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, CHARLI MAE SYKES, MAURICE WARRREN II, and GEORGEANNA BUTLER WOMACK,	)
Plaintiffs,	)
v.	)
THE GUILFORD COUNTY BOARD OF ELECTIONS,	)
Defendant.	)

PLAINTIFFS' PRE-TRIAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Plaintiffs Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, Maurice Warren II, and Georgeanna Butler Womack (collectively "Individual Plaintiffs") submit the following trial brief. Plaintiff City of Greensboro ("City") joins in this brief only with regard to those matters directly relating to the claim alleging that the legislature's decision to deprive the City and its citizens, alone among all other municipal jurisdictions, of the right to use the initiative and referendum provisions of Chapter 160A of the North Carolina General Statutes, constitutes unconstitutional disparate treatment. Individual Plaintiffs raise separately two additional claims—that the deviations in the enacted districts are unconstitutional because they are motivated by illegitimate considerations and that District 2 is an unconstitutional racial gerrymander.

INTRODUCTION

Halfway through the decade, the General Assembly took the extraordinary step of dramatically restructuring the Greensboro city government against the will of the Greensboro City Council and the vast majority of Greensboro citizens, and also took away from them their ability to exercise the rights afforded to all municipal citizens to make decisions for themselves as to how the city should be governed, including the structure of the city council and the district lines used to elect council members.

And not only did the General Assembly dramatically restructure the Greensboro City Council—it did so in an unconstitutional way. The legislature cynically acted as though keeping the new redistricting plan's overall deviation under 10% gave it free rein to manipulate population deviations (thus affording to some voters in the city greater

voting strength than others) to create unfair Republican advantage in a city that is heavily Democratic and to double-bunk and thus oust sitting incumbents who are registered Democrats. Such partisan political considerations are not legitimate reasons for population inequality among electoral districts, and no legitimate reasons, such as compactness, preserving precincts or respecting communities of interest, explain the higher-than-necessary deviations. Moreover, the legislature also proclaimed that its redistricting plan was in the best interest of black voters, and justified its predominant use of race on that basis, when in reality, the plan packed black voters into as few districts as possible, limiting their influence citywide. Ultimately, this case is materially indistinguishable from the Wake County cases in which the Fourth Circuit recently invalidated on equal protection grounds local redistricting bills foisted by the General Assembly on that county, *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) ("*RWCA*"), and the same result is mandated here on the one person, one vote claim. The challenged legislation has three independent constitutional flaws, and the evidence in this case will demonstrate that it must thus be permanently enjoined.

I. Statement of Facts

a. Greensboro Demographics and City Council Elections

Greensboro is North Carolina's third largest city, and has been experiencing tremendous population growth over the last two decades. Between the 2000 and 2010 federal censuses, the population of Greensboro grew by 45,775, to 269,666 in the 2010 census. (Stip. ¶¶ 2, 4-5.) That trend has continued throughout this decade, with federal

census estimates projecting that the city now has a population of 285,342. (Stip. ¶ 6.) There is also a substantial minority community in the city. As of the 2010 Census, Greensboro was 40.6% African-American, 7.5% Latino, and 7% other races in total population. (Stip. ¶ 7; Ex. 120, at 10.)

Since 1983, the Greensboro City Council has been composed of nine members: five members elected from single-member districts, three members elected at-large, and a mayor elected at-large who voted as a regular council member. (Stip. ¶ 13; Tr. Test. Vaughn.) In the over thirty years in which that structure has been in place, neither the city nor its citizens has ever attempted to change its structure, though they had that power under N.C. Gen. Stat. §§ 160A-101, -103 and -104. The municipal government and its structure have been quite stable. While elections for city council seats are non-partisan, the reality is that the partisan affiliation of candidates for council and council members are widely known by city voters. (Tr. Test. Vaughn, Fesmire, Wells.)

Voter registration data show that the city is heavily Democratic, as 55.66% of the city's voters are registered Democrats, 21.35% are registered unaffiliated, and only 22.84% are registered Republicans. (Stip. ¶ 9.) And while state and federal election results are not reported at the city level, reconstituted election results accurately reflect the city's political leanings. For example, in the 2008 presidential election, 68.13% of Greensboro's voters supported Barack Obama. (Ex. 3, at 7.)

