

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
CIVIL ACTION No. 1:15-CV-559**

THE CITY OF GREENSBORO, LEWIS A.  
BRANDON III, JOYCE JOHNSON,  
NELSON JOHNSON, RICHARD ALAN  
KORITZ, SANDRA SELF KORITZ, AND  
CHARLI MAE SYKES,

Plaintiffs,

v.

THE GUILFORD COUNTY BOARD OF  
ELECTIONS,

Defendant.

**BRIEF IN SUPPORT OF  
PLAINTIFFS' MOTION  
FOR TEMPORARY  
RESTRANDING ORDER**

**I. NATURE OF THE MATTER BEFORE THE COURT**

Plaintiffs The City of Greensboro (“City of Greensboro” or “City”) and Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, and Charli Mae Sykes (collectively “Citizen Plaintiffs”) seek a Temporary Restraining Order (“TRO”) enjoining Defendant the Guilford County Board of Elections (“the Board”) from implementing, enforcing, or giving any effect to Session Law 2015-138 (House Bill 263), entitled “An Act to Modify the Form of Government in the City of Trinity and to Clarify the Form of Government, Method of Election, and Determination of Election Results in the City of Greensboro” (hereinafter “the Greensboro Act” or “the Act”).

Enacted on July 2, 2015, the Greensboro Act implements a scheme to destroy the City's existing municipal government and—in an unworkably short time span—create a brand new structure for the that government. Specifically, the Greensboro Act:

- creates eight (8) City Council districts where there used to be only five (5) such districts;
- redraws the lines of City Council districts—while simultaneously splitting existing precincts and communities of interest—to overpopulate certain districts and underpopulate other districts for arbitrary and discriminatory reasons in violation of the equal protection guarantees of “one person, one vote” found within the North Carolina and United States Constitutions;
- pairs six (6) of eight (8) incumbent council members against each other in the newly drawn districts; and
- changes the method of electing city council members from the method that has been used for the past forty-two (42) years to a method apparently designed to confuse voters and elect city council members in October—a month earlier than the November elections to which voters are accustomed.

At the same time that it destroys the City of Greensboro’s existing method of government, the Greensboro Act singles out the City from the hundreds of North Carolina municipalities and obliterates the right of the City and its citizens to democratically change their method of self-government through initiative and referendum petitions. Worst of all, the Act makes all of these unprecedented changes just weeks

before the opening of the filing period for upcoming municipal elections. Even assuming that the Greensboro Act was constitutional, the impractically short time frame for these changes will cause irreparable harm to Greensboro's democratic government by causing voter confusion; effectively moving election of City Council members to periods of low voter turnout; and disempowering new and existing candidates for office, who will be hard pressed in the next two weeks to identify, analyze, and access their voting constituencies before the filing period commences on Monday, July 27, 2015.

For all of these reasons, immediate injunctive relief is necessary to prevent the Greensboro Act from going into effect and causing irreparable harm to the City and citizens of Greensboro. A TRO will allow the Court to fully analyze the effect of the Greensboro Act on the City, declare the City's authority to respond to citizen petitions for initiative and referendum, and ensure that the city council districts crafted by the Act do not deprive the Citizen Plaintiffs and other Greensboro voters of their constitutional rights to equal protection.

## **II. FACTUAL ALLEGATIONS**

The relevant facts concerning the enactment of the Greensboro Act, the constitutional deprivations threatened by the new city council districts it defines, and the destruction of Greensboro voters' rights to petition for initiative and referendum to determine the form of their local government are set out in the Plaintiffs' Brief in Support of Motion for Preliminary Injunction, contemporaneously filed herewith.

### **III. QUESTION PRESENTED**

Have Plaintiffs demonstrated their entitlement to a TRO prohibiting the Board from implementing, enforcing, or otherwise giving effect to the Greensboro Act prior to the filing period for upcoming municipal elections?

### **IV. ARGUMENT**

#### **A. Federal Rule of Civil Procedure 65 sets for the standard for issuance of a TRO.**

Rule 65 of the Federal Rules of Civil Procedure<sup>1</sup> provides that a TRO may issue if “specific facts in an affidavit . . . clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(a). The standard for granting a TRO is the same as that governing a preliminary injunction, except that a TRO issued requires a showing of

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<sup>1</sup> When a TRO or preliminary injunction is granted, Rule 65(c) requires security from the movant “in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c).

Plaintiffs respectfully request this Court to exercise its discretion to set the bond amount at zero (0) dollars, as has been done in at least one other constitutional challenge in the Fourth Circuit. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999) (noting district court’s discretion to set bond); *Doe v. Pittsylvania Cnty.*, 842 F. Supp. 2d 927, 937 (W.D. Va. 2012) (fixing “security bond at zero dollars” in a constitutional challenge, finding there could be “no monetary damages or other harm to the Board from conducting its meetings in a manner consistent with the Establishment Clause”).

“immediate” harm.<sup>2</sup> See Fed. R. Civ. P. 65(b), *Jacobs v. Holmes*, No. 5:15-CT-3031-FL, 2015 U.S. Dist. LEXIS 81963 at \*4 n.1 (E.D.N.C. June 24, 2015) (citing *Hoechst Diafoil v. Nan Ya Plastics Corp.*, 174 F.3d 411, 422 (4th Cir. 1999)). Parties seeking injunctive relief must “demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm, (3) the balance of hardships tips in their favor, and (4) the injunction is in the public interest.” *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013) (citing *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7 (2008)).

The Brief in Support of Plaintiffs’ Motion for Preliminary Injunction, filed contemporaneously herewith, shows Plaintiffs’ likelihood of success on the merits, that the balance of hardships tips in Plaintiffs’ favor, and that injunctive relief is in the public interest. Out of respect for this Court’s limited resources and in the interests of efficiency for all parties, this Brief will not repeat those arguments, but instead focus on the irreparable prong harm of the analysis.

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<sup>2</sup> A TRO issued without notice also requires a showing of the efforts made to give notice and the reasons why notice should not be required. See Fed. R. Civ. P. 65(b)(1)(B). In the present case, counsel for Defendant (County Attorney Mark Payne) was notified last week that this filing would be forthcoming and was served by email and U.S. Mail with copies of all filings. Similarly, the State of North Carolina, pursuant to North Carolina General Statutes Section 1-260, was provided a copy of all filings the day of filing.

In addition, Plaintiffs respectfully request a hearing during which all parties may be heard, so long as it occurs prior to the irreparable injury that will occur if the filing period opens for the new districts on Monday, July 27, 2015. Accordingly, Plaintiffs seek a TRO with notice, and Rule 65’s provisions regarding issuance of the TRO without notice do not apply.

- B. The Greensboro Act will cause immediate and irreparable harm to Plaintiffs and other Greensboro citizens if the Act is not enjoined prior to the July 27, 2015 opening of the filing period for the 2015 Greensboro City Council election.**

“[T]he harm necessary to justify issuance of a preliminary injunction [must] be irreparable.” *Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691, 694 (4th Cir. 1994). “The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.” *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (emphasis in original) (quoting *Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)). If not enjoined, the destructive scheme of the Greensboro Act will cause irreparable harm to the City and its citizens, including Citizen Plaintiffs.

**1. The Act's numerous provisions effectuate a scheme to destroy the City's and its citizens' right to self-government.**

Through an inextricably intertwined scheme, the Greensboro Act destroys the City's existing form of government and creates a brand new government built upon an unconstitutional foundation. First, the Act decrees the form the City's government shall take (Council-Manager), the number of members of the Greensboro City Council (eight), the terms both the City Council members and the Mayor shall serve (four years), and the mayor's authority to vote on or veto matters before the City Council (only in the case of a tie and on certain personnel matters). Greensboro Act §§ 2(a),(d),(e) (Compl. Exh. A). Second, the Act defines eight (8) new single-member districts from which City Council

members are to be chosen (and defines them in such a way as to devalue the votes of minority voters while overvaluing the votes of others). *Id.* § 2(c). Third, the Act repeals the primary/election method for selecting City Council members—a method that has been in place for forty-two years, *see* Greensboro, N.C., Charter, Ch. II, § 2.21 (last amended by 1973 N.C. Sess. Laws 213 § 1)—and replaces it with the election/runoff-election method, which will have the practical effect of selecting more City Council members at the October election, which for the 2011 and 2013 elections, had half the voter turnout of the November election. To cement its changes to the City’s government, the Act flatly prohibits the City and its citizens from making any changes to the form or structure of the municipal government, a right otherwise made available by statute to citizens of every other North Carolina municipality. *Id.* § 2(b).

**2. The Greensboro Act’s violations of the Citizen Plaintiffs’ equal voting rights causes them irreparable harm.**

It is long settled that violations of fundamental constitutional rights cause irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976); C. Wright, A. Miller and M. Kane, Federal Practice and Procedure, § 2948.1, at 161 (1995) (“[W]hen a deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). Under the United States and North Carolina Constitutions, the right to vote on equal terms is a fundamental right. *See Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015) (“Inherent in the equal protection of voting is the requirement that all citizens’ votes be weighted equally, a principle that is commonly known as one person, one vote.”); *Daly v. Hunt*, 93 F.3d 1212, 1218 n.8 (4th

Cir. 1996) (“[T]he right to vote is a fundamental right, perhaps the most fundamental right in our democracy. . . .”); *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) (“‘[T]he right to vote on equal terms is a fundamental right.’ ” (citation omitted); *see also, e.g., Johnson v. Mortham*, 926 F. Supp. 1540, 1543 (N.D. Fla. 1996) (holding that impediment to the equal right to vote arising from a redistricting plan causes “significant and irreparable harm”). Voting on equal terms is just part of the constitutional guarantee, which extends beyond the election to the period during which the elected candidate represents the people:

The equal protection guarantee of “one person, one vote” requires that representatives to an elected body are elected from voting districts of substantially equal population. *Reynolds v. Sims*, 377 U.S. 533, 577, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964). This principle ensures that every voter, no matter what district he or she lives in, will have an equal say in electing a representative. It also ensures that every person receives equal representation by his or her elected officials.

*Daly v. Hunt*, 93 F.3d 1212, 1216 (4th Cir. 1996) (footnote omitted) (emphasis added); *see also id.* at 1226 (“The right to vote is reserved only to certain members of society. But people can affect what their representatives do in another way: through their right to petition their representatives to voice their concerns and interests on particular issues.”).

Accordingly, the violation of the “one person, one vote” requirement effectuated by the Greensboro Act—if allowed to take effect—will cause irreparable harm to Citizen Plaintiffs by depriving them of their equal right to vote at the October and November

elections and their right to equal representation during the four-year terms of the newly elected council members.

**3. The short time frame before the Greensboro Act takes effect means that Act will immediately cause irreparable harm to the City and its citizens.**

The time frame for implementation of the Greensboro Act, standing alone, shows the immediate need for injunctive relief to avoid irreparable harm to the City and its citizens. The Greensboro Act was enacted on July 2, 2015 and—as set forth above—creates an entirely new framework and structure for electing City Council members. Yet the Act only provides a three-and-a-half week period for candidates seeking election to identify, analyze, and access their brand new constituencies in order to determine whether they should file for office beginning July 27, 2015. As set forth in the Declaration of Nancy Hoffmann (filed contemporaneously herewith), the Act’s extensive changes to voting districts do not allow candidates for City Council adequate time to analyze their constituencies, organize and prepare for the election, and communicate with voters.

That fast-approaching filing deadline demands immediate relief. Absent a TRO, the Act’s unconstitutional scheme will begin to take effect in just two weeks, as candidates file for office in the new, constitutionally infirm voting districts. Once that election machinery gets underway, it will be exceedingly difficult, if not impossible, for the City to correct the equal protection violations created by the Act if this Court ultimately finds, as it should, that the Act is unconstitutional. Immediate relief is essential to forestall significant and potentially detrimental reliance on the electoral

scheme by the Board and potential candidates for City Council as the election season gets underway.

As the Supreme Court elaborated in *Purcell v. Gonzalez*:

Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.

549 U.S. 1, 4-5 (2006). In the present case it is not a court order, but the terms of the Greensboro Act that threaten voter confusion, frustration, and harm to the fundamental right to vote. Plaintiffs seek a TRO to prevent this irreparable harm from taking effect.

**4. Aggravating its immediate impact, the Greensboro Act shortens the time period prior to City Council elections and destroys voter expectations that have been in place for almost half a century.**

For the forty-two (42) years prior to the Greensboro Act, the City Council was elected using the primary/election method of voting set forth in North Carolina General Statutes Section 163-294. Greensboro, N.C., Charter, Ch. II, § 2.21 (last amended by 1973 N.C. Sess. Laws 213 § 1). Under that system, a primary was held in October and the field was narrowed to two candidates, who faced each other on Election Day in November. See N.C. Gen. Stat. § 163-294. It bears emphasis that turnout at the polls in November has been at least two times that of turnout in October for the municipal elections in 2011 and 2013, Compl. ¶¶41c, 63, meaning that Council members elected in

November have greater approval of the political majority and likely a greater connection to their constituents from the outset of their term.

The Greensboro Act destroys those well-established electoral expectations by switching the City's elections to the election/runoff method under N.C. Gen. Stat. § 163-293. *See* Greensboro Act § 2.(f). Under the election/runoff method, a determinative election occurs in October. *See* N.C. Gen. Stat. § 163-293(a),(b) (providing that a candidate who receives a majority of votes prevails and does not face a runoff election); *id.* §§ 163-293(e), 163-279(a)(4) (setting election date as "the fourth Tuesday before the Tuesday after the first Monday in November", which works out to October 6, 2015 for the next City Council elections). As a result, the brand new form of government enacted by the Greensboro Act not only causes immediate harm that begins with the filing period on July 27, 2015, but it shortens—by four weeks—the time period during which candidates must identify, analyze, and access their constituencies. The shortened period before the determinative election also requires voters to educate themselves about the candidates sooner, provided they receive notice of the drastic change in the timing of the election.

In sum, the shortened time period for voters and candidates to prepare for the election—coupled with the unexpected shift in the date of the determinative election from November to October—appears aimed at speeding the destruction of the City's government as part of the larger, unconstitutional scheme. In any event, the speed with

which the Greensboro Act moves the city towards its brand new government (as hastily shaped by legislative fiat) further shows the need for immediate injunctive relief.

## CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court enter a temporary restraining order (to be followed by a preliminary injunction) prohibiting the implementation of the Greensboro Act and directing that the July 27, 2015 candidate filing period open based upon the electoral districts and form of government as they existed prior to the Greensboro Act.

Respectfully submitted this the 13<sup>th</sup> day of July 2015.

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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day electronically filed the foregoing Brief in Support of Plaintiffs' Motion for Temporary Restraining Order in the above-titled action with the Clerk of the Court using the CM/ECF system, and served the document by mail and electronic mail to the following counsel who has accepted service on behalf of Defendants:

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Respectfully submitted this 13th day of July, 2015.

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