STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 002322

NORTH CAROLINA STATE CONFERENCE OF NAACP BRANCHES; LEAGUE OF WOMEN VOTERS OF NORTH CAROLINA, DEMOCRACY NORTH CAROLINA; A. PHILLIP RANDOLPH INSTITUTE OF NORTH CAROLINA; ELAINE OKAL; RETTA RIORDAN; CHERYL TUNG; and CANDACE BLACKLEY,

Plaintiffs,

vs.

DAVID R. LEWIS *in his official capacity as Senior Chairman of the North Carolina House of Representatives Select Committee on Redistricting for the 2017-2018 Session;* RALPH E. HISE *in his official capacity as Chairman of the North Carolina Senate Committee on Redistricting for the 2017-2018 Legislative Session*; TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives;* and PHILLIP E. BERGER, *in his official capacity as President Pro Tempore of the North Carolina Senate;* THE STATE OF NORTH CAROLINA; and THE NORTH CAROLINA STATE BOARD OF ELECTIONS,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

NOW COME Plaintiffs, by and through counsel, and offers this brief in support of their Motion for Preliminary Injunction.

INTRODUCTION

This case boils down to two simple legal questions: does the plain language of the state constitution mean what it says it when it prohibits mid-decade redistricting? If it does, then should it be strictly interpreted to bind the legislature from redrawing settled district lines, except where necessary to comply with federal law or court order? The answer to both questions is plainly yes, and because Plaintiffs are so certain to succeed on the merits of their claims, preliminary injunctive relief is warranted, particularly in light of the fact that the balance of equities also weighs in their favor.

In this state, the right to vote in elections on an equal basis with every other voter in the state is fundamental. *See Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 489 (1989). Yet despite this guarantee, millions of the state's voters have, for the better part of this decade, been forced to participate in the election of their General Assembly from districts that have been unconstitutionally constructed. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd,* 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017) (mem.): Affidavit of Ivy Johnson, Ex. 5, *Dickson* Order Dismissing Case. That is, some voters have voted from constitutionally constructed districts, and some have been forced to vote from districts that segregate them based on the color of their skin.

Now, for a second time, voters again are being denied the right to vote in elections on an equal basis with other voters. Under the North Carolina Constitution, every voter enjoys the right to remain in an unaltered State Senate and State House district for the entire decade (absent, of course, a federal court order correcting some unconstitutional aspect of the districts). In some

areas of the state, that constitutional right has been respected and enforced, but for thousands of Wake County voters, it has not. For the second time, the organizational Plaintiffs in this case are seeking relief from this state's courts. While the nature of the relief sought is slightly different in this case (they are harmed by different unconstitutional districts this time), the fact remains that the plaintiffs have not yet found complete vindication in the state courts for the constitutional harm that has persisted this decade. The legislature now seeks to exploit every possible benefit of its ill-gotten and unconstitutional gains from its 2011 maps —and this particular ploy to extract some remnant of their ill-gotten gain relies on a tactic that the state constitution commands this Court to deny.

Article II, Sections 3 and 5 of the North Carolina State Constitution unequivocally grants its citizens the right to remain in the same state legislative district for the entire decade absent a finding of violation of federal law. N.C. Const. art. II, §§ 3(4), 5(4). This protection, which fewer than half of the states in this country enjoy, is a significant constitutional limit on what would otherwise be unfettered legislative discretion in redistricting. That is, the provision is not just a technicality—it provides real benefits and rights to voters in an era where technology has allowed gerrymandering to run amok. Those real benefits include the ability to organize politically—understanding the district's boundaries and identifying all other voters within those boundaries to develop collective political will, and to hold elected officials accountable through political organizing. Likewise, the loss of this benefit is tangible. If voters are about to express their political will (or have recently expressed their political will) to either oust a representative who does not represent their interests or to elect a competitor who does, the unregulated manipulation of district lines would serve to frustrate that political will and effort, leaving voters in those districts suffering a procedural and substantive harm. That harm is one that our State

Constitution, the ultimate embodiment of the state's policy choices and the voters' rights, prohibits.

In 2017 a federal court ordered the North Carolina General Assembly to remedy unconstitutionally racially gerrymandered districts in its 2011 state legislative plans, but rather than enact a full remedy to those constitutional violations, the legislature simply replaced one constitutional violation with another. The legislative "remedy" changed districts beyond those necessary to comply with the court's order, specifically exceeding the federal court's direction to correct only two State House districts in Wake County, thereby violating Plaintiffs' state constitutional rights anew. The legislature was put on notice of this state constitutional violation before it enacted the 2017 plans, and it persisted in its unconstitutional action anyway. Left unaddressed, these unnecessarily redrawn districts will cause irreparable harm to Plaintiffs and the voters of North Carolina. The only remedy for Plaintiffs at this point is a preliminary injunction while litigation in this case proceeds. Because Plaintiffs are likely to succeed on the merits of their claim, and this Court is likely to find that the 2017 versions of HDs 36, 37, 40, and 41 were unnecessarily altered and thus violate the State Constitution, and will suffer irreparable harm absent an entry of an injunction, Plaintiffs respectfully request that this Court enter a preliminary injunction.

Background

Plaintiffs seek a preliminary injunction to keep Defendants from implementing, enforcing, relying on, and conducting elections in State House Districts 36, 37, 40, and 41, located in Wake County, as they were redrawn and adopted by the General Assembly on August 31, 2017 (hereinafter "the 2017 districts"). While the history of the litigation surrounding state legislative redistricting this cycle is extensive and complicated, the operative legal issue here is

not. The procedural history should not cloud the clear responsibility this Court bears to act quickly to ensure that only constitutionally-compliant districts are in place for the 2018 elections. Indeed, the protracted attempts by Plaintiffs in this action to hold the legislature accountable for blatantly unconstitutional and manipulative redistricting, and the legislature's steadfast heel-dragging in response, even when unanimously rebuked by the United States Supreme Court, weighs heavily in favor of this Court taking decisive action to ensure—for the first time this decade—that all the voters of North Carolina are afforded the opportunity to participate in constitutionally-drawn electoral districts.

In early 2011, the North Carolina General Assembly redrew state House and Senate districts so as to account for changes in population and demographics pursuant to the most recent decennial census, as directed by the State Constitution. N.C. Const. art. II, §§ 3, 5. Following the enactment of those redistricting plans, a group of four North Carolina nonprofit organizations – the very same organizations who are party to the present suit – and individual North Carolina voters challenged many of the new districts in state court as racial gerrymanders in violation of the United States and North Carolina Constitutions. *See Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (201), *vacated,* 135 S. Ct. 1843 (2015) (mem.). Though the trial court in *Dickson* found that race was the predominant factor motivating the shape of the districts at issue, the trial court erroneously concluded, and the North Carolina Supreme Court twice affirmed, that this race-based line-drawing was required to comply with federal law. *See Id.; Dickson v. Rucho,* 368 NC 481, 781 S.E.2d 404, *vacated,* 137 S. Ct. 2186 (mem.). The United States Supreme Court twice granted certiorari and vacated each of the erroneous decisions of the North Carolina Supreme Court. *See Dickson v. Rucho,* 135 S. Ct. 1843 (2015), *Dickson v. Rucho*, 137 S. Ct. 2186 (2017).

