trial court did, as the Court of Appeals noted, admit the evidence proffered by defendants for limited purposes. Responding to plaintiffs' motion to strike on the grounds that the affidavit was hearsay and contained information of which the Director of the AOC had no personal knowledge, the trial court specifically stated: "I'm going to let it in, but I'm going to be very careful, and I want both of you to make sure I base no findings on anything contained in there that is hearsay or is made without personal knowledge." (T p. 31-32) By the trial court's own ruling, it is clear that the trial court did not fully admit and consider the materials provided by AOC to USDOJ.

The first fallacy leads to the second. As a matter of law, the evidence erroneously excluded by the trial court satisfied the "rational basis" test.

> "When determining whether a rational basis exists for application of a law, we must determine whether the law in question is rationally related to a legitimate government purpose." *In re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (2007) (plurality) (citing *Glucksberg*, 521 U.S. at 728; *Rhyne*, 358 N.C. at 180-81, 594 S.E.2d at 15), *cert. denied*, ___ U.S. ___, 128 S. Ct. 615, 169 L. Ed. 2d 396 (2007). In assessing whether there is a legitimate government interest, "[i]t is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient." *Id.* (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980)).

Standley v. Town of Woodfin, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008).[20] As noted *supra*, the proper standard of review is *de novo*. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. at 348, 543 S.E.2d at 848 (2001). The Court of Appeals correctly applied this standard and found that, even if the Constitution otherwise requires some population proportionality, the evidence that the trial court should have considered established as a matter of law that the State had a rational basis for drawing District 10-A as it did.

Because Chapter 321, §§ 200.4, 200.5 and 200.6, contained amendments to Chapter 7A of the General Statutes that made numerous changes regarding voting in counties covered by § 5 of the Voting Rights Act, the session law's changes to Chapter 7A were submitted to USDOJ for preclearance. (*See* R p. 112) In his initial submission to the USDOJ, James C. Drennan, then-Director of AOC, described the history of the creation, pursuant to 1987 N.C. SESS. LAWS 509, of majority-minority districts, including District 10-A. (*See* Stips. 17-24, R pp. 69-71) With regard to the selection of which districts received new judgeships in the 1993 legislation, Drennan explained:

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

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[20] Defendants note that the trial court found that the State "has a compelling interest in creating judicial districts that do not have the intent or affect [sic] of abridging non-white votes and in establishing judicial districts that assure minorities attain the office of superior court judge." (Judgment and Order, Finding of Fact ¶ 27; R p. 93)

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

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

> The recommendation to put the judge in District 10 was based on my recommendation. In making that recommendation, I initially misread the workload table which resulted in my telling the [House] Subcommittee that District 10 was the second most needy district in the Second Division, based on workload. That was not correct, and when I discovered my error during the conference process, I told the House leadership and the Senate appropriations leaders about it. I was told that the House had made a decision, which was subsequently concurred in by the Senate, to include one minority judgeship among the eight new judges.
>
> Since District 10-A was in the first set of districts in the Second Division on the caseload tables that contained a minority district, it would have been the logical choice to place the minority judgeship. As a result, the House version of the budget from the beginning included a judgeship in District 10A, initially based on my misreading of the tables and thereafter based on a conscious decision to create a judgeship in a minority district.

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

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

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

Even when it was discovered, while the appropriations bill was in conference committee to resolve differences between the versions of that bill as passed by the House and Senate, that the caseload table did not necessarily support the addition of a new judgeship in District 10-A, the legislature still desired to include that judgeship among the eight Superior Court judgeships it was creating. Just six years earlier, the *Alexander* litigation had alleged that North Carolina's method of electing Superior Court judges violated of § 2 of the Voting Rights Act and had been resolved by the enactment of 1987 N.C. SESS. LAWS 509 and its creation of nine Superior Court districts with majority African-American or Native-American populations. (Stip. 24, R p. 71; 1993 Submission at 10); *see also Republican Party v. Martin*, 980 F.2d 943, 948 (4th Cir. 1992). The Consent Order dismissing *Alexander* specifically reserved

