No. 24-01095

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,

Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS IV in his official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants-Appellees.

From the United States District Court for
the Eastern District of North Carolina
The Honorable James E. Dever III (No. 4:23-cv-193-D-RN)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The facts necessary for liability are not subject to reasonable dispute: A majority-minority district made of whole counties can be formed in the region; Black voters are cohesive; and white voters vote as a bloc against Black-preferred candidates at extreme levels, though Legislative Defendants do dispute the reasons for that polarization. It is likewise undisputed—because the General Assembly's own StatPack shows—that using results of 23 statewide elections from 2016 to 2022, the Black-preferred candidate loses in Senate Districts 1 and 2 *every single time*. And it is undisputed that, in the 2022 Senate elections in the exact counties at issue here, when one of the two districts was drawn with 42.33% BVAP and thus was much *more* favorable to Black voters, the Black-preferred candidate still lost by 5 points. Those facts establish "legally significant" racially polarized voting.

The Court need find nothing more to reverse. Legislative Defendants' arguments are precluded by binding case law, including *Cooper v. Harris*, 581 U.S. 285 (2017), and—as to the Whole County Provisions—*Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002). And *Purcell* is no bar to relief where, as here, the State's own Board of Elections confirms that adopting new districts in advance of the 2024 elections is administratively feasible.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits

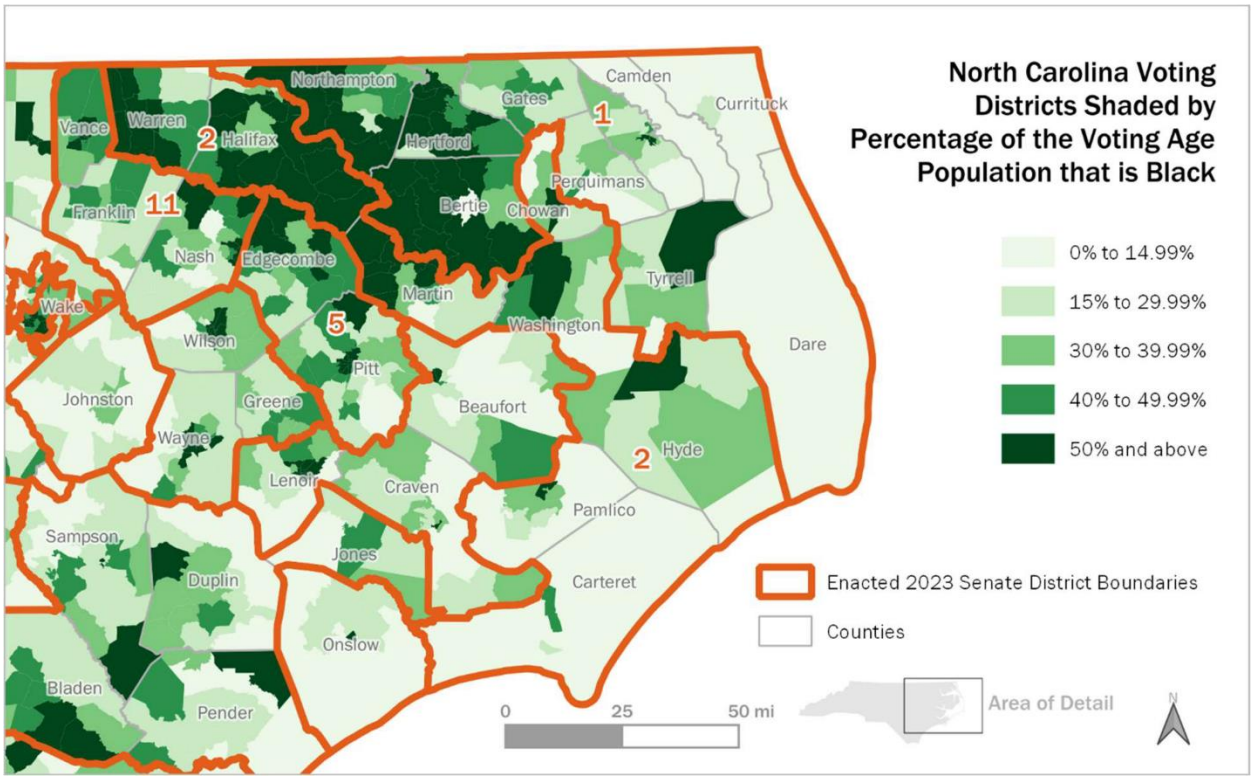
A. The First *Gingles* Precondition Is Satisfied