While the *Dickson* plaintiffs sought reversal of those erroneous state court decisions in the United States Supreme Court, a separate set of plaintiffs filed suit in federal court challenging the same state legislative districts as racial gerrymanders in violation of the United States Constitution. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd,* 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017) (mem.). On May 30, 2017, for the second time, the United States Supreme Court vacated and remanded the North Carolina Supreme Court's decision upholding the challenged state legislative districts. *Dickson v. Rucho,* 137 S. Ct. 2186 (mem.). On August 11, 2016, the United States District Court for the Middle District of North Carolina unanimously held that the North Carolina General Assembly had relied, unjustifiably, on race to redraw dozens of the state Senate and House districts in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The United States Supreme Court unanimously and summarily affirmed that decision on June 5, 2017. *North Carolina v. Covington,* 137 S. Ct. 221 (2017) (mem.). Following that final judgment in favor of the *Covington* plaintiffs, the *Covington* court began remedial proceedings. *Covington v. North Carolina,* 267 F. Supp. 3d 664 (2017). On August 31, 2017, pursuant to an order by the *Covington* court to redraw the specific districts struck down as unconstitutional racial gerrymanders, the General Assembly adopted new state Senate and House districts—the 2017 districts—that purported to remedy the racially gerrymandered 2011 districts. However, prior to the enactment of the 2017 plans, on August 23, 2017, the *Covington* plaintiffs in a letter warned the legislature that the revision of every House district within Wake County was far beyond what was necessary to comply with the federal court's order and remedy the two of eleven State House districts in that county that had been declared unconstitutional. *See* Johnson Aff., Ex. 1, *Covington* Plaintiffs' letter. They explained that the changes, which went beyond those authorized by a federal court, violated the state

constitutional prohibition on mid-decade redistricting. *Id*. at 2-3. They further provided the legislature with a demonstrative map that showed them that it was possible to remedy the racially gerrymandered districts—House Districts 33 and 38—without altering four of the eleven districts in the county. *Id*. at 5. The legislature ignored that advice and enacted the 2017 plans that changed every state house district in Wake County, even ones that did not touch an unconstitutional district, regardless of the federal court's order to simply remedy the two racially-gerrymandered districts.

After the enactment, the *Covington* plaintiffs lodged those same objections—along with others—namely, that in several places across the state, the legislature had failed to cure the racial gerrymandering unanimously identified by every federal judge to look at the matter. The United States District Court for the Middle District of North Carolina found nine of those objections had merit, including the plaintiffs' objection that the reconfiguration of Wake County House Districts 36, 37, 40, and 41 was unnecessary to remedy racially gerrymandered Districts 33 and 38 and therefore violated the North Carolina Constitution's bar against mid-decade redistricting. The *Covington* Court appointed a Special Master to evaluate and redraw the districts, and it ultimately approved the Special Master's plan, leaving Wake County House districts 36, 37, 40, and 41 as they were drawn in 2011 while remedying the identified racially gerrymandered districts. Upon review of the Special Master's report, which confirmed what the *Covington* plaintiffs had alleged—that it was not necessary to change every district in Wake County in order to remedy the two racially-gerrymandered districts, the *Covington* court ordered into effect the Special Master's map that both corrected the insufficient remedy to racial gerrymandering in four areas of the state and corrected the mid-decade redistricting prohibition in Wake County. *See* Johnson Aff., Ex. 2, *Covington* Order on Remedy, at 82-90. Legislative defendants in that

case sought an emergency stay from the United States Supreme Court seeking to prevent implementation of the Special Master's remedial map. With respect to the Special Master's alteration to Wake County House Districts, they argued that the *Covington* plaintiffs did not have standing to challenge those districts and that this was an issue to be decided by the state courts. See Johnson Aff., Ex. 3, *Covington* Emergency Stay Application, at 27-29. The Supreme Court denied the requested stay with respect to the districts that the Special Master changed because the 2017 enacted plan failed to cure the racial gerrymandering, but it did stay, pending appeal, the alterations to the 2017 enacted plan based on failure to comply with the state constitution. *See* Johnson Aff., Ex. 4, Supreme Court Order. Given the arguments made by Legislative Defendants in their stay briefing and their Jurisdictional Statement in *Covington*, it seems likely that the Supreme Court either believed there to be a standing problem or that this was a matter best decided by the state courts. Neither presents a problem for quick adjudication in this case.

While the *Covington* remedial proceedings were underway, the trial court in *Dickson* heard arguments as to whether the case was moot. After the United States Supreme Court issued its stay, the *Dickson* plaintiffs sought relief from the *Dickson* trial court. On the same day, that court ruled that the case was moot and denied relief, explaining that the Dickson plaintiffs would need to file a new lawsuit to challenge districts that they alleged violated the state constitutional bar on mid-decade redistricting. *See* Johnson Aff., Ex. 5, *Dickson* Order Dismissing Case, at 6-7. Plaintiffs here have followed that directive.

And in this action, Plaintiffs now seek vindication of their constitutionally-protected rights that they and other litigants have been unable, to date, to receive in other forums. The legislature plainly exceeded the terms of the order from the federal court to remedy the two districts in Wake County that had been ruled unconstitutional. A failure by this Court to act to

enforce the unequivocal rule established by the state constitution would neuter one of the few protections that voters have, granted to them by the state constitution, against gerrymandering and gamesmanship. Whatever the reasons for the Supreme Court stay—and to be clear, neither of the likely explanations presents a problem in the instant litigation—it would be unreasonable and contrary to established legal principles to permit a state legislature to ignore clear state constitutional policies and restrictions on their ability to manipulate electoral districts. To avoid the serious constitutional harms that would follow from refusing to enforce a plain reading of the North Carolina Constitution, this Court should issue a preliminary injunction restraining the implementation and enforcement of the 2017 versions of Wake County House Districts 36, 37, 40, and 41.

ARGUMENT

I. Standard of Review

In North Carolina, a mandatory preliminary injunction "may be issued to restore the status wrongfully disturbed." *Seaboard A.L.R. Co. v. Atlantic C.L.R. Co.* 237 N.C. 88, 94, 74 S.E.2d. 430, 434 (1953). Issuance of a preliminary injunction is "a matter of discretion to be exercised . . . after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville St. Christian Sch.,* 299 N.C. 352, 357, 261 S.E.2d 908, 913 (1980). The North Carolina Supreme Court has held that issuance of a preliminary injunction is appropriate when (1) "a plaintiff is able to show *likelihood* of success on the merits of his case," and (2) when "a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure,* 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (internal citations omitted); *see also* N.C. Gen. Stat. § 1A–1, Rule 65. When these two

conditions are met, a plaintiff is entitled to injunctive relief. *Vest v. Easley*, 145 N.C. App. 70, 76, 549 S.E.2d 568, 574 (2001). Here, in light of the equities at play, the plaintiffs' showing of their likelihood of success and the irreparable injury that will result if the injunction is not granted entitles them to a preliminary injunction.

II. Plaintiffs are likely to succeed in showing state House Districts 36, 37, 40, and 41 are drawn in a way that violates the North Carolina Constitution.

The North Carolina Constitution mandates that "[w]hen established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, § 5(4). That is, the plain language of this provision forbids the redrawing of any electoral districts other than once per decade. Under the Supremacy Clause, however, a violation of federal law can override state law. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1381 (2015) ("The Supremacy Clause instructs courts to give federal law priority when state and federal law clash."); *see also Stephenson v. Bartlett*, 355 N.C. 343, 368, 562 S.E.2d 377, 388 (2002); *State v. Brewington*, 367 N.C. 29, 39, 743 S.E.2d 626, 632 (2013). But state law can only be compromised to the extent necessary to comply with federal law. *See Stephenson*, 355 N.C. at 369, 562 S.E.2d at 389 ("state provisions in [the field of state legislative redistricting and reapportionment] not otherwise superseded by federal law must be accorded full force and effect"). Therefore, *absent a court order directing a remedy for a specific federal law violation*, the General Assembly is prohibited from redrawing any districts mid-decade.

On August 11, 2016, when the United State District Court for the Middle District of North Carolina "order[ed] the North Carolina General Assembly to draw remedial districts . . .to correct the constitutional deficiencies in the Enacted Plans," *Covington v. North Carolina*, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017), the court

was specific in directing where the defects existed. This order from the Court did not, and indeed could not, authorize the General Assembly to redraw districts that did not suffer from such federal constitutional deficiencies.

According to the Supreme Court of North Carolina, the State Constitution "enumerates several limitations on the General Assembly's redistricting authority," including Article II, Sections 3 and 5's prohibition of mid-decade redistricting. *See Pender Cty. v. Bartlett*, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007), *judgment aff'd sub nom., Bartlett v. Strickland*, 556 U.S. 1 (2009). "Those constitutional limitations are binding upon the General Assembly 'except to the extent superseded by federal law.'" *Id*. (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 372, 562 S.E.2d 377, 389 (2002)). Furthermore, "where [a jurisdiction's] remedial plan contravenes state laws that have not been remedially abrogated by the Supremacy Clause," the remedial plans offered by a legislative body must still respect the policies that sovereign state constitutional law demands. *Large v. Fremont Cty.*, 670 F.3d 1133 (10th Cir. 2012); *Bodker v. Taylor*, Civ. A. No. 1:02-cv-999ODE, 2002 U.S. Dist. LEXIS 27447, at *5 (N.D. Ga. 2002) (the court would not order a jurisdiction's preferred redistricting plan when doing so would contravene state law); *see also Cleveland Cty. Ass'n for Gov't by the People v. Cleveland Cty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) ("[I]f a violation of federal law necessitates a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs."). In the present case, the General Assembly does not have the authority to disregard the state policies commanded by the state constitution unless specifically abrogated by the *Covington* court's order identifying violations of federal law and directing a remedy.

Article II, Sections 3 and 5 of the North Carolina Constitution specifically lay out restrictions imposed on the General Assembly when it undertakes state legislative redistricting.

Sections 3(4) and 5(4) go so far as to explicitly prohibit the General Assembly from redrawing state legislative districts, once enacted, until after the next decennial census. N.C. Const. art. II, §§ 3(4), 5(4). The 2017 Wake County House Districts violate the provision applicable to State House redistricting and go well beyond the necessary abrogation of the State Constitution required by the August 11, 2016 order by the *Covington* court, 316 F.R.D. 117, and must therefore be rejected.

In his affidavit, Plaintiffs' expert witness Mr. Anthony Fairfax, an experienced mapdrawer, walks this Court through the process by which he was easily able to both remedy the two racially gerrymandered State House districts in Wake County and minimize any so-called "ripple effect" to ensure compliance with the mid-decade redistricting prohibition in the state constitution. *See* Affidavit of Anthony Fairfax, at ¶¶ 20-36. As any mapdrawer intent on drawing a remedial district would, Mr. Fairfax started with an examination of the features of HDs 33 and 38 that led the Covington court to conclude that the districts were unconstitutional. Because the Covington court found that the evidence that race predominated in the construction of these districts included (1) an intentional inflation of the BVAP to over 50%; (2) the splitting of precincts **on the basis of race** in the construction of the districts; and (3) the splitting of neighborhoods **on the basis of race** in the constructions of the district, *see Covington*, 316 F.R.D. at 159-60, Mr. Fairfax took care to ensure that none of these factors were present in his demonstrative remedial districts. Fairfax Aff. at ¶¶ 24, 37.

As is legally appropriate, Mr. Fairfax started with the 2011 legislative enacted districts. His first step was reuniting the precincts that were split **on the basis of race** in HDs 33 and 38. Fairfax Aff. ¶ 25. He assigned those whole precincts to adjacent non-gerrymandered districts because he observed that the splitting of those precincts on the basis of race, and assigning the

majority census block to racially gerrymandered districts is what drove the BVAP in the districts above 50% (thus removing another aspect of the districts that led the Covington court to conclude they were racially gerrymandered). Fairfax Aff. ¶ 27. He then observed by shifting the now under-populated HDs 33 and 38 to the east and southeast in the county and away from where there were non-invalidated and non-abutting House Districts, he could easily minimize the number of districts he would have to change in order to remedy the district. Fairfax Aff. ¶¶ 28-29, 40. He added precincts to HDs 33 and 38 consistent with race-neutral traditional redistricting criteria, such as trying to draw more compact districts that better respected municipal boundaries. Fairfax Aff. ¶¶ 30-32. After bringing HDs 33 and 38 to within acceptable population deviations, he then made minor adjustments to the surrounding districts to likewise bring them within acceptable population deviations. Fairfax Aff. ¶¶ 33-36. He confirmed that there were no neighborhoods split on the basis of race in his remedial districts. Fairfax Aff. ¶37. During his drawing process, Mr. Fairfax neither considered racial data nor political data, except for incumbents addresses. Fairfax Aff. ¶¶ 21, 37. As others had done in the *Covington* proceedings, he was easily able to fix the two unconstitutional districts without altering the four districts at issue in this litigation. Fairfax Aff. ¶¶ 44-45.

Additionally, Mr. Fairfax reviewed the expert report submitted by Legislative Defendants' expert in *Covington*, Dr. Douglas Johnson. Mr. Fairfax opined that based on his extensive experience drawing maps, particularly in North Carolina, Dr. Johnson was incorrect in asserting that the "ripple effect" of correcting the unconstitutional State House Districts in Wake County would require every district in the county to be altered in the 2017 remedial plan. Fairfax Aff. ¶¶ 38-41. Mr. Fairfax explained that it is quite easy to minimize the effects of corrections to an unconstitutional district, consistent with traditional redistricting criteria, and

that he had demonstrated as such walking the Court through how he constructed his demonstrative remedial districts. Fairfax Aff. ¶¶ 38-40. When Dr. Johnson testified before the *Covington* court, he admitted he had no experience drawing maps to comply with a state constitutional prohibition on mid-decade redistricting. *See* Johnson Aff., Ex. 14 at 102:24-104:13 (transcript of Dr. Johnson's testimony in *Covington*). Thus, Legislative Defendants' arguments that it was not possible to correct the racially gerrymandering in HDs 33 and 38 without changing every State House district in Wake County, apparently relying on Dr. Johnson's superficial and inexperienced understanding of the "ripple effect" and complying with a mid-decade redistricting prohibition, carries no weight here.

Furthermore, Mr. Fairfax's analysis is confirmed by the indisputable factual record in *Covington*, where two sets of alternative maps—the Covington Special Master's map and the Covington plaintiffs' proposed map—demonstrated that it was possible to comply with the court's remedial order while still respecting the redistricting limits put in place by the North Carolina constitution by not unnecessarily redrawing House Districts 36, 37, 40, and 41. *See* Johnson Aff., Ex. 6, Special Master's Report and Exhibit 1 thereto (documenting how the districts at question in Wake County did not need to be changed), *Covington*, 1:13-cv-00399, ECF 220, 220-1; Ex. 7, *Covington* Pls.' Obj. (Excerpt from Ex. 7 to the Objections, Gilkeson Declaration and Exhibit A thereto) (offering alternative plans for Wake County), *Covington*, 1:13-cv-00399, ECF 187-7.

Given the plain language of the State Constitution in this matter, there can be no serious dispute as to its interpretation. In fact, the North Carolina Supreme Court has only interpreted this constitutional provision in a single case and deemed its plain meaning so obvious and significant a directive that the court held the mid-decade prohibition took precedence over

another constitutional provision—the state constitutional requirement that districts be comprised of whole counties. *Comm'rs of Granville Co. v. Ballard,* 69 N.C. 18 (1873). In that case, plaintiffs challenged a state statute that changed the boundaries between Franklin and Granville Counties, adding portions of Granville County to Franklin County. Before the enactment of that challenged statute, Granville County was within Senate District 21 and Franklin County was in Senate District 7, and the boundary separating those two counties was coterminous with the boundary separating the two Senate Districts. *Id*. at 19. Challengers argued that the statute could not be construed in a manner that did not run afoul of at least one constitutional provision: (1) if part of Granville County was moved into Franklin-based Senate District 7, as would happen if the boundaries between the counties were changed, that would result in a violation of Article II, Section 5, because it would effectively change the senatorial district boundaries in violation of the constitutional prohibition on mid-decade redistricting, *id*.; and (2) if those voters in Granville County were not then incorporated into Senate District 7 with the rest of Franklin County, then senatorial districts would not be comprised of whole counties, as required by a different provision of the State Constitution, which required counties be kept whole in the construction of state legislative districts. *Id*. at 20. The North Carolina Supreme Court found the statute could be interpreted to mean that while some Granville County residents would now be residents of Franklin County, they would continue to vote in SD 21 and thus avoid the prohibition of mid-decade redistricting altogether. That is, the state's high court opted for an interpretation that did not strictly comply with the whole county requirement in order to strictly comply with the prohibition on mid-decade redistricting. *Id.* The North Carolina Supreme Court thus prioritized complying with the plain language of the mid-decade redistricting prohibition—not changing the composition of the senate districts in question in the case, even if it meant

sacrificing strict compliance with the state whole county requirement. *Id*. The *Granville* case and its reasoning establish both that the provision at issue here is an overriding concern of the State Constitution and that its clear directives must be interpreted literally.

Here, the General Assembly has violated Art. II, Section 5(4) by unnecessarily altering State House districts before the next decennial census in a manner that exceeded the terms of what a federal court order allowed. House Districts 36, 37, 40, and 41 in Wake County were not declared unconstitutional, they do not touch a district that was ruled unconstitutional, and there is no other valid legally relevant reason why it was necessary to change their boundaries to cure the unconstitutional districts. This Court cannot allow a purported remedial plan that essentially reads out of the state constitution a clear restriction on legislative authority in redistricting—even in unusual circumstances. The North Carolina Supreme Court has demanded complete adherence to the rule.

Defendants here will try, as they have before in this tortured history of litigation over state legislative districts this decade, to justify their illegal scheme with a "ripple" effect claim. That desire in search of a theory suggests that redrawing House districts 33 and 38, as ordered by the *Covington* court, 316 F.R.D. 117, necessitated that House districts 36, 37, 40, and 41 also be redrawn. However, Mr. Fairfax's analysis and the previously mentioned alternative maps considered by the federal court all amply demonstrate that such a "ripple effect" theory is erroneous. Not only are there now three maps that demonstrate that any alleged "ripple effect" can be controlled or minimized (the Fairfax map, the *Covington* Special Master's map, and the *Covington* plaintiffs' map), but the legislature was squarely on notice before it enacted the 2017 challenged districts that it was not necessary to alter any of the four districts at issue here. The *Covington* plaintiffs demonstrated just that with their proposed alternative map, introduced at the

August 22, 2017 public hearing. This Court can rest assured that this is not a game of litigious "gotcha," where challengers attempt to, post hoc, find some flaw with a legislative redistricting plan they do not prefer. The state was put on notice that the redistricting plans under contemplation violated a clear constitutional rule, and that rule was clearly articulated and explained to the legislature before they enacted those challenged districts. *See* Johnson Aff., Ex. 1, *Covington* Plaintiffs' Letter. Plaintiffs here have the right to remain in unaltered State House districts for the entire decade, that right has been infringed upon, and they have standing to assert that right. If there is any case where there the judiciary faces a close call on the sufficiency of legislative attempts to comply with the law, this is not that case: the legislature's failure to correct the constitutional problems before enactment certainly cuts against any equitable concerns in enforcing that clear constitutional mandate now and this Court compelling state compliance with that mandate.