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

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

Without question, the General Assembly had a reasonable basis for believing that if it increased the total number of resident Superior Court judgeships by 10%, without providing that at least one of the new judgeships would be elected from one of the nine "minority districts," North Carolina would be left vulnerable to an attack under § 2 of the Voting Rights Act. This could come through the reopening of the *Alexander* litigation or the filing of new litigation. Additionally, the inclusion of a new judgeship in District 10-A supported the State's showing in its § 5 preclearance submission under the Voting Rights Act that Chapter 321, § 200.5, did not have the purpose of retrogression for members of a racial minority group.[21] (*See* Stips. 36-38, R pp. 80-81) The Director of AOC believed that District 10-A was "the logical choice to place the minority judgeship." (1993 Submission at 156.)

Such concerns clearly demonstrate that the addition of a new Superior Court judgeship in District 10-A was neither arbitrary nor capricious. The trial court erred in not fully admitting the evidence and then in ruling that the General Assembly acted

[21] Of course, any judicial decision that would alter the districts created by 1987 N.C. SESS. LAWS 509, would make the State vulnerable to a § 2 attack under the Voting Rights Act. It should also be noted that Chapter 321 included District 10-A in the Second Judicial Division, which also includes several counties covered by § 5 of the Voting Rights Act. *See* 1993 N.C. SESS. LAWS 321 § 200.4. (*See also* Stip. 37, R pp. 80-81.) Rotation of judges within a division made the make-up of the Second Judicial Division as a whole relevant to preclearance; indeed USDOJ specifically raised a question about this. (*See* 1993 Submission at 124, 167-170.)

arbitrarily and capriciously. The arbitrary and capricious standard is an exceedingly difficult standard to meet in seeking to set aside legislation. Where, as here, the trial court found that the State had a compelling state interest in adopting the legislation in question (Judgment and Order, Finding of Fact ¶ 27; R p.93-94) and where the evidence erroneously excluded by the trial court established as a matter of law a rational basis for the legislation, the arbitrary and capricious standard is simply inapplicable. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside [as arbitrary or capricious] if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). *See also State ex rel. Martin*, 325 N.C. at, 450 n.2, 385 S.E.2d at 479 n.2 ("'continued compliance with the Voting Rights Act' . . . [is] a public purpose").[22] *See also Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780 (1989), *cert. denied*, 493 U.S. 954, 110 S. Ct. 365, 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).

Plaintiffs cannot show that the statute is unconstitutional. The General Assembly's concerns – ensuring compliance with federal law and avoiding litigation

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

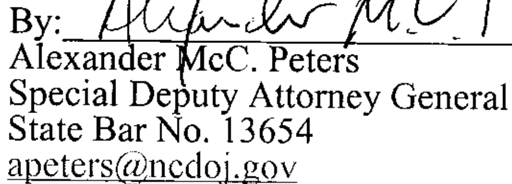
under the Voting Rights Act – can only be viewed as a compelling state interest. "[E]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker*, 330 N.C. at 334, 410 S.E.2d at 889 (quoting *Gardner*, 269 N.C. at 595, 153 S.E.2d at 150). Because plaintiffs dispute the validity of statutes duly enacted by the General Assembly, they are directly challenging the people of North Carolina. The burden rests with them to establish that the statutes are "clearly, positively, and unmistakably" unconstitutional. *Jacobs v. City of Asheville*, 137 N.C. App. 441, 443, 528 S.E.2d 905, 907 (2000). Their challenge can succeed only if they show, beyond a reasonable doubt, that the provisions they protest are prohibited by the Constitution. *Baker*, 330 N.C. at 334, 410 S.E.2d at 889. Plaintiffs have failed to meet this burden, and the Court of Appeals properly so found.

CONCLUSION

For the foregoing reasons, defendants respectfully pray that the decision of the Court of Appeals be affirmed.

Respectfully submitted, this the 23rd day of January, 2009.

ROY COOPER
Attorney General

By: 
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CERTIFICATE OF SERVICE

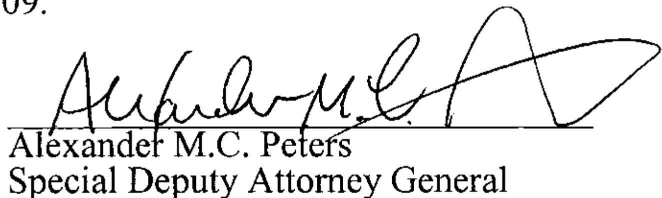
This is to certify that the undersigned has this day served the Foregoing **NEW BRIEF OF DEFENDANTS-APPELLANTS** in the above titled action upon all other parties to this cause by:

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

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

Counsel for Plaintiffs

This the 23rd day of January, 2009.



Alexander M.C. Peters
Special Deputy Attorney General

APPENDIX

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PORTIONS OF TRANSCRIPT OF FEB. 6, 2006 1-3
(T pp. 13, 31-32)
N.C.G.S. § 8C-1, RULES 803 (6) AND (8) 4

1 not relevant or not material, that it won't affect the
2 outcome of this trial, unless I make a finding of fact
3 based on incompetent or irrelevant evidence, isn't
4 that the rules?
5 MR. HUNT: Yes, your Honor.
6 MR. PETERS: Yes, your Honor.
7 THE COURT: All right. Then, I'll tell you
8 what I'm going to do. I'm going to admit Exhibit A,
9 insofar as it may be material or relevant.
10 Right now, I don't anticipate any findings
11 of fact based on Exhibit A. But if I do, you can call
12 it to my attention, and I'll probably strike that
13 finding of fact.
14 MR. HUNT: Thank you, your Honor. I'll just
15 note for the record our objection stands.
16 THE COURT: And by the way -- by the way, I
17 would like to keep this underlined --
18 MR. HUNT: If the Court would like for me to
19 identify for the record what I handed up, I'll be glad
20 to do so.
21 THE COURT: All right, do that.
22 MR. HUNT: Exhibit A to Paul Reinhartsen's
23 affidavit was Bate stamped, that means that they were
24 assigned page numbers that are consistent throughout
25 the body of the document, which may not be consistent

1 basis of our objection.

2 THE COURT: You don't know that I'm

3 accepting it as anything.

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

5 THE COURT: Let me just say this. If he had

6 been told that by the Speaker of the House, so what?

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

8 THE COURT: Or by the President Pro Tem of

9 the Senate, so what? It's still of the same

10 consequence.

11 MR. HUNT: Correct. And I think all we're

12 saying is we're not imputing whether a majority/

13 minority district is a good or a bad public policy

14 decision. What we're saying is that when you make

15 that decision, you cannot go stick the judge in

16 District 10-A with 60,000 voters to the disadvantage

17 of everybody else in Wake County. Not when Judge

18 Stephens' affidavit makes it quite clear that you

19 could have just shifted the district lines altogether

20 to accomplish the same purpose and make everybody

21 else's vote count roughly equally.

22 THE COURT: Right. I'm going to stick with

23 the ruling I made later -- I mean earlier. I'm going

24 to let it in, but I'm going to be very careful, and I

25 want both of you to make sure I base no findings on

1 anything contained in there that is hearsay or is made
2 without personal knowledge.
3 And you're going to get -- both of you are
4 going to get your shot later on, you'll find that out.
5 All right. Let's go ahead now with getting
6 the evidence in. I have ruled conditionally on
7 Exhibit A.
8 MR. HUNT: And we have introduced the
9 stipulations, and we'll be getting the new set of
10 stipulations concerning --
11 THE COURT: Now, these new set are the ones
12 that I suggest, which tells how we modified the
13 election of the judges after drawing the districts --
14 MR. PETERS: In 1987.
15 THE COURT: -- in '86 or '87.
16 MR. PETERS: Right.
17 THE COURT: So I want y'all to have a chance
18 to look at that, and I hope that will be coming in
19 with just another stipulation.
20 MR. PETERS: That's what I would anticipate.
21 THE COURT: We've got your first set of
22 stipulations, then your next set, which were amended.
23 MR. HUNT: The VRA stipulations, your Honor.
24 THE COURT: Yep. And now we're going to be
25 getting the stipulations on how the judges were

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

N.C. Gen. Stat. § 8C-1, Rule 803 (2008)

Rule 803. Hearsay exceptions; availability of declarant immaterial

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

. . . .

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

. . . .

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