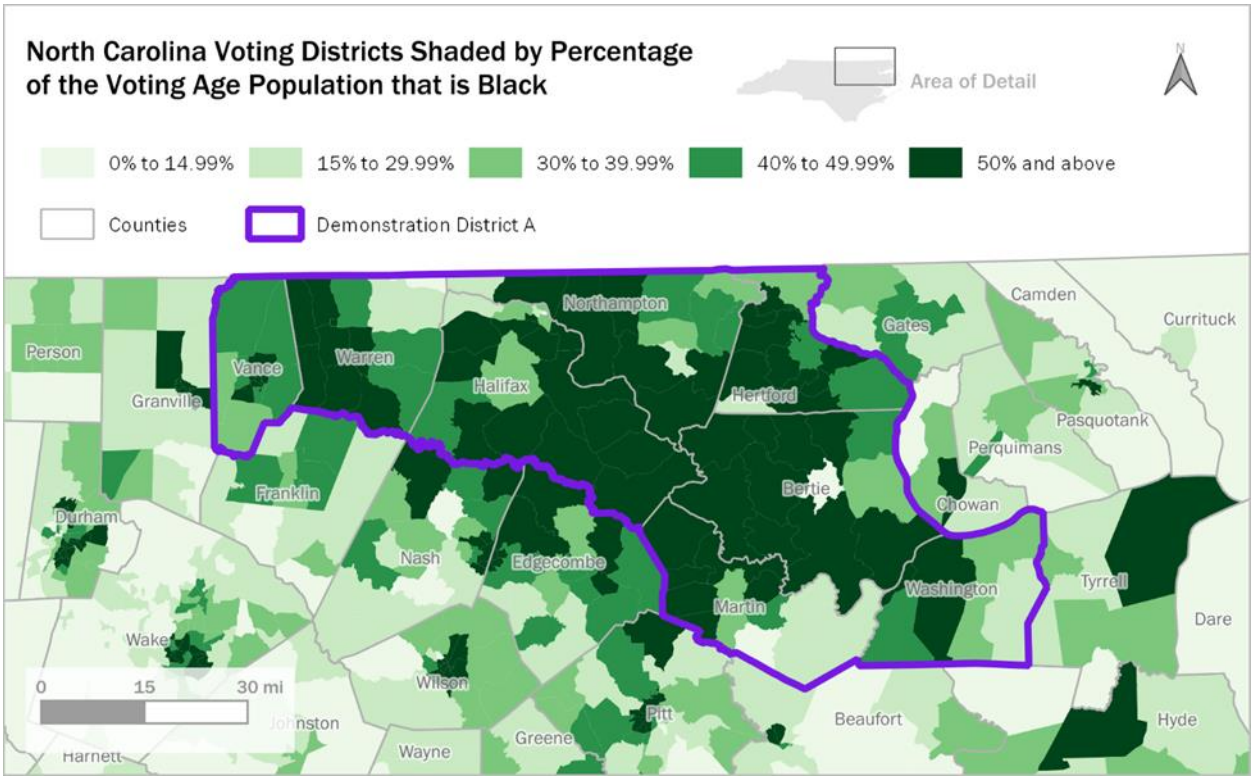
1. Demonstration District A Alone Satisfies *Gingles* One

The district court "assume[d]" that Demonstration District A establishes the first *Gingles* precondition because it does. JA925. Legislative Defendants' only argument is that Demonstration District A "would require reconfiguring the senate plan's county groupings," LD.Br.35, and that Plaintiffs were accordingly required to furnish a reasonably configured map, not a reasonably configured district. But they cite no authority imposing such a requirement. LD.Br.36. Although VRA plaintiffs often propose entire maps (and Plaintiffs did so here with Demonstration District B-1), *Gingles* merely requires proof that the minority is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Demonstration District A provides such proof.

Adopting Demonstration District A—which Plaintiffs do not advocate—would of course require adjusting the rest of the Senate map. But that is irrelevant for *Gingles One* for two reasons. First, Demonstration District A is made up of whole counties and is *more* compact than the districts it replaces. Pl.Br.15. Legislative Defendants offer no explanation of how a compact

demonstration district made up of *whole counties* could cause "ripple effects" that would *require* drawing unreasonable districts elsewhere. Merely comparing Demonstration District A to the districts in the actual 2023 senate enacted map makes clear that accommodating Demonstration District A is likely to make the map more compact and reasonably configured, not less:





Second, in North Carolina, it is necessarily true that a reasonably configured map could be drawn around Demonstration District A. As Legislative Defendants note, under the Whole County Provisions, "[t]he formula of groupings and traversal rules is objectively ascertainable." LD.Br.4. If a county is large enough to constitute a single senate district, that district is drawn first, and so on. *Stephenson*, 562 S.E.2d at 397. Under *Stephenson*, those rules and that formula must be applied after any VRA districts are drawn. *Id.* Since the parties agree that Senate District 5 cannot be disturbed, if Demonstration District A were the remedy (which Plaintiffs do not advocate), then the map-makers would freeze Demonstration District

A and Senate District 5 and then simply apply the county grouping formula to the rest of the map. The remaining lines in that map would be dictated by state law and reasonably configured for federal purposes by definition. Indeed, the county grouping algorithm the General Assembly used in 2023 has a feature allowing application of the algorithm after VRA districts are drawn.[1]

Nor is there any concern about "trad[ing] off" minority opportunity. *Contra* LD.Br.37. Demonstration District A does not involve or impact any counties in Senate District 5, so it could not possibly "eliminat[e] minority opportunity" there. *Contra* LD.Br.37. Senate District 11 is irrelevant to this argument because there is no evidence that it provides minority opportunity; its BVAP is 36.65%, JA44-45, and the Black-preferred candidate lost the district by 10 points in 2022.[2] Legislative Defendants' evidence-free assertion that District 11 "may provide equal minority electoral opportunity" (LD.Br.37) does not make it so.

Legislative Defendants' final argument, that *any* alteration to the county groupings precludes a district from being "reasonably configured,"

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[1] *See Repository*, https://git.math.duke.edu/gitlab/gjh/countycluster/-/blob/master/examples/qgCountyClusterExampleNC4VRA.py

[2] *11/08/2022 Official General Election Results - Statewide*, https://bit.ly/3OzzUmx.

LD.Br.37, is erroneous for the reasons in Plaintiffs' opening brief. Pl.Br.15-17. To the extent Legislative Defendants now argue that *Stephenson*'s holding about drawing VRA districts before formulating county groupings only concerned § 5, LD.Br.38 n.3, that is quite wrong. *Stephenson* specifically discussed § 2, 562 S.E.2d at 385, and *Pender County v. Bartlett* was about § 2, 649 S.E.2d 364, 365-66 (N.C. 2007).

2. Demonstration District B-1 Also Satisfies *Gingles* One

Demonstration District B-1 independently satisfies the first *Gingles* precondition. Pl.Br.18-26. If this Court finds that Plaintiffs must present a reasonably configured map, not just a reasonably configured district, Demonstration District B-1 satisfies that requirement too. It is paired with Demonstration District B-2 and enacted districts 3 through 50 in the enacted plan. Demonstration District B-1 is more compact than enacted Districts 1 and 2 and splits only one county. That is not unreasonable; the enacted plan splits 15 counties, JA81, and Districts 29, 35, and 47 split two counties, JA83-84.

Legislative Defendants' sole objection to Demonstration District B-1 is that citizen voting-age population (CVAP) is purportedly unavailable under *Gingles* One. This is wrong. Pl.Br.19-22. To the extent Legislative

Defendants implicitly argue that the *Bartlett* plurality's stray reference to voting-age population constituted a rejection of CVAP, *see* LD.Br.32, it did not—and *LULAC v. Perry* confirms that courts cannot reject a majority-minority CVAP district. 548 U.S. 399, 429 (2006). It is telling that, although the VRA has been around for six decades, the only decision Legislative Defendants cite to show that courts may disregard a compliant majority-minority CVAP district is a single unpublished district court opinion, *Pope v. County of Albany*, 2014 WL 316703 (N.D.N.Y. Jan. 28, 2014)—which, as Plaintiffs explained, did not even so hold. Pl.Br.20-22.

Legislative Defendants' theory also fails on its own terms. They concede that CVAP is the correct metric when there is a "significant noncitizen population." LD.Br.32-33. That concession is dispositive. If CVAP may be used when there is a "significant noncitizen population"—*i.e.*, when the difference between minority VAP and minority CVAP *matters*—it may be used here. The fact that Black CVAP exceeds BVAP proves that there is a significant noncitizen population in the relevant districts, Pl.Br.22-24, and thus that CVAP "provides probative information not available from the decennial census," LD.Br.32.

Legislative Defendants also echo the district court's claim that ACS citizenship data is "not intended to be used in redistricting," LD.Br.33, which the court took from *Pope*, 2014 WL 316703, at *13 n.22. But *Pope* was merely paraphrasing a Census Bureau webpage, *id.*; whatever that page actually said, it has since been taken down. ACS citizenship data is routinely used in VRA cases. *Terrebonne Par. Branch NAACP v. Edwards*, 399 F. Supp. 3d 608, 614 (M.D. La. 2019) (collecting cases). The United States brief Legislative Defendants cite (L.D.Br.33) specifically explains that, while ACS citizenship data should not be used to ensure population equality for Equal Protection purposes, it *is* appropriate to use for establishing the *Gingles* preconditions. Brief for the United States as Amicus Curiae, *Evenwel v. Abbott*, No. 14-940, 2015 WL 5675829, at *24 (Sep. 25, 2015).

Legislative Defendants stated below that the CVAP of Demonstration District B-1 was 50.19%. JA464. Neither of their experts disputed that Plaintiffs' expert correctly calculated CVAP based on the ACS five-year estimates, or contended that those five-year estimates' margin of error made them unreliable for measuring a legislative district's CVAP. *See* JA653-666 (Trende Report); JA673-688 (Alford Report). Though Legislative Defendants noted the unremarkable fact that CVAP data *has* a margin of error, JA465—

true in every case where courts have considered CVAP—Legislative Defendants point to no place in the record where they or their experts argued that block group-level margins of error are relevant for calculating CVAP for a state Senate district.

On these facts, it was clear error, both legal and factual, for the district court to conclude that unchallenged CVAP figures based on the standard calculation method were unreliable in light of the district court's own prohibited extra-record research and mathematical calculations. Pl.Br.24-25 & n.6.[3] Indeed, the district court's calculations are unreliable on their face. Again, it is routine to use five-year ACS CVAP data at the level of districts for VRA Section 2 purposes. *Terrebonne*, 399 F. Supp. 3d at 614. As one district court in this Circuit has noted, "ACS data is reliable Census data," "it is commonly used by expert witnesses in Voting Rights Act cases," it is "the only source of local information on the citizen voting age population (CVAP)," and "sister jurisdictions have consistently relied upon ACS for examining

[3] To the extent Legislative Defendants may claim these figures are judicially noticeable, they are not. First, they are not numbers from any Census Bureau document, but the district court's own *calculations* based on a download of partial data (because the entire dataset was too large to process). Second, their *relevance*—the district court's (incorrect) assumption that block group margins of error are applicable to districts—is not judicially noticeable.

demographic information of minority populations for Section 2 cases." *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1061 (E.D. Va. 2021), *vacated as moot*, 42 F.4th 266 (4th Cir. 2022).

No one could use that data if the relevant margin of error were "between 57% and 4,475%." LD.Br.34. In the case Legislative Defendants cite for the proposition that district courts may consider margins of error, the district court had not purported to calculate its own margin of error to question a calculation no party had challenged. *United States v. Stewart*, 256 F.3d 231, 253 n.18 (4th Cir. 2001).

Even if Demonstration District B-1 were not a majority-minority district (and it is), it would still be a permissible remedy in this case. The *Bartlett* plurality did not state that "because § 2 does not require crossover districts, the WCP cannot be breached to create one." *Contra* LD.Br.34 (citing *Bartlett v. Strickland*, 556 U.S. 1, 7-8, 24-25 (2009) (plurality op.)). The North Carolina Supreme Court has made clear that the WCP can be "breached" to create any district required by the VRA (more accurately, the WCP's grouping formula does not come into play until the VRA-required-district is created). Pl.Br.15-16. And if this Court concludes that all of the *Gingles* factors are satisfied—including if it concludes that Demonstration District A satisfies

Gingles One—then it is common ground that a VRA district will be required. Demonstration District B-1 would qualify as an appropriate remedial VRA district, and so Demonstration District B-1 need not follow the county grouping rule. *Cooper*, 581 U.S. at 305 (rejecting the notion that "§ 2 … cannot be satisfied by crossover districts (for groups in fact meeting *Gingles*' size condition)").

Indeed, though Legislative Defendants now claim that North Carolina "could not use [Demonstration District B-1] if it wanted to" (LD.Br.34), the district court itself recognized that, if the *Gingles* factors were satisfied via Demonstration District A, Demonstration District B-1 was an available remedy in this case—even if (as the district court believed) it was a crossover rather than a majority-minority district. JA961 (if plaintiffs succeeded on the VRA claim, "the General Assembly could choose to enact Demonstration Districts B-1 and B-2").

B. The Third *Gingles* Precondition Is Satisfied

1. Expert Evidence the District Court Credited, Combined with Undisputed Election Results, Establishes Legally Significant Racially Polarized Voting

Although Legislative Defendants try to obscure this point, the district court credited and relied upon Dr. Barreto's regression analysis and findings

about extreme racially polarized voting, which are described in his report and included in his Appendix A. JA932, JA934. That is unsurprising because they were never contested, Legislative Defendants' expert Dr. Alford replicated those results and relied upon them in his own report, JA678, and Dr. Barreto's supplemental declaration—the purported basis for the district court's decision to ignore his performance analysis—did not concern the racially polarized voting analysis. The district court did not dispute any of Dr. Barreto's statistical findings about the extent of racially polarized voting (a term that just means that white voters vote for different candidates than Black voters). Indeed, all of Dr. Alford's (unsupported) opinions that the underlying *cause* of the racially polarized voting was political—opinions which are irrelevant at the *Gingles* Three phase, *United States v. Charleston Cnty.*, 365 F.3d 341, 347-48 (4th Cir. 2004)—assume the accuracy of Dr. Barreto's racial polarization analysis. JA673-688.

The district court's conclusion that this undisputed racially polarized voting was not "legally significant" rests on legal error, not (just) factual error. Pl.Br.37-40. Legislative Defendants do not even defend the principal basis for the district court's result on *Gingles* Three—that proving "legally significant" racially polarized voting requires a "district effectiveness analysis"

establishing the particular BVAP at which nonperforming districts would begin to perform for Black-preferred candidates. Legislative Defendants concede that what transforms statistically significant racially polarized voting (undisputed here) into legally significant racially polarized voting is evidence that the polarized voting in the relevant districts usually results in the defeat of Black-preferred candidates. LD.Br.21. As Plaintiffs explained in detail, Pl.Br.28-31, in light of the extremity of the polarization and the low BVAP percentage in these districts, that is established here as a matter of basic math (and historical election results) even without Dr. Barreto's performance analysis.

Legislative Defendants' claim that "Plaintiffs rested their third-precondition case solely on Appendix B and accompanying text in Dr. Barreto's report," LD.Br.26, utterly disregards the record. That statement is citationless for a reason; Plaintiffs' preliminary injunction brief stated that the extreme extent of the racially polarized voting here, along with the defeat of the Black-preferred candidate in 2022 in Senate District 3, *alone* establish that Plaintiffs were likely to succeed on *Gingles* Three. ECF 17 at 12-14. Evidence of "especially severe" racially polarized voting—such as the 88.4% of White voters in the 2022 Senate elections who vote against Black-preferred

candidates in the relevant Northeast-1 region, JA285—can itself satisfy *Gingles* Three. *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016).

Legal significance is independently established by the General Assembly's own judicially noticeable performance analysis showing that, using the results of 23 statewide elections between 2016 and 2022, the Black-preferred candidate loses every time in Districts 1 and 2. Pl.Br.32-33; *StatPack, SL 2023-146*, https://www.ncleg.gov/Files/GIS/Plans_Main/Senate_2023/SL%202023-146%20Senate%20-%20StatPack2023_S.pdf. It is hard to imagine clearer evidence that white bloc voting "usually" defeats Black voters' preferred candidates in these districts. *See United States v. Gregory*, 871 F.2d 1239, 1245 (4th Cir. 1989) (relying on judicially-noticeable data "not suppl[ied] below" to find clear error).[4]

Even though Legislative Defendants' own StatPack used only exogenous (i.e., statewide) elections to assess the likely performance of the

[4] Because the analysis is judicially noticeable, *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004), it is irrelevant that Plaintiffs did not offer the General Assembly's performance analysis into evidence below. The reason Plaintiffs did not is that neither Legislative Defendants' opposition brief nor their experts disputed Dr. Barreto's results.

challenged districts, Legislative Defendants now argue that endogenous elections are what matter most. LD.Br.23. As an initial matter, Legislative Defendants mix apples and oranges. Their cases (LD.Br. 23, 25-26) speak to the relative probative value of endogenous and exogenous elections in situations where there were relevant historical endogenous elections in the *actual districts at issue*. *E.g.*, *Johnson v. Hamrick*, 196 F.3d 1216 (11th Cir. 1999) (holding that past at-large elections in the city of Gainesville were most probative in evaluating the same at-large districts). None of their cases suggests, and no expert in this case has contended, that endogenous elections are better for purposes of conducting a reconstituted election analysis that predicts how *new* districts would perform. To the contrary, Dr. Alford has opined before that "exogenous races" are "the most relevant" in performing "reconstituted election analysis" in a new district with no or few prior elections. *Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 860-61 & n.7 (5th Cir. 2004) (citing Dr. Alford's testimony).

In any event, Plaintiffs agree that historical endogenous elections are probative—and the only examples within the relevant boundaries were the Senate races in Districts 1 and 3 in 2022, which contain every county in what are now Districts 1 and 2. There, the Black-preferred candidate lost in District

3 even though its BVAP was 42.33% BVAP (compared to 30% in both new districts); and no Black-preferred candidate even ran in District 1. It is clear error for the district court to have simply *ignored* that evidence of what actually happened in 2022—it is acknowledged nowhere in the opinion even though Plaintiffs repeatedly raised it below—while declaring that the 2022 Senate races suggest that Black-preferred candidates will win. It is also notable that the court ignored this race while discussing the (readily distinguishable) 2022 congressional election at length. Pl.Br.41-42.

Even when engaged in "deferential" review, this Court is "not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (citation omitted). If 85% or more of white voters vote as a bloc against the Black-preferred candidate, those candidates plainly cannot win elections in a district with only 30% BVAP. Likewise, if the Black-preferred candidate lost by 5 points in a 42.44% BVAP district, that candidate is not likely to win in a 30% BVAP district.

2. The District Court's Treatment of Dr. Barreto Was Clearly Erroneous

In any event, the district court's decision to discard Dr. Barreto's performance analysis—which no expert in the case even disputed—was clear error and an abuse of discretion warranting reversal. *See, e.g.*, *Raleigh Wake*

Citizens Ass'n v. Wake Cnty. Bd. of Elections, 827 F.3d 333, 344-45 (4th Cir. 2016) (district court's rejection of expert testimony was clear error in a voting rights case); *Easley v. Cromartie*, 532 U.S. 234, 258 (2001) (same).

The district court declined to credit Dr. Barreto's performance analysis because Dr. Barreto provided a supplemental report, in response to the district court's own question, explaining that, although he included all available 2022 and 2020 elections, using 2022 Senate votes to measure the performance of District 2 was not as probative because most of the counties in what is now District 2 were uncontested in the 2022 Senate races. JA853-854. Thus, that particular cell in the chart was in reality only reporting results in a few heavily Black counties. JA853-854. None of those facts are in dispute. Neither Legislative Defendants nor the district court have ever explained what they believe to be *wrong* about that explanation from Dr. Barreto. Nor did Dr. Barreto "propose[] including uncontested races." LD.Br.24. He simply calculated what would happen if those votes were included, as further evidence that this election was "less probative" than the 27 statewide races with a contest in every part of Districts 1 and 2. JA854.

Legislative Defendants reiterate the district court's unexplained statement that "fuller data sets could change [Dr. Barreto's] estimated

outcomes," LD.Br.24, but they do not explain what that means either. As noted, these outcomes aren't "estimates." Pl.Br.35. They are addition—adding up precinct-level results in the precincts that make up Districts 1 and 2. There are no uncontested races in the 27 statewide elections, so there is no missing data. If Legislative Defendants believed that "fuller data sets" actually changed these results, they would have said so—but they don't and can't, because these are the same results they produced on their own website. And, again, despite the district court's insistence that the 2022 Senate votes are the most important piece of evidence in the case when reviewing Dr. Barreto's report, the court ignored the *actual* 2022 Senate results, which disprove any notion that these districts could elect Black-preferred candidates.

As in *Raleigh Wake Citizens Association*, a "closer inspection" reveals that "it is the district court's own analysis of [the expert] analysis that is materially flawed." 827 F.3d at 344. Dr. Barreto's analysis showed that white bloc voting in these districts "usually" would defeat Black-preferred candidates even if the tally was 30 elections to 1, or 27 statewide elections to zero, but the district court refused to consider every single one of the elections Dr. Barreto analyzed—even those unaffected by the uncontested election

issue. That is clear error. *See Easley*, 532 U.S. at 252 (district court clearly erred in rejecting entire expert analysis where the court's "criticism … at most affects the reliability" of a single element).[5] Where the "record" lacks "any significant evidence refuting [an expert's] data," district courts cannot simply disregard it. *Id.*

None of the authority Legislative Defendants cite supports the notion that this Court must simply accept the district court's decision to ignore unrebutted expert evidence. Their cases are readily distinguishable, including because most concern factual findings based on witness credibility assessments after bench trials. LD.Br.40-41. Where, as here, there is a paper record and no testimony-based credibility determination, this Court must perform an "extensive review." *Easley*, 532 U.S. at 243.

3. Plaintiffs Were Not Required to Prove that a Majority-Minority District is Necessary for Black-Preferred Candidates to Succeed

Legislative Defendants insist that the possibility that a crossover district would elect a Black-preferred candidate in this region defeats *Gingles*

[5] Insisting that Dr. Barreto "refused to disclose his data" does not make it so. LD.Br.25. He used election results available for download at links in his report. The district court's description of the preliminary injunction hearing omits that while Plaintiffs *offered via email* to forward the input data, Legislative Defendants *chose* instead to simply download it. JA947 n.12.

Three, and that Plaintiffs were required to prove that *only* a majority-minority district could enable election of Black-preferred candidates. LD.Br.27-31. The Supreme Court could not have rejected this proposition any more clearly. Legislative Defendants say that "a remedial district is a majority-minority district," LD.Br.27, but *Cooper v. Harris* describes this same proposition—that "§ 2 … cannot be satisfied by crossover districts"—as "at war with our § 2 jurisprudence," including *Bartlett* in particular, 581 U.S. at 305-06.

Despite Legislative Defendants' effort to make it complicated, the lesson of *Cooper, Bartlett*, and *Covington* is simple. If the *existing district* succeeds in electing Black-preferred candidates because of substantial white crossover voting, then obviously it is not possible to satisfy *Gingles* Three and show that white bloc voting would defeat Black-preferred candidates "if no remedial district were drawn." *Covington*, 316 F.R.D. at 168. But if extreme white bloc voting means that the existing district will not elect Black-preferred candidates, then it is possible. *Cooper* did not hold that "[e]vidence that *a* crossover district *would* perform disproved the third precondition," LD.Br.29 (emphases added); it held that evidence that the *existing* crossover district *did perform* disproved the third precondition.

Here there is no such evidence. The existing 30% BVAP districts will not perform and are not crossover districts. That a 48% BVAP district would perform does not save the 30% BVAP districts.[6] Indeed, on Legislative Defendants' theory, a § 2 claim could not succeed absent white bloc voting at the 100% level—since otherwise, a crossover district might perform. *But see Allen v. Milligan*, 599 U.S. 1, 22 (2023).

Nothing about this contravenes the *Bartlett* plurality's statement that § 2 does not require crossover districts. *See Cooper*, 581 U.S. at 305 (rejecting that argument). Plaintiffs are not arguing that the General Assembly was "required" to create a crossover district here; it could have created a majority-minority district. Legislative Defendants say that, because a legislature can't take a performing crossover district and racially gerrymander it to create a majority-minority district, "a legislature's only choice would be crossover districts." LD.Br.31. But if there is *already* a performing crossover district, § 2 isn't implicated and doesn't require the legislature to do anything. And if there *isn't* a performing crossover district, § 2 might be implicated if the other preconditions are satisfied—but then, "majority-minority districts" are *not*

[6] That is assuming arguendo that Demonstration District B-1 is a "crossover district," LD.Br. 30; it is not, since it has a majority-Black CVAP.

"unavailable per *Cooper*," *contra* LD.Br.31, and a legislature could remedy the situation with a majority-minority district or a performing crossover district.

C. The Totality of the Circumstances Supports a VRA Violation

The "totality of the circumstances" in the Black Belt counties makes clear that Black voters lack equal opportunity to elect candidates of their choice. *Gingles*, 478 U.S. at 46; *Milligan*, 599 U.S. at 18. The district court's contrary conclusion was legally flawed and clear error—indeed, the district court's remarkable conclusion that *zero* factors pointed in favor of a lack of equal opportunity speaks for itself. *Cf. Raleigh Wake Citizens Ass'n*, 827 F.3d at 343 (rejecting district court decision that "discounted every single one of Plaintiffs' fifteen trial witnesses"). Legislative Defendants did not even *contest* all the factors that the district court rejected. JA474-476 (contesting only six factors).

Where, as here, all three *Gingles* preconditions are satisfied, a "district court must explain with particularity why it has concluded, under the particular facts of that case, that an electoral system that routinely results in white voters voting as a bloc to defeat the candidate of choice of a politically cohesive minority group is not violative of § 2 of the Voting Rights Act." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir.

1993). The district court did not do so, and no facts could support such a conclusion.

The district court's error of law on factor one—refusal to consider historical discrimination in a factor that focuses on history—was exactly the error that prompted this court to reverse on the totality of the circumstances in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014). *See also* Pl.Br.44-45 (recent evidence of discrimination). Legislative Defendants did not even dispute this factor, JA474, yet the district court found it unsatisfied.

On factor two, Legislative Defendants do not explain how Plaintiffs' evidence could "demonstrate[] substantial crossover voting" (L.D.Br.40) when their own expert replicated Plaintiffs' expert's racially polarized voting analysis showing that 85% and often more of white voters in this region vote against Black-preferred candidates. Legislative Defendants also state that "Black candidates routinely win without majority-minority districts," LD.Br.40, but they point to no examples, and certainly none in the Black Belt counties in a district with a 30% BVAP like those here.

On factor three, Legislative Defendants, like the district court, ignore recent evidence of practices that enhance discrimination. Pl.Br.45-46.

On factor five, Legislative Defendants offer no substantive defense of the district court's assertion that the enormous racial differences in education, employment, and health in the Black Belt are not attributable to past discrimination. Nor do Legislative Defendants offer any other explanation. Plaintiffs presented exactly the kind of evidence that this Court has held satisfies the fifth factor in the past. *League of Women Voters of N.C.*, 769 F.3d at 246. The notion that this factor requires Plaintiffs to perform a regression analysis to demonstrate causation is an error of law. This is another factor that Legislative Defendants did not dispute below. JA474-475.

On factor six, the district court's decision to ignore past evidence of racial appeals was an error of law, as was its conclusion that ads flashing a picture of Black people with felony convictions next to a Black candidate weren't racial appeals because they didn't expressly mention "race." Pl.Br.47 (citing *Gingles*, 478 U.S. at 40); *see* JA427-428.

On factor seven, the district court asked the wrong question. The lack of success of Black candidates in the region at issue is the key question—not whether Black candidates succeed in other parts of the state. The two districts at issue do not elect Black candidates. And historically, districts in these

counties have not done so *except* when the Black Belt counties are kept together.

Factor eight is satisfied for the reasons explained in Plaintiffs' opening brief. Pl.Br.48-49. In addition, the very decision at issue here—cracking the only majority-Black counties, an obvious and historic community of interest—due to a purported interest in keeping the "Norfolk media market" together, JA649, demonstrates significant lack of responsiveness.

The ninth factor is also satisfied for reasons Plaintiffs explained. Pl.Br.49. The Whole County Provisions are not a legitimate justification for failing to create VRA districts, and Legislative Defendants' denial that they had evidence of VRA violations is flatly false. Legislative Defendants notably do not cite the media-market-preservation explanation for these districts that the redistricting chairs gave on the record. JA649-650.

Finally, Legislative Defendants' efforts to defend the district court's findings about political polarization fall flat. They claim that their expert concluded that "[p]artisan affiliation *better predicts* voter choice than race in all elections he studied." LD.Br.44 (emphasis added). Dr. Alford's report says no such thing. He instead concluded that "party affiliation of the candidates is *sufficient* to fully explain the divergent voting preferences of Black and White

voters," JA687, and that Dr. Barreto's results were "consistent with a polarized response to the party affiliation indicated on the ballot," JA680. Dr. Alford performed no analysis that would support a conclusion that the *cause* of white and Black voters' divergent votes is political. In any event, as explained, all of his analysis is irrelevant because the *Charleston County* "causation" inquiry relates to whether the race of the *voter* causes polarization, not the race of the candidate. Pl.Br.50-51 (citing 356 F.3d at 347).

D. Plaintiffs Have a Cause of Action

Section 2 is privately enforceable under binding precedent. In any event, Plaintiffs also sued under 42 U.S.C. § 1983, which creates an express private right of action for VRA claims.

1. Section 2 Creates a Private Right of Action

Scores of Supreme Court and Fourth Circuit cases have adjudicated private claims under Section 2. Last year in *Milligan*, the Supreme Court "decline[d] to adopt an interpretation of § 2 that would revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence for nearly forty years." 599 U.S. at 26 (internal quotation marks omitted). The same principle forbids jettisoning the longstanding private right of action. The Court should reject Legislative Defendants' half-hearted

invitation to adopt the Eighth Circuit's contrary, erroneous ruling in *Arkansas State Conference of NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), which contravened Supreme Court precedent.

Five Justices agreed in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), that Congress created an individual cause of action under § 2, as Eighth Circuit Chief Judge Lavenski Smith stressed in dissent in the *Arkansas* case. *Ark. State Conf. of NAACP*, 86 F.4th at 1221-23 (Smith, C.J., dissenting); *see Morse*, 517 U.S. at 289 (opinion of Stevens, J., joined by Ginsburg, J.) (stating that the "private right of action under Section 2 ... has been clearly intended by Congress since 1965" and that VRA § 10 contains an implied private right of action because "[i]t would be anomalous, to say the least, to hold that both § 2 and § 5 are enforceable by private action but § 10 is not"); *id.* at 240 (Breyer, J., concurring in the judgment, joined by O'Connor & Souter, JJ.) ("Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5"); *see also Ark. State Conf. of NAACP v. Ark. Bd. of Apportionment*, 2024 WL 340686, at *3 (8th Cir. 2024) (Colloton, J., joined by Kelly, J., dissenting from denial of rehearing en banc) (criticizing the *Arkansas* majority for misconstruing *Morse*).

Morse controls, and this Court should disregard the Eight Circuit's flawed, outlier decision and remain aligned with the hundreds of cases over six decades (during which Congress has repeatedly reenacted the VRA) that have allowed private enforcement of § 2. Unless and until the Supreme Court says otherwise, courts must "adhere to the extensive history, binding precedent, and implied Congressional approval of Section 2's private right of action." *Ark. State Conf. of NAACP*, 86 F.4th at 1223 (Smith, C.J., dissenting).

2. Section 1983 Creates a Private Right of Action

Section 2 is also privately enforceable under Section 1983, which creates an express private right of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws*[.]" 42 U.S.C. § 1983 (emphasis added); *see* JA31-32 (Amended Complaint asserting § 1983 claim based on VRA violation). The Supreme Court recently reiterated that private plaintiffs can sue under § 1983 for violations of their rights under federal statutes. *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 171-72 (2023)). VRA § 2 explicitly protects the "right of any citizen" to vote free from racial discrimination, 52 U.S.C. § 10301(a), "unambiguously creat[ing] § 1983-enforceable rights," *Talevski*, 599 U.S. at 172.

The Attorney General's VRA enforcement authority is not "incompatible" with private enforcement, as the last six decades of private enforcement have shown. *Id.* at 181-82, 188-89. Legislative Defendants ignore the Supreme Court's clear guidance in *Talevski*. And they misunderstand *Gonzaga University v. Doe*, 536 U.S. 273 (2002). The "initial inquiry" in an "implied right of action case" is not whether there is an implied right of action, but whether "a statute confers any right at all." *Id.* at 285. The VRA clearly does.

II. The Remaining Factors Strongly Favor an Injunction

Legislative Defendants do not dispute that, if Plaintiffs establish likelihood of success on the merits, they will have established irreparable harm. Pl.Br.54-55.

This Court's precedents likewise establish that the balance of equities favor relief. Pl.Br.55. Legislative Defendants' main response is that plaintiffs brought suit 26 days after the map was enacted and sought a preliminary injunction 2 days later, and sought to expedite responses. LD.Br.49. This is warp speed in a case requiring multiple expert reports. Legislative Defendants cite no authority for the notion that these facts could alter the balance of the equities. It is hard to understand how this could constitute

unreasonable delay when Legislative Defendants themselves sought 30 days to prepare responsive expert reports, which should estop them from making this argument. Pl.Br.55, 62. Legislative Defendants' invocation of *Singleton v. Merrill* cuts against them. While "suit was filed the day" the law there was enacted, LD.Br.49 n.5, multiple plaintiffs filed preliminary injunction motions 41 days after the plan's passage. 582 F. Supp. 3d 924, 942 (N.D. Ala. 2022).

Accusations of "racial gerrymandering," LD.Br.50, do not change the calculus. If Plaintiffs are likely to succeed on the merits and show that these districts violate the VRA, the equities favor relief—indeed, that was a necessary implication of the Supreme Court's decision in *Milligan*, which affirmed a preliminary injunction upon finding a VRA violation and rejected the notion that forming VRA-compliant districts constitutes racial gerrymandering. And Legislative Defendants' representation that no one told them the VRA was violated in these districts (LD.Br.50) should trouble this Court in light of the record reflecting unequivocally that the Southern Coalition for Social Justice did exactly that. Pl.Br.6 & n.6, 53-54.

As explained, Plaintiffs do not seek a mandatory injunction (though they satisfy the requirements for one). Pl.Br.56-57. Legislative Defendants do not

cite precedent holding that a VRA challenge must satisfy mandatory injunction standards and *Milligan* reflects that it need not.

III. *Purcell* Does Not Counsel Against a Preliminary Injunction

Purcell does not bar relief here. At the outset, there are no primaries in the challenged districts on March 5, as Legislative Defendants cannot dispute. As Plaintiffs explained (Pl.Br.57-58), the first election implicated by a remedy in this case is likely the November general election, nearly nine months away. Even if primaries are needed in redrawn Senate Districts 1 and 2, the State Board has confirmed it would be "administratively feasible" to hold them May 14, the date already set for runoff primaries, as long as candidate filing ends before March 15. JA826. The State is well equipped to handle such changes to primary schedules, which have occurred "with some frequency in North Carolina in recent years." JA827.

Legislative Defendants cite no example of *Purcell* barring relief or an appellate court staying a redistricting injunction where state election officials had *confirmed* that the remedy was administratively feasible and non-disruptive. They instead rely heavily on the stay the Supreme Court issued in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), which is inapposite. First, unlike here, state election administrators in *Merrill* described "substantial

obstacles" to redrawing congressional districts for the entire state of Alabama and its 3.6 million voters on the timeline the plaintiffs sought. Decl. of Clay S. Helms at 2-3, *Milligan v. Merrill*, No. 2:21-cv-1530 (N.D. Ala. Dec. 27, 2021), ECF 82-7. Among other things, the state Director of Elections testified that dozens of counties would be required to restart election administration procedures that were already well underway, and that voter confusion was likely. *See id.* at 3, 8; Reply in Supp. of Emergency App. for Admin. Stay at 25-26, *Merrill v. Milligan*, No. 21A375 (Feb. 2, 2022) (citing state declaration). The State Board has articulated no such concerns here, either for election administrators or North Carolina voters.

Second, "the underlying merits" of Plaintiffs' claims here "are entirely clearcut," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), in the wake of the Supreme Court's sweeping merits decision in *Allen v. Milligan*, 599 U.S. 1. At the emergency stay stage in that case, the defendants had raised significant legal questions, as Justice Kavanaugh's concurrence in *Merrill* emphasized in characterizing the Supreme Court's post-*Gingles* case law as "notoriously unclear and confusing." 142 S. Ct. at 881. Naturally, "the underlying merits" at the stay stage were, "at a minimum, not clearcut in favor of plaintiffs." *Id.* But *Allen v. Milligan* has now reaffirmed and plainly set

forth the governing analysis for § 2 claims, *see* 599 U.S. at 17-19, 24-42, under which Plaintiffs here are overwhelmingly likely to succeed on the merits.

Legislative Defendants again urge the Court to give weight to the hypothetical statewide impact of adopting Plaintiffs' Demonstration District A, but as explained, Plaintiffs are not proposing that district as a remedy. Demonstration District A has no bearing on the impact of the relief Plaintiffs actually seek, which the State Board has confirmed is "administratively feasible" in the time available, JA826, and is entirely lawful, *see supra* pp.10-11. Finally, mere candidate refiling (LD.Br.48) does not trigger *Purcell*. The election hasn't started, and the harm *Purcell* seeks to prevent is "voter confusion," not candidate confusion. *Democratic Nat'l Comm. v. Wis. Stat. Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should reverse and enjoin the use of Senate Districts 1 and 2 in the 2024 elections.

Dated: February 8, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2024, I electronically filed the foregoing document and accompanying materials with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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