Importantly, even otherwise legitimate or reasonable legislative policy concerns cannot justify or supersede the legislature's duty to comply with the state constitution. *See Stephenson*, 355 N.C. at 371-72, 562 S.E.2d at 390. (Noting that the General Assembly's "application of its discretionary redistricting decisions" must be exercised "in conformity with the State Constitution . . . . except to the extent superseded by federal law.") Legislative Defendants have also alleged that it was necessary to change all the districts in the county to make the districts more compact and split fewer precincts—and that since the non-compact shapes of House Districts 33 and 38 led to their invalidation as racial gerrymanders, the legislature was duty bound to correct those characteristics of other districts in the rest of the county. *See* Johnson Aff., Ex. 2 at 63. This argument carries no weight for several reasons: first, it was not the legislative policy for the state legislative districts in 2011 to emphasize compactness and split

precincts as priorities. Though experience may have taught them harsh electoral lessons regarding the wisdom of those 2011 policy choices, the constitution directs that the legislative policy adopted in 2011 binds the North Carolina General Assembly for the full decade. While the legislature may have had a change of heart, and preferred to draw more compact districts in 2017, it can only employ such changed legislative policy preferences with respect to districts that *must* be redrawn to effectuate the remedy ordered by a federal court. House Districts 36, 37, 40 and 41, which were redrawn without judicial direction, do not fit within that category. Likewise, a desire to reconfigure these districts for partisan advantage, in reaction to how voting patterns in Wake County have changed since 2011, also cannot justify ignoring the clear state law directive that legislative redistricting may only happen once a decade. *See* Compl. at 15-20; Johnson Aff. Ex. 8-9. Comparing the election statistics packet compiled for the 2011 Wake County House districts with the one compiled for the 2017 Wake County House districts, (both of which were available at the time of the 2017 enactment), extra districts were manipulated to pursue a partisan effect. The clearly discernible goal of these non-essential changes was to ensure that Districts 36 and 40 (both whose races were trending Democratic), were shored up for Republican contestants. *Compare* Johnson Aff., Ex. 8, 2011 Stat Pack at 21, *with* Johnson Aff., Ex. 9, 2017 Stat Pack – HBK-25 2017 House Redistricting Plan A2: Population 2010, US Senate 2010, President 2012 at 1; *see also* Affidavit of Representative Joe John, ¶¶ 10-14 (noting that as a result of the changes in the 2017 enacted house plan, his district lost the precincts in which he defeated the Republican incumbent with 58% of the vote or more and gained eight precincts which performed for a Republican candidate in the 2016 general election). The affidavit of Representative Gale Adcock also demonstrates that this aim was achieved by significantly increasing the amount of precincts in District 41 that perform for Democrats, rendering the district significantly less competitive.

Adcock Aff. ¶ 10. This contemporaneously-available data does not establish a state constitutional violation in and of itself, but it confirms that the Legislative Defendants' excuses for the 2017 unnecessarily-altered districts boil down to politics, and politics cannot trump the state constitution.

Lastly, it is simply not true that by failing to make all districts in Wake County more compact and to split fewer precincts, the legislature would have failed to cure the racial gerrymandering identified by the Court. If that argument carried any legal weight, the legislature should have endeavored to correct every split precinct in the state, and it plainly did not. *See* Johnson Aff., Ex. 2 at 11 (noting that only "116 of the 170 state House and Senate districts" were altered). And it was not the lack of compactness nor the split precincts per se that created the constitutional violations (or established racial predominance) in House District 33 and 38—it was that precincts were split **on the basis of race** in the construction of the district—with black voters included and white voters excluded. Nor is lack of compactness a per se constitutional problem—only when the shape is explainable only on the basis of race.

Mr. Fairfax explained how, as an experienced mapdrawer and one who has been tasked previously with constructing remedial districts in a federal court proceeding, it was quite simple for him to ensure that he had cured the racial gerrymandering in the two districts invalidated as unconstitutional. *See* Fairfax Aff. ¶¶ 44-47. It strains credulity that this legislature was uncertain about how to address a finding of racial predominance in districts where precincts had been split by race. Likewise, it is simply not plausible that the legislature understood that the constitutional cure to the predominant use of race in two specific districts **intentionally drawn as majority black districts** involved tinkering with precincts located in non-majority black districts not even adjacent to the invalidated districts, as is the case with the four districts at issue

here. Once again, the legislature ignores black letter law on racial gerrymandering in a cynical attempt to gain partisan advantage.

Finally, the partial stay entered by the United States Supreme Court on February 6, 2018 does not and cannot deprive North Carolina state courts, as the ultimate arbiter of state constitutional law, of jurisdiction to act to afford Plaintiffs relief or to rule on the state constitutional issues. Such an interpretation of the stay order would represent an extreme intrusion on the sovereignty of this state to define and enforce its own state constitution—an intrusion that the United States Supreme Court, always respectful of the appropriate role of state courts in such matters, would certainly not intend. *See Growe v. Emison*, 507 U.S. 25, 33 (1993) ("In the reapportionment context, the [Supreme] Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.") (emphasis in original).

In order to understand why it is logically unnecessary and legally erroneous for this Court to stay its hand pending proceedings in the *Covington* appeal, it is helpful to understand the arguments presented in that case. Legislative Defendants have premised their appeal of the *Covington* remedial order with respect to Wake County on two primary legal arguments: (1) none of the *Covington* plaintiffs had standing to raise concerns with respect to HDs 36, 37, 40 and 41; and (2) under the Supreme Court's precedent in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984), the federal court "lacked jurisdiction… to enjoin the State from using the 2017 Plan on state law grounds." Johnson Aff. Ex. 3 at 28 (*Covington* Emergency Stay Application). The first legal argument cannot be an issue in this case—Plaintiffs Okal, Riordan, Tung and Blackley reside in HDs 36, 37, 40 and 41, respectively—the challenged, altered districts. State Defendants admitted the residency of these plaintiffs in their

answer filed in this case on March 26, 2018. There can be no question, raised in good faith, that Plaintiffs here have standing to allege that these districts were unconstitutionally challenged. Thus, to the extent that this standing argument justified the partial stay implemented in *Covington*, it is not an issue here and nothing the Supreme Court may decide in that case would affect the jurisdiction this Court has to hear Plaintiffs' challenges.

With respect to their second legal argument, Legislative Defendants err in their understanding of why the federal district court ordered the Special Master's Wake County districts into effect, but regardless of that error, again, nothing about that argument in the *Covington* appeal obviates this Court's duty to enforce the State Constitution pending a resolution in *Covington*. Despite Legislative Defendants' erroneous contention, the *Covington* court did not sustain the *Covington* plaintiffs' objections to the Wake County districts on state law grounds—it sustained the objections because the legislature exceeded the scope of that court's order to redraw HDs 33 and 38. *See* Johnson Aff., Ex. 2 at 62 (*Covington* Order on Remedy). That is, being respectful of the very same federalism concerns that underpinned both the Supreme Court's ruling in *Pennhurst* and in *Perry v. Perez*, 565 U.S. 388 (2012), the *Covington* court wanted to ensure that its order enjoining some 2011 state legislative districts did not unnecessarily infringe on North Carolina's state sovereignty. Respect for North Carolina's sovereignty must include respect for its state constitution, which is the ultimate declaration of its sovereign rules and principles, especially as related to redistricting. Thus, the federal court order enjoining the unconstitutional 2011 districts needed to be interpreted as narrowly as possible to give full effect to the state constitutional rules on redistricting. *See Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs,* 142 F.3d 468, 477 (D.C. Cir. 1998) ("if a violation of federal law necessitates a remedy barred by state law, the state law must

give way; if no such violation exists, principles of federalism dictate that state law governs."). Because the legislature mistook the scope of the federal court directions to redraw the racially gerrymandered districts, the federal court had to sustain the *Covington* plaintiffs' objections on federalism, not state law, grounds.

But even if Legislative Defendants were correct in their *Covington* appeal that a federal court did not have jurisdiction to enjoin the 2017 plan on state law grounds, and they are most certainly not, a state court does have jurisdiction to enjoin a redistricting plan on state law grounds. *Stephenson v. Bartlett*, 357 N.C. 301, 305, 582 S.E.2d 247, 250 (2003) ("within the context of state redistricting and reapportionment disputes, it is well within the 'power of the judiciary of a State to require a valid reapportionment or to formulate a valid redistricting plan.'") (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). There is no conceivable way in which the Supreme Court ruling for Legislative Defendants on that basis would affect this Court's jurisdiction to enter a state-law based injunction, and any claim to the contrary is baseless.

Finally, even to the extent the Supreme Court may have stayed the *Covington* remedial order with respect to Wake County because it believed the district court improperly exercised pendent jurisdiction over an unclear area of state law—and the district court did not improperly exercise pendent jurisdiction because the mid-decade redistricting rule is quite clear—that still does not justify this Court declining to rule on the merits of this case. Even though federal courts are authorized, in the name of judicial efficiency, to exercise pendent jurisdiction over state law claims, 28 U.S.C. § 1367, the United States Supreme Court cannot and will not act as the ultimate arbiter of what the North Carolina state constitution means. Only this state's courts can do so. *See Stephenson,* 357 N.C. at 362, 582 S.E.2d at 384 ("issues concerning the proper

construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court.") (quoting *Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)). If there is any uncertainty as to whether the plain words of the North Carolina Constitution mean what they say, and there can be no reasonable uncertainty that those words should employ their common-sense meaning, it is up to this Court and the North Carolina Supreme Court to resolve that uncertainty. As such, a delay in ruling on the merits here pending the resolution of the *Covington* appeal would act only to deny Plaintiffs their constitutional rights in a fourth election cycle this decade and put at extreme risk their ability to receive relief in time for the fifth and final election cycle of the decade. For all of these reasons, this Court should consider the merits of the case now.

Thus, because now three different maps, drawn by three different mapdrawers, have all unequivocally demonstrated that it is possible to both remedy the racial gerrymandering violations in HDs 33 and 38 without altering HDs 36, 37, 40, and 41, it is clear the 2017 Wake County House district configurations represent a discretionary and not mandatory decision by the legislature. The former patently violates the state constitutional prohibition on mid-decade redistricting, compliance with which the North Carolina Supreme Court has interpreted strictly. Thus, Plaintiffs are likely to succeed on the merits of their claim here, and this Court should grant a preliminary injunction as litigation moves forward.

III. Plaintiffs and the public writ large will suffer irreparable harm if the 2017 districts are allowed to remain for the 2018 elections.

The electoral process and the right to vote are of fundamental import, and the need for voters to be able to freely participate in legally-conducted elections that form and empower the government of this State cannot be understated. *See* N.C. Const. art. I, § 9 ("For redress of grievances and for amending and strengthening the laws, elections shall be often held."); *id*. art.

II §§ 3, 5 (setting forth the requirements for the drawing of electoral districts). The right to vote is a fundamental right "enshrined in both our Federal and State Constitutions." *Blankenship v. Bartlett*, 363 N.C 518, 522, 681 S.E.2d 759, 762 (2009); *see also Wesberry v. Sanders*, 376 U.S. 1,117 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). Specifically, in North Carolina, the right to vote on equal terms is a fundamental right. *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). For Wake County voters to be specifically subjected to this state constitutional violation represents a particular affront to their constitutional rights. Indeed, given the power of local legislative delegations to enact local bills—several of which in Wake County have been invalidated as unconstitutional in recent years, *see Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016)—it is even more critical that Wake County voters enjoy the protections guaranteed to them by the state constitution to be free from undemocratic effects of gerrymandering. Without that, Wake County voters are subject to differential treatment and rights compared to other voters in the state.

Furthermore, it has long been settled that violations of fundamental constitutional rights cause irreparable harm. *See e.g., Elrod v. Burns*, 427 U.S. 47, 373 (1976); *see also, e.g., Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (holding that "[d]eprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause" through redistricting, "constitutes irreparable harm."). On the sole basis of the constitutional injury to Plaintiffs, a preliminary injunction is appropriate. *See High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) (holding that "equity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance [such

as electoral districts] which contravenes our Constitution, where it is essential to protect . . . the rights of persons against injuries otherwise irremediable.").

The significance of the injury is further magnified in light of the fact that this is an election year and absent intervention from this Court, Plaintiffs will have no recourse but to participate in unconstitutional elections once again—in districts manipulated to subvert the will that Wake County voters have been expressing in recent elections. Moreover, in determining whether to issue an injunction the Court must consider the public interest at stake. *A.E.P Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). Given the fundamental importance of the right to vote and fair elections in our democracy, the public is undeniably served by the issuance of an injunction. An injunction will ensure that the 2018 elections are conducted under constitutional redistricting plans, and any contrary result would greatly undermine the public's interest in electing officials pursuant to constitutional methods. *See Wesberry v. Sanders*, 376 U.S. 1, 6, 84 (1964) (asserting "the power of the courts to protect the constitutional [voting] rights of individuals from legislative destruction" and proclaiming that such power has been asserted since 1803 when the United States Supreme Court decided *Marbury v. Madison*). Therefore, given the magnitude of the irreparable harm facing the plaintiffs and the interest of the public in the election of a constitutionally-comprised legislature, the Court should grant a preliminary injunction enjoining Defendants from enforcing, relying on, and conducting elections in the four Wake County districts as litigation moves forward in this case.

Finally, a balancing of the equities of the potential burden on the state against the irreparable harm to the Plaintiffs also weighs in favor of this Court's issuance of a preliminary injunction. Despite Defendants' contentions to the contrary, as discussed in detail, *infra* Part IV.,

the burdens on election administration that will result should this court order the 2011 configuration of the challenged districts into effect and a special election held are neither unreasonable in light of the constitutional violations nor unusual in light of the frequency with which second primaries and special elections must be held. Further, though Defendants have represented to this court that the relief Plaintiffs request will result in widespread voter confusion and unduly burden the campaigns of candidates, these representations misstate reality.

As an overarching matter, there is some level of voter confusion caused or adjustment of voters' understanding necessary any time district lines change, but that of course does not justify declining to redistrict after the return of federal decennial census data (in order to equalize population amongst districts) or after a court declares a redistricting plan unconstitutional. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.") This "baseline" and unavoidable level of voter confusion does not rise to the level voter confusion that would warrant a court declining to impose constitutional election laws. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 3-5 (2006) (staying a lower court's injunction of a voter identification requirement where that injunction was entered with no explanation as to its logic, only one month before the general election, and would cause voter confusion as to the rules applicable in the election). Thus, it is important for this Court not to conflate the natural and expected level of voter readjustment necessary following the correction of the racially gerrymandered districts[1] with any alleged confusion that might flow from Plaintiffs' preliminary injunction request. The two are entirely different phenomena, and the latter is actually minimal or non-existent.

[1] And, of course, the legislature could have minimized this confusion or readjustment by complying with the state constitutional prohibition on mid-decade redistricting when they were put on notice of the issue prior to enactment. *See* Johnson Aff., Ex. 1.

There is no evidence to support a conclusion that Plaintiffs' requested remedy would cause so much additional confusion to the voters of Wake County that this Court would be justified in allowing yet another election under unconstitutional districts to occur. The affidavits of Representatives Joe John and Gale Adcock demonstrate that any potential confusion experienced by the voters in Wake County about their state legislative districts stems from the 2017 changes to remedy the racially gerrymandered districts. John Aff. ¶ 16-17, Adcock Aff. ¶ 12-13; *See also* Montford Aff. ¶ 17 (noting that the principal cause of confusion ahead of the 2016 special primary stemmed from changes to voters' congressional districts). While it was necessary and inevitable that some districts in Wake County be changed – and therefore that some voters experience the confusion that accompanies changes in district lines – in order to remedy the racial gerrymandering found in Districts 33 and 38, any voter confusion resulting from the modification of Districts 36, 37, 40, and 41 has been as unnecessary and avoidable as the modification of the districts themselves. Reverting House Districts 36, 37, 40, and 41 to a configuration that voters within these districts are already familiar with would only serve to alleviate the confusion that may already exist. John Aff. 16, Adcock Aff. ¶ 13. To many Wake County voters, a change in the primary date will be immaterial, either because their districts do not have any contested primary elections, John Aff. ¶ 20, Adcock Aff. ¶ 14, or because the majority of North Carolina voters do not participate in primary elections at all. John Aff. ¶18. Further, the affidavits of Melvin Montford, Executive Director of the NC APRI, and Reverend Portia Rochelle, President of the Raleigh-Apex Branch of the NAACP recounting their experiences doing voter outreach in primary elections establish that many North Carolina voters were no more surprised or confused to hear that the 2016 special primary election was upcoming

than voters normally are to hear that a regularly scheduled primary is upcoming. Montford Aff. ¶¶ 14-16, Rochelle Aff. ¶¶ 15-19. In any event, both NC APRI and the Raleigh-Apex Branch of the NAACP are prepared and well-resourced to mount extensive voter education and Get-Out-The-Vote ("GOTV") campaigns for any and all elections slated to occur in 2018, including a special primary, Montford Aff. ¶¶ 18-20, Rochelle Aff. ¶¶ 20-21, and are but two of many organizations that conduct such efforts across the state.

Finally, because Defendants have, in oral argument to the Court, made much ado about the alleged *candidate* confusion that might be induced by the ordering of a special primary, Plaintiffs offer the affidavits of two Wake County state legislators and a former Wake County Board of Elections member to dispel such unsupported notions. Each of those affiants describe how, based on their extensive experience as candidates who must engage with voters, or as an election administrator, they do not believe a special primary will cause the alleged substantial confusion, amongst voters or candidates, that Defendants have depicted. Representatives John and Adcock, both of whom are in districts at issue here and thus may be affected by this Court's ruling, disclaim that they would experience any prejudice or confusion as candidates. See John Aff., ¶¶ 15-21; Adcock Aff., ¶¶ 11-16. Mr. Ezzell, who was on the Wake County Board of Elections when the June 2016 special primary was conducted, was not aware of any substantial voter confusion, and was in a position to know of such confusion if it existed. *See* Ezzell Aff., ¶12. This Court should thus reject such unsupported assertions as any basis for not affording Plaintiffs the relief requested here.

Moreover, "the right to seek office 'is a political privilege and not inalienable, and certainly when a different method of selection has been provided, consistent with the Constitution, the fact that [a candidate's] aspiration has been thwarted by a nondiscriminatory

change of the law gives him no cause of action.'" *See State ex rel. Martin v. Preston*, 325 N.C. 438, 455, 385 S.E.2d 473, 482. Therefore, under North Carolina law, it is difficult to imagine a circumstance where any nondiscriminatory burden on a candidate could outweigh the rights of voters to cast ballots under constitutional district lines. Nonetheless, it is equally unlikely that Plaintiffs' request would unduly burden the campaign efforts of candidates for the North Carolina House of Representatives in Wake County. Currently, only three House Districts within Wake County will have contested primaries if held as scheduled – HD 11, HD 33, and HD 35. The remainder of candidates, therefore, have no primary campaign to burden. Restoration of the 2011 configurations of House Districts 36, 37, 40, and 41 would alleviate the burden to some degree, as the candidates in those districts will no longer need to expend resources familiarizing themselves with the voters previously drawn into different districts. *See* John Aff. ¶¶ 13, 20-13 (noting that his district has gained thirteen new precincts and that considerable time would be spent engaging these new precincts for the general election if the districts did not revert), Adcock Aff. ¶¶ 11, 15 (noting that 53% of the precincts within her districts are new and that her campaign's focus on engaging with new voters would be unnecessary if the districts reverted). Even in the event that these candidates drew challengers during a new filing period, a delayed primary would only provide more time to campaign, and for some, under district lines and to voters with which the candidates are already familiar. John Aff. ¶¶ 20-21, Adcock Aff. ¶¶ 16. Surely these circumstances do not justify the irreparable harm that will result from subjecting the voters of Wake County, yet again, to an election under unconstitutional district lines.

IV. There is ample time to resolve this simple legal question in time to preserve Plaintiffs' right to participate in constitutional elections in November of 2018.

On a more practical front, there is no reason, from a timing standpoint, to deny Plaintiffs the constitutional districts to which they are entitled because filing has already concluded for the unconstitutional districts. The November elections are over seven months away. While of course there may be some burden associated with Wake County election officials having to conduct a special primary this summer because there is no time to implement a remedy before the May 8, 2018 primary, there are mitigating steps that this Court can take to both minimize any possible electoral disruption and still ensure that Wake County voters are, for the first time this decade, afforded the opportunity to have representatives in the state legislature that have been duly and properly elected.

The proximity of the 2018 election cycle may very well obviate the need for this Court to grant the legislature yet another chance to remedy its persisting constitutional violations if this Court finds, as a matter of fact, that doing so would put at risk the opportunity to get constitutional districts in place by the time of the election. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (the legislature is entitled to "a reasonable opportunity . . . to meet constitutional requirements by adopting a substitute measure," insofar as is "practicable."). *See also Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 642, 599 S.E.2d 365, 393 (2004) ("Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.")(collecting cases); *Stephenson v. Bartlett*, 357 N.C. 301, 303, 582 S.E.2d 247, 248 (2003) ("This Court . . . ordered the trial court to hold an expedited hearing on the feasibility of allowing the General Assembly the first opportunity to develop new plans. However, this Court held that if the General

Assembly was unable to develop revised constitutional plans meeting the guidelines established in *Stephenson I* . . . . [the North Carolina Supreme Court] 'authorized [the trial court] to take all necessary remedial actions to ensure that the primary elections for legislative offices are conducted in a timely and expeditious manner and consistent with the general election scheduled for 5 November 2002.'' (internal citations omitted)). However, if the legislature does wish to act promptly and avail itself of its opportunity to redraw, then this Court may afford them the chance to do so. If this Court enters a preliminary injunction in April and gives the legislature the statutorily-prescribed two weeks to develop a remedial plan, N.C. Gen. Stat. §120-2.4—which would involve re-implementing districts already drawn in 2011 and making only minor changes to a few other districts in one county only—the remedial process can be concluded by May. Such a timeline would leave the Wake County Board of Elections months to conduct a special primary. Indeed, the elections processes associated with the November general election do not begin in earnest until the fall, when counties begin preparing ballots to provide to absentee voters starting 60 days before a statewide general election in even-numbered years (so on September 7 this year). *See* N.C. Gen. Stat. § 163A-1305.

Wake County is a very well-resourced and well-managed county board of elections. *See* Ezzell Aff. at ¶¶ 12-13. In the *Covington* hearing, the recently retired former director of the Guilford County Board of Elections, a similarly well-resourced county board, testified to the speed with which a county board like Guilford's could act to implement a remedial plan in their county. *See* Johnson Aff., Ex. 13, Excerpt from Gilbert Testimony in *Covington v. North Carolina*, at 30-35 (describing the speed with which a well-resourced urban county can geocode new districts and how equipment testing can be conducted while absentee voting is underway). And, of course, the implementation of a remedial plan is also facilitated by the fact that the

county board of elections has already geocoded the districts that Plaintiffs seek to have restored, because those were the districts used in the 2012, 2014 and 2016 elections. While there would be some changes to other districts, these changes would, by necessity, be relatively minimal, and a well-resourced and well-run county board of elections like Wake County's is well-equipped to deal with such changes.

Finally, the conducting of a special primary this summer to determine the political parties' nominees for any Wake County House District altered in another remedial map does not represent any kind of significant departure from what the Wake County Board of Elections regularly has done in even-numbered election years. While it appears that Wake County will not have to conduct a second primary pursuant to statute this year, see N.C. Gen. Stat. § 163A-984 (amended in 2017, effective Jan. 1, 2018, to reduce the substantial plurality threshold for requesting a second primary from 40% to 30%), because no more than three candidates filed to run in any party primary for a race in Wake County, Wake County election administrators are quite accustomed to having to conduct primaries in the summer months. In fact, Wake County has had to have a second primary in six of the last nine even-year election cycles. *See* Ezzell Aff. at ¶8; Johnson Aff., Ex. 10. Indeed, just in 2016, when Wake County would not have needed to conduct a second primary, it had to conduct a special primary because a federal court in North Carolina ordered a special primary election be conducted for remedial congressional districts. Those elections were conducted on June 7, 2016. *See* Johnson Aff., Ex. 10. Thus, in seven of the last nine even-numbered general election cycles, Wake County has conducted primaries in the summer months. *See* Ezzell Aff., ¶8.

A special primary election as needed here is not extraordinary relief, because it shortens no terms of office and does not disrupt the general election schedule. Indeed, given that the

United States Supreme Court denied an emergency stay application from North Carolina legislators in the *Harris v. McCrory* case when those legislators were ordered to conduct a special primary election for congressional seats in 2016, this Court can reasonably infer that such a slight accommodation in the election schedule is warranted in order to effectuate constitutional rights. *See McCrory v. Harris*, 136 S. Ct. 1001 (2006). Even more compelling, the special primary election during the summer of 2016 was a statewide special primary—here, only Wake County would be required to hold a special primary, minimizing the cost for election administrators. And when Wake County did conduct that special primary in June of 2016, it was both able to easily secure funding from its Board of County Commissioners, *see* Ezzell Aff. ¶12, and conduct an election where turnout far exceeded the statewide average. *See* Johnson Aff., Ex. 11-12 (turnout in June 2016 special primary in Wake County was 10.60% compared to 7.73% statewide).

Finally, on that front, it is entirely possible, and maybe even probable, that the state will be required to conduct statewide special primaries for appellate judicial elections at some point this summer. Unrelated to this case, the North Carolina Democratic Party sued the state over the legislature's decision to cancel judicial primaries after making all judicial elections partisan, alleging that this interfered with the Party's First Amendment associational rights. A district court granted a preliminary injunction and ordered that primaries be held for appellate judicial elections. Memorandum Opinion and Order, *N.C. Dem. Party v. Berger*, No. 1:17-cv-1113 (M.D.N.C. Jan. 31, 2018). While the Fourth Circuit stayed that preliminary injunction, it ordered expedited briefing and argument (the case was argued on March 20, 2018). *See* Order at 3, *N.C. Dem. Party v. Berger*, No. 18-1150 (L) (4th Cir. Feb. 16, 2018). With the stay in place, if the appeals court were likely to reverse the lower court, there would be no reason to expedite the

appeal. Thus, it seems that there is at least a reasonable chance that plaintiffs in that action will prevail in their efforts to have the partisan judicial primaries re-established. Moreover, the case is set to go to trial on June 7, 2018, irrespective of the Fourth Circuit's decision on the preliminary injunction. Scheduling Order at 2, *N.C. Dem. Party v. Berger*, No. 1:17-cv-1113 (M.D.N.C. Mar. 13, 2018) (setting one-day trial for the matter). That would give the federal trial court ample time to make a ruling on the merits and order judicial primaries be conducted this summer. The cost to Wake County election administrators would be practically non-existent if they conducted the special primaries for any altered State House districts at the same time as that possible judicial primary.

To be clear, this Court does not need to decide now when a special primary should be conducted in Wake County as part of implementation of remedial districts. The legislature can make that decision just like it did when it set the June 7, 2016, special primary for the remedied congressional districts. *See* N.C. Sess. Laws 2016-2 (establishing procedures and date for special primary for remedial congressional districts). This Court just should appreciate the fact that Wake County election administrators are amply equipped to comply with a court order granting the preliminary injunctions, and other events may come into play that even further minimize any burden felt by the county in administering a special primary.

In short, there is no reason this Court cannot act in a way that both ensures that Plaintiffs are not irreparably harmed by yet another election cycle conducted under unconstitutional districts and that the election machinery is not significantly disrupted. As long as this Court rules on the Motion relatively promptly, there is ample opportunity to develop a legal map for Wake County House Districts and conduct a special primary in an unrushed fashion. Thus, this

Court should not stay its hand on equitable grounds and decline to enforce the rights guaranteed by the state constitution to Wake County voters.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this court grant their Motion for Preliminary Injunction and enjoin Defendants from using the 2017 districts in House districts 36, 37, 40, and 41.

Respectfully submitted this the 2nd day of April, 2018.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a copy of the foregoing Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction in the above-titled action by mail and electronic mail to the following parties:

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