Despite Republicans comprising a relatively small portion of the city's electorate, Republicans have been generally represented on the city council by between one and three registered Republicans, although from 2009 through 2011, the council was

controlled by a Republican majority. (Stip. ¶ 21.) Republican Senator Trudy Wade was a former member of the Greensboro City Council, serving from 2007 to 2012. (Stip. ¶ 21; Tr. Test. Goldie Wells.) Indeed, Ms. Wade was on the City Council when it redistricted itself in 2011 after the release of the 2010 decennial census data. The plan adopted by the city in 2011, drawn by Ms. Wade, (Stip. ¶¶ 17; Tr. Test. Vaughan, Wells), adjusted the five single-member districts to reduce the overall deviation to 3.86%. (Ex. 145, at 7.) In 2011, no member, including Ms. Wade, proposed revamping the 5-3-1 structure of council, nor did any member raise concerns that the city's adjusted redistricting plan would not provide adequate geographic diversity on the council. (Tr. Test. Vaughn).

b. Legislative Process for S.B. 36

Members of the General Assembly can introduce legislation that has limited application known as "local bills." A local bill affects fewer than 15 counties and does not require the signature of the governor to be ratified. By longstanding practice, local bills are usually requested by the locality and must be sponsored by a member of the legislative delegation representing the local government requesting the local bill. (Stip. ¶¶ 23-25, 27.)

In December 2014, city leaders and residents first started hearing rumors that the North Carolina General Assembly might try to restructure and redistrict the Greensboro city council. The general public, city council, and other members of the General Assembly were not asked for input and had no knowledge of the redistricting bill until it

was filed, (Tr. Test. Vaughn, Abuzuaiter, Harrison, Robinson), and Senator Wade introduced Senate Bill 36 on February 4, 2015. (Stip. ¶ 31.)

The bill was referred to the Senate Redistricting Committee and was heard on March 5, 2015, less than 24 hours after it was noticed for that committee's agenda. (Stip. ¶ 34.) The bill made several significant changes to municipal governance in Greensboro: (1) it directed that the council would be comprised of seven members, all elected from single member districts; (2) it created districts that had a substantially higher overall deviation than in the existing plan (9.64% in S.B. 36 compared to 3.86% in the existing plan); (3) it limited the Mayor to voting only in cases of a tie vote on the council; and (4) it withdrew from the city council and the citizens of Greensboro the ability to use the initiative or referendum to revise the structure or function of city government.[1] (Ex. 6 at 1; Ex. 14.)

After passage in the Senate, Senate Bill 36 was sent to the House on the same day. The bill was noticed for hearing in the House Elections Committee several times, but it was always removed from the agenda before hearing and was never heard in that committee. (Stip. ¶¶ 38-41.)

c. Legislative Process for H.B. 263

The failure of S.B. 36 to progress through the House did not bring the General Assembly's involvement in Greensboro redistricting to an end. House Bill 263 was filed by Representative Pat Hurley of Randolph County on March 17, 2015. (Stip. ¶ 42.)

[1] As originally introduced, SB36 purported to repeal *in its entirety* Part 4 of Article 5 of Chapter 160A. Only in Edition 2 was Greensboro the specific target of the withdrawal of referenda rights.

Originally, that bill only dealt with restructuring the Trinity City Council (and, paradoxically, adding an at-large representative to that council). (Stip. ¶ 43.) As with most local bills, H.B. 263's restructuring of Trinity's governing body was proposed at the urging of the unanimous Randolph County delegation, and with support of the Trinity City Council. (Tr. Test. Rep. Pricey Harrison.) H.B. 263 passed the House on March 30, 2015. (Stip. ¶ 45.)

On Tuesday, June 9, 2015, a meeting of the Senate Redistricting Committee meeting was announced for less than 24 hours later, on Wednesday, June 10, 2015. (Stip. ¶ 47.) At that meeting, the contents of Senate Bill 36 were added to House Bill 263 as a committee substitute. (Stip. ¶¶ 48-49.) The district lines were exactly the same as they had been in S.B. 36, and a proviso was added to limit the city from making any changes to those districts or, in fact, any aspect of its municipal government until after the 2020 census. (Stip. ¶¶ 50-51.) No notice was given for the addition of the Greensboro bill to the Trinity bill. (Stip. ¶¶ 53.) The bill was rushed through the Senate in an incredibly abbreviated process, with passage in in the Senate along party lines, and no African-American legislator voting to support the bill (Stip. ¶¶ 54-56; Tr. Test. Robinson.)

On June 29, 2015, the House, in a bipartisan vote, defeated Rep. Hurley's motion to concur in the Senate's changes to the bill. (Stip. ¶¶ 59-60.) In particular, members of the Guilford House delegation, Republican and Democrat, were largely united in wanting a referendum attached to the bill that would allow city residents to vote on whether they wanted to make the change. The bill's primary proponent, Sen. Wade, had been vocal in

her opposition to including a referendum in the bill. (Tr. Test. Harrison; Ex. 17, at 39:18-40:7.)

On June 29 and 30, legislative leaders formed a conference committee to resolve the House and Senate's disagreements on House Bill 263. Leadership ignored House rules in the formation of the conference committee, as the committee was neither bipartisan nor comprised of a balance of proponents and opponents. (Stip. ¶ 62.) On July 1, 2015, less than two days after the House refused to concur on H.B. 263, the conference committee returned a report signed by all committee members except Rep. John Blust (although in later House floor debate, Rep. Hurley falsely stated that the committee report was unanimous). (Tr. Test. Harrison.) The conference committee substitute made two significant changes to the bill: (1) it created eight (rather than seven) single-member districts for electing council members; and (2) it permanently prohibited the City of Greensboro from exercising rights available to all other municipalities under Part 4 of Article 5 of Chapter 160A, and from ever changing its own method of election, instead reserving that power for the General Assembly at all times going forward. (Stip. ¶ 63.)

The conference committee map created districts with an overall deviation of 8.25%. (Stip. ¶ 65.) All of the districts that were overpopulated were majority minority.[2] (Ex. 145, at 7; Ex. 1.) The map paired every African-American incumbent—Justin Outling was paired in a district with Sharon Hightower, and Jamal Fox was paired with Yvonne Johnson. Additionally, two white Democratic incumbents, Nancy Hoffmann and

[2] Two of the majority black districts and the one coalition district in which white voters are the minority were overpopulated.

Mike Barber, were paired. The one Democratic incumbent who was not paired with another incumbent was drawn into a district that voted 59.6% Republican straight ticket in the 2010 election, thus making her re-election unlikely. Two districts that leaned Republican were drawn to be open seats, with no incumbent residing in the new district. (Ex. 145, at 12, 14.) In creating the eight districts, the plan split eight precincts, whereas the existing plan split only one. (*Id*. at 8.) During that conference committee meeting, Republican Rep. Jon Hardister of Guilford County shared with the conference committee an alternative eight-district map for the Greensboro City Council that would have double-bunked fewer African-American incumbents (the Hardister map did not double-bunk Justin Outling and Sharon Hightower), but it is unclear whether that alternative map was ever seriously considered. (Stip. ¶ 94; Ex. 28, 165; Tr. Test. Harrison.)

At 11:00 AM on July 2, 2015, the House considered the conference report and voted 53-50 to not adopt it. (Stip. ¶¶ 68-69.) After a brief recess and Republican caucus meeting, and without any debate, the House came back to pass the bill 57-46. (Stip. ¶¶ 70-75.) In fact, when House Minority Leader Rep. Larry Hall attempted to speak in opposition to the conference report, he was told debate was not in order because H.B. 263 was no longer on its second or third reading. (Ex. 31.) The Senate then voted on party lines 33-16 to adopt the conference report to H.B. 263. (Stip. ¶¶ 76-77.) House Bill 263 was ratified on July 2, 2015, and chaptered as Session Law 2015-138 that same day, only one day after its revised contents were first made public. (Stip. ¶ 78.)

d. Technical corrections

On September 29, 2015, during the full House's consideration of Senate Bill 119, an omnibus technical corrections bill, Republican Rep. John Faircloth of Guilford County moved to rewrite part of Session Law 2015-138 to provide that the City of Greensboro was prohibited from altering its form of government until after the return of the 2020 Census. (Stip. ¶¶ 79-80.) There was no explanation for the change. (Ex. 35, at 3:2-4:5.)

e. The Effects of H.B. 263 Are Evidence of Improper Motivations

i. <u>The plan and the deviations therein create an advantage for Republican voters and candidates</u>

The eight single-member district plan created by H.B. 263 makes it likely that Republican voters will be able to elect their candidates of choice in at least four of the eight districts, which, given the political make-up of the city and its residents' voting habits, is a grossly skewed result. This advantaging of Republican voters could not have been accomplished without the population deviations in the enacted plan. Dr. Jowei Chen, a renowned political scientist at the University of Michigan, has developed computer simulation programming techniques that allow him to randomly produce a large number of alternative districting plans in any given state or local jurisdiction. He can then use those simulations to compare to enacted plans to test for political bias or racial gerrymandering. Dr. Chen's analysis in this case shows that when he set one of the simulation criteria to be equal population (that is, plus or minus 2% deviation, or nearly identical to the deviations in the city council plan as redrawn in 2011), it was not possible to produce a redistricting plan that had the same partisan distribution of seats. That is, the General Assembly's enacted plan creates an advantage for Republican voters that falls

completely outside the range of outcomes that are possible using a redistricting process that creates approximately equally-populated districts. (Ex. 133, at 7-8.)

Specifically, Dr. Chen found that when simulating districts that maintained the same level of population equality seen in the existing 2011 redistricting plan, it was not possible to draw four of the eight districts as Republican-controlled. Respecting population equality, compactness, and political subdivisions, Dr. Chen's simulations only ever produced plans with two or three Republican seats. It was only after Dr. Chen allowed his simulations to have population deviations of 8-10% (as seen in the enacted plan) that it became possible to have four Republican seats. Thus, Dr. Chen concluded that the desire to maximize the number of Republican seats is what drove the population deviations. (Ex. 133, at 7-13.)

Additionally, Dr. Chen's analysis showed that 86.1% of Republican voters in Greensboro reside in an underpopulated district. In his simulations using traditional and legitimate redistricting criteria, the percentage of Republicans assigned to an underpopulated district ranges from 27.5% to 73.3%. Again, the result produced in the enacted plan is outside the range of what is possible using legitimate redistricting considerations and only becomes possible when the restrictions on equal population are relaxed. (Ex. 133, at 13.)

ii. <u>The plan and the deviations therein target Democratic incumbents for disfavor, particularly African-American incumbents</u>

It is plain that the lines in H.B. 263 were drawn to disadvantage incumbents who were registered as Democrats, and, more insidiously, incumbents who are African-

American. Six of the seven Democrats serving on the council now were paired, including every single African-American serving on the council. The remaining Democrat who was not paired was drawn into a heavily Republican district. Indeed, if one examines the exact way in which the district lines were drawn, it is clear that a precinct was split in order to ensure that incumbent Nancy Hoffmann, a Democrat, was drawn into the same district as incumbent Mike Barber. The bulk of the precinct is in another, open district—only Ms. Hoffmann's home was extracted from the precinct to add her to a district with another incumbent. (Ex. 145, at 12-14.)

Additionally, the conference committee had the option of adopting an eight-district plan that paired two fewer African-American incumbents. Rep. Jon Hardister had been talking, albeit without sharing specifics, of a "compromise" plan he would be putting forth. The conference committee did not adopt that plan, and instead endorsed a plan that targeted Democratic and African-American incumbents for defeat. (Ex. 165; Tr. Test. Vaughn, Harrison, Robinson.)

iii. The plan dismisses the will of the voters of Greensboro

The uncontested record here demonstrates that a vast majority of Greensboro voters were opposed to H.B. 263. Voters inundated city elected officials and state legislators with their opposition to the changes forced upon them—changes that would reduce the number of council seats for which each voter could vote from essentially five (one district, three at-large, and a mayor empowered to vote) to one (one district alone, since the mayor would largely be powerless). (Ex. 174-199; Ex. 217 (compilation of emails to state legislators.)

Groups like the League of Women Voters and the NAACP held large public meetings where voters overwhelmingly spoke out against the changes. (Tr. Test. Fesmire, Johnson). The Greensboro News & Record published an ad in which hundreds of Greensboro residents registered their opposition to the bill. The only indication that the bill had any significant support from Greensboro residents,[3] a poll conducted by the conservative weekly publication the Rhino Times, was not conducted transparently and was marred by questions of illegitimacy. (Tr. Test. Fesmire, Sen. Robinson.)

iv. The plan minimizes the voice of minority voters, was not supported by most African-American voters, and segregates voters by race

Senator Wade asserted that the redistricting plan for Greensboro was motivated by an intent to create new electoral opportunities for black voters in the city, but the plan does the opposite. Black voters had long been exercising significant political power citywide, including electing the candidates of their choice in at-large seats for many years. Indeed, for the past twenty years, Greensboro has always had at least three African-Americans serving on council except for one two-year period when there were only two; currently, the council has four African-American members. Rather than creating any new opportunity for black voters by drawing three majority black districts, the enacted plan limited African-American influence by packing black voters into only three of eight districts and limiting their political influence over the city council. The

[3] Indeed, in that first Senate Redistricting Committee meeting, held on less than twenty-four hours' notice, where a few voters spoke in favor of Senate Bill 36, it later became clear that some of those people who spoke in favor of the bill were not even Greensboro residents.

Greensboro NAACP, along with every African-American legislator from Guilford County and on the city council, opposed this unconstitutional packing.

The districts as drawn harm black voters by fracturing cohesive African-American communities in Greensboro. The plan splits up the North Carolina A&T State University and Bennett College communities, both historically black, between two districts, although those communities typically have been in the same district. The plan fragments the cohesive and politically active African-American community in northeast Greensboro, thus limiting its residents' ability to effectively organize and educate voters. (Tr. Test. Wells.)

Additionally, the plan as drawn, and specifically District 2, would have a racially segregating effect on black voters. Evidence indicates that District 2 was drawn predominantly on the basis of race. Employing a related analysis, Dr. Chen also looked to see if race was a predominant factor in drawing any of the individual districts in the enacted plan. Dr. Chen found that the black voting age population (BVAP) for Districts 1 and 4 were within the range of BVAPs produced by his simulations for those two districts, and his simulations did not use race as predominant factor. However, the BVAP for District 2 in the enacted plan was outside the range of that produced by any of his simulations. Thus, he focused his analysis on District 2, looking to see if race or politics best explained how that particular district was drawn. Dr. Chen looked to see if the legislature might have been motivated by partisan considerations in the particular construction of District 2. Using non-racial criteria to draw the district but still attempting to achieve the same partisan performance of the district, Dr. Chen found that

the BVAP of the district fell completely outside the distribution of the BVAP population in simulated districts. That is, partisan goals for the district's performance did not explain the level to which the district was packed. He thus concluded that racial considerations predominated in the drawing of the district. (Ex. 133, at 21.)

A visual inspection of District 2 confirms Dr. Chen's statistical analysis. District 2 is a visually non-compact district. It has an oddly-shaped appendage that reaches out to grab a pocket of minority voters in precinct G24, a precinct that has never been in a district with northeast Greensboro. (Tr. Test. Fairfax.) A large satellite annexation in northeast Greensboro that had previously been assigned in whole to the nearest district—district 2—is now split between two districts, with the white voters in the northern and eastern precincts of the satellite annexations assigned to predominantly white District 2. The remaining precinct in the satellite annexation, more heavily minority, is assigned to District 2, which is majority black. (Tr. Test. Fairfax, Wells.) All of this circumstantial evidence is consistent with Senator Wade's repeated protestations that the plan purposely created three majority black districts so that black voters would have the ability to elect their candidates of choice.

v. <u>The plan and the deviations therein do not decrease campaign costs</u>

Contrary to the unsupported contentions of Sen. Wade and a small number of individuals who spoke in favor of the bill, changing the method of election for Greensboro City Council members will not decrease the cost for running for office on the council. As a primary matter, no proponent of the change gave any example of individuals who were deterred from running for council, particularly for at-large seats,

because of the cost of running for those seats. Second, the unrebutted evidence in the form of campaign finance reports demonstrates that rather than it being more expensive to run for at-large seats than district seats, district elections have been decidedly more competitive and expensive than have at-large seats in recent years, requiring candidates to raise and spend multiple times more money in those elections than in at-large elections. (Ex. 51-77; Tr. Test. Abuzuaiter.)

vi. Loss of referendum rights

The effect of the Greensboro law, as revised in the technical corrections bill, is that the Greensboro City Council and all Greensboro residents have lost for years the right afforded to every other citizen in North Carolina municipalities—the right to decide for themselves if their municipal governance structure is not working for them and make adjustments accordingly. Notably, the Greensboro bill was added into another local bill that significantly revised a local government—the town of Trinity in neighboring Randolph County. The Trinity portion of the same bill did not take away from the citizens of Trinity their future ability to exercise their rights under Chapter 160A. Also, in a remarkably similar bill passed during the same 2015 legislative session, the General Assembly passed a local bill that moved the city of Albemarle from electing four members of the city council from districts and three at large to a system where all seven members are elected from districts. 2015 N.C. Sess. Laws 253. The changes to the Albemarle City Council are materially indistinguishable from those in this case, but the referendum and initiative rights of those similarly-situated Albemarle citizens were not revoked. Greensboro's singling out is unprecedented.

II. Fourteenth Amendment Claims – Disparate Treatment with Respect to Removal of Referendum Rights

The legal basis for the City and Individual Plaintiffs' claim that the removal of a municipal citizen's ability to use the initiative and referendum process to alter their municipal governing bodies from Greensboro citizens alone constitutes disparate treatment in violation of the Fourteenth Amendment to the Constitution and Article 1, § 19 of the North Carolina Constitution has been briefed extensively. *See* Doc. 96. Plaintiffs adopt the arguments asserted therein, and continue to assert that the matter is appropriate for summary judgment.

While a referendum right of city voters to determine their own method of election is not constitutionally required, once the General Assembly granted the right to all municipalities by enacting N.C. Gen. Stat. § 160A-102, it could not arbitrarily or without rational basis revoke that right from Greensboro only. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *see also Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 295 (6th Cir. 1993) ("[A]lthough the Constitution does not require a state to create an initiative procedure, if it creates such a procedure, the state cannot place restrictions on its use that violate the federal Constitution."). The selective removal of initiative and referendum rights from Greensboro citizens alone can only be upheld if there is "a rational basis for distinguishing between Greensboro voters and voters in every other North Carolina municipality." Injunction Order 11-12. That is, there must have been a legitimate legislative goal for that distinction, and the means chosen by the legislature must

rationally advance those goals. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985).

This Court will hear testimony and evidence that further cement the unavoidable conclusion that Greensboro and its citizens were treated disparately and unconstitutionally when they were prohibited from exercising their rights under Chapter 160A—rights afforded to every other similarly-situated municipal citizen. Specifically, this Court will hear testimony from legislators and city council members that no rational justification was ever offered for why Greensboro could not be afforded the same rights as any other citizen in North Carolina's cities. The Court will also be presented with evidence that no other local bill on municipal governance so removed the referendum and initiative rights from municipal voters, and that, in fact, a nearly identical revision to another city's method of election in the exact same legislative session did not so target that city. There is no rational basis for the legislature to treat Greensboro and its citizens differently than any other city and residents in the state, and the revocation of the ability of Greensboro and its citizens alone to avail themselves of Chapter 160A constitutes unconstitutional disparate treatment.

III. Fourteenth Amendment Claims – One Person, One Vote

The Fourteenth Amendment to the U.S. Constitution guarantees that every voter, no matter where that voter lives or how that person votes, will be placed on equal footing with his or her fellow citizens in electing representatives. The principle known as "one person, one vote" has developed consistent with that guarantee and requires that all citizens' votes be weighted equally. *Reynolds v. Sims*, 377 U.S. 433, 563, 565 (1964).

As the Fourth Circuit recently noted, "allowing, through unequal apportionment amongst districts, a vote to be worth more in one district than in another would run counter to our fundamental ideas of democratic government." *RWCA*, 827 F.3d at 340. This principle applies to local and municipal governing boards with the same weight that it does to state legislative redistricting. *Wright v. North Carolina*, 787 F.3d 256, 264 (4th Cir. 2015) (citing *Avery v. Midland Cnty.*, 390 U.S. 474 (1968)).

The Supreme Court and Fourth Circuit have both emphasized that while "mathematical exactness" in population amongst electoral districts is not a workable standard for local government redistricting, governments must nonetheless "make an honest and good faith effort to construct districts as close to equal population as is practicable." *Reynolds*, 377 U.S. at 577; *see also Wright*, 737 F.3d at 264 (internal quotations omitted). Consistent with this, a district apportionment plan with a maximum population deviation of under 10% will not, standing alone, support an equal protection claim. *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996); *Wright*, 737 F.3d at 264. However, neither does staying below that 10% threshold insulate the plan from constitutional attack. Instead, the United States Supreme Court recently reaffirmed that such plans may be found unconstitutional if challengers demonstrate that "it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the 'legitimate considerations' to which we have referred in *Reynolds* and later cases." *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016); *see also Larios v. Cox*, 300 F. Supp. 2d 1338

(N.D. Ga. 2004) (striking down a plan where population deviations were not the result of an effort to further any legitimate, consistently applied state policy).

The Supreme Court further explained what constitutes legitimate considerations that might motivate population deviations: (1) "traditional districting principles such as compactness [and] contiguity, *Harris*, 136 S. Ct. at 1306 (citing *Shaw v. Reno*, 509 U.S. 630, 647 (1993)); (2) maintaining the integrity of political subdivisions, *id.* (citing *Mahan v. Howell*, 410 U.S. 315, 328 (1973)); (3) complying with the Voting Rights Act, *id.*; and (4) maintaining competitive balance among political parties, *id.* (citing *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973)). Importantly, though, the legitimate consideration to which the Court deferred in *Gaffney* is not at all the strategies in place here. The state legislative plans developed in *Gaffney* had an overall deviation of 1.81% in the Senate and 7.83% in the House, 412 U.S. at 737, thus significantly lower than the overall deviations here. The redistricting Board responsible for redistricting in *Gaffney* explained that they followed a "policy of 'political fairness,' which aimed at a rough scheme of proportional representation of the two major political parties." *Id.* at 738. Importantly, in *Gaffney* there was no allegation or evidence presented that in order to achieve that goal, the Board systematically under- or overpopulated districts controlled by one political party.

Following and consistent with the Supreme Court's guidance in *Harris*, the Fourth Circuit last year struck down local bills enacted by the North Carolina General Assembly in 2013 and 2015 restructuring the Wake County Board of Education and Board of County Commissioners, respectively. *RWCA*, 827 F.3d at 337. As here, the legislature,

in the middle of the decade and over the vociferous objection of the county delegation and the public generally, restructured those county boards and dramatically increased the overall deviation in the plans in order to achieve a disproportionate partisan advantage. *Id.* at 338. The evidence in that case also demonstrated that the reason that the overall deviation in the challenged plans were increased was to facilitate achieving Republican electoral victories in a heavily Democratic county, far beyond that which might accurately reflect the Republican population in the county. *Id.* at 346. Because of the striking similarities in the legislation challenged here and the legislation invalidated in *RWCA* (indeed, enacted in the same 2015 legislative session), the decision in *RWCA* controls here.

Indeed, other courts have invalidated plans with under 10% overall deviations using the logic described in *Harris* and *RWCA*. In *Larios*, a three-judge panel held that Georgia's legislative reapportionment plan with just less than 10% overall population deviation was arbitrary and discriminatory in violation of the Equal Protection Clause. The court found that the Georgia legislature drew districts within "what they perceived to be a 10% safe harbor" to favor Democrats. 300 F. Supp. 2d at 1328. The court struck down the plans because it found that two primary motivations for the deviations in the plans—regional favoritism and Democratic incumbency favoritism—were impermissible causes for the population deviations. *Id*. at 1322. That decision was summarily affirmed by the United States Supreme Court in *Cox v. Larios*, 542 U.S. 947 (2004).

Larios is not the only instructive case in which courts have struck down, on one person one vote grounds, a redistricting plan with less than 10% deviation. In 2012, a

three-judge panel preliminarily enjoined the use of a district in the Texas state house redistricting plan because, even though the challenged district itself had a deviation below even 5%, the court saw a discriminatory pattern in the particular county in which the district was located of overpopulating and underpopulating districts based on the partisan preferences of the voters in the district. *Perez v. Perry*, 891 F. Supp. 2d 808, 826 (W.D. Tex. 2012); *see also Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001) (finding that the plan, which had a 9.3% total deviation, was tainted with arbitrariness and discrimination).

Additionally, because determining whether state justifications are illegitimate, arbitrary, or discriminatory may involve at least some inquiry into legislative motivations, this Court may find the Supreme Court's guidance in *Arlington Heights* instructive. *See Vill. of Arlington Heights v. Metro. Housing Redevelopment Corp.*, 429 U.S. 252 (1977). To show discriminatory legislative intent, plaintiffs are not required "to prove that the challenged action rested solely on [] discriminatory purposes." *Id.* at 265. "Rather, Plaintiffs need only establish that…animus was one of several factors that, taken together, moved [the decision-maker] to act as he did." *Orgain v. City of Salisbury*, 305 Fed. App'x 90, 98 (4th Cir. 2008). To be clear, Individual Plaintiffs are not alleging, nor do they have to prove, invidious discrimination motivated the enactment as a whole, although under *Daly*, that evidence is relevant. But the circumstantial evidence that would give rise to such a finding may be useful to the Court here in determining whether the deviations in the challenged plans were arbitrary and discriminatory.

Given the fact that legislative proponents of the challenged legislation have, at every turn, resisted producing documents and giving testimony relevant to questions squarely before this Court, cloaking themselves in asserted legislative privilege, this Court is allowed to draw an adverse inference from that resistance. "[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Dist. 65, Distributive Workers of Am. v. NLRB*, 593 F.2d 1155, 1163-64, 1164 n.21 (D.C. Cir. 1978) (affirming an adverse inference against an employer alleged to have committed discriminatory discharge where the employer failed to put on testimony of the discharged employees' supervisors to bolster its defense that the discharges were the result of non-discriminatory performance issues).

Indeed, the assertion of privilege to shield information from discovery "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." *U.S. v. 4003-4005 5th Ave, Brooklyn NY*, 55 F.3d 78, 82 (2d Cir. 1995) (quoting *SEC v. Greystone Nash. Inc.*, 25 F.3d 187, 190 (3d Cir. 1994)). "[P]rivilege cannot be used both as a sword and as a shield." *Navajo Nation v. Peabody Holding Co*., 255 F.R.D. 37, 44 (D.D.C. 2009) (citation omitted); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997); *see also U.S. v. Rylander*, 460 U.S. 752, 758 (1983). While not required to do so, a court can properly draw an adverse inference against a party claiming a privilege to resist producing relevant evidence. For instance, an inference will be drawn

against a party to a civil suit that invokes the Fifth Amendment privilege against self-incrimination. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976); *see also Int'l Chem. Workers Union v. Columbian Chemicals Co*., 331 F.3d 491, 497 (5th Cir. 2003).

Applying this precedent to the facts in this case, Individual Plaintiffs will produce ample evidence to establish that "it is more probable than not" that the deviations in this plan reflect "the predominance of illegitimate apportionment factors rather than the legitimate apportionment factors" previously endorsed in the Supreme Court's equal population jurisprudence. *Harris*, 136 S. Ct. at 1307. Consistent with the Fourth Circuit's analysis in *RWCA* of what constitutes a successful challenge to a districting plan with deviation near, but under, 10%, Individual Plaintiffs will demonstrate with uncontroverted evidence that the deviations in the challenged plan were motivated by a desire to give Republican voters an unfair advantage in city electoral politics, to create a number of Republican-controlled districts far beyond what partisan fairness might dictate, and to target for defeat Democratic and African-American incumbents—thus, Individual Plaintiffs will show "the use of illegitimate factors significantly explained deviations from numerical standards. *Harris,* 136 S. Ct. at 1310; *RWCA,* 827 F.3d at 341.

Importantly, Dr. Chen's analysis as to whether the population deviations in a plan can be linked to illegitimate considerations such as partisan favoritism and political bias has been plainly endorsed by the Fourth Circuit. Dr. Chen used the same methodology in *RWCA,* and the Fourth Circuit found that his analysis was critically useful in "assess[ing] whether the population deviations in the challenged plans could have been the product of something other than partisan bias." And the Court found compelling the fact that he

"concluded with extremely high statistical certainty, beyond any sort of doubt here that they could not have." *RWCA*, 827 F.3d at 344. Individual Plaintiffs will also demonstrate that traditional redistricting criteria do not explain the deviations. The districts are visually less compact, split far more precincts, and completely disregard communities of interest. And though members of the legislature have largely resisted production, the very little material that has been produced supports Individual Plaintiffs' arguments that illegitimate considerations drove the deviations in the plan.

And while on the basis of uncontested record evidence, Individual Plaintiffs will demonstrate that illegitimate reapportionment factors predominated, resulting in an overall deviation barely below 10%, Individual Plaintiffs will also show that the stated reasons for the redistricting plan were pretextual, further supporting the conclusion that illegitimate redistricting factors were at play. *RWCA*, 827 F.3d at 349. Undisputed campaign finance reports, demonstrating that district elections are regularly more expensive than at-large elections, disproves any assertion that the new plan will decrease the cost of running for municipal office. The district plans do not create or promote geographic diversity because a large number of districts still include portions of the city where Sen. Wade alleged that too many city council members lived—that is, there is not now simply one district or two that touch on the center of the city. There are still four, and incumbents who lived outside this alleged "circle of power" were double-bunked and targeted for defeat. Ultimately, however, even if these justifications were not pretextual, and they are, none of them explains or justifies the high deviations between the districts. Those goals could have been achieved with a plan that had substantially equal population

among the districts. Instead, unfair partisan advantage and the desire to unseat many incumbent city council members were the real motivations behind the plan, and these illegitimate factors underpinning the deviations in the plan demand its invalidation.

Indeed, the partisan bias demonstrated in the enacted map goes far beyond the normal course, because Greensboro is not an evenly divided city, politically: thus, the enacted plan "subverts political fairness and proportional representation and sublimates partisan gamesmanship." *RWCA*, 827 F.3d at 348. And while the Supreme Court has indicated that it will be rare that plaintiffs will be able to establish that a plan with an overall deviation of less than 10% violates the Constitution, *Harris*, 136 S. Ct. at 1307, the Fourth Circuit has subsequently made clear that "these mid-decade partisan redistricting plans constitute just such an unusual case." *RWCA*, 827 F.3d at 351. The case at bar is materially indistinguishable from the Wake County cases the Fourth Circuit found constitutionally malapportioned. The same result is mandated here.

IV. Fourteenth Amendment Claim – Racial Gerrymandering

The Equal Protection Clause also protects against the unjustified use of race in the enactment of laws, including redistricting plans. When race is a predominant motivating factor in the drawing of electoral lines, a reviewing court must apply strict scrutiny. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015). If racial considerations are proven to have predominated in the placement of a district's lines, the district must be invalidated unless it is narrowly tailored to advance a compelling governmental interest. *Id.* at 163. Once challengers prove that race predominated, the burden shifts to the defending party to demonstrate that the district was narrowly tailored to advance a

compelling state interest. *See Shaw v. Hunt*, 517 U.S. 899, 908 (1996); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Miller v. Johnson*, 515 U.S. 900, 920 (1995). And where the defending party produces no evidence of compelling governmental interest or narrow tailoring, challengers have met their burden in proving an unconstitutional racial gerrymander after establishing racial predominance. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 622 (M.D.N.C. 2016) (defendants produced no evidence of narrow tailoring, so conclusion that race predominated ended inquiry).

In proving that race predominated in the drawing of an electoral district, no category of evidence is solely dispositive; racial predomination may be proved by direct or circumstantial evidence, or a combination of the two. *Miller*, 515 U.S. at 916; *Covington v. North Carolina*, No. 1:15-cv-399, 2016 U.S. Dist. LEXIS 106162, at *21 (M.D.N.C. Aug. 11, 2016); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514, at *32 n.7 (E.D. Va. June 5, 2015). Circumstantial evidence of racial predominance can also include, among other things: oddly-shaped and non-compact districts; use of land bridges to deliberately attempt to bring African-Americans into a district; and districts that disregard geographic city limits, precincts, and voting tabulation districts (precincts). *Page*, 2015 U.S. Dist. LEXIS 73514, at *20-*21. The Supreme Court has endorsed the use of statistical analysis to parse racial from partisan motivations in drawing districts. *See Easley v. Cromartie*, 532 U.S. 234, 252 (2001).

Here, the facts relevant to the analysis of racial predominance, including the racial composition of the district, the shape and split precincts, and other record facts, are almost entirely objective and undisputed; this Court must simply determine whether those

facts constitute evidence of predominance, which is a legal question. Individual Plaintiffs will demonstrate that race was the predominant factor in the construction of District 2. While it is possible to draw three majority-black districts in Greensboro without race predominating, it is not possible to draw them at the level at which they were drawn, particularly District 2, without race predominating. Black voters are packed into District 2 because of the color of their skin, and this violates the Equal Protection Clause.

Substantial circumstantial and statistical evidence supports this conclusion. District 2 is oddly shaped and has lines that witnesses explain are only understood as drawn on the basis of race. In particular, a substantial satellite annexation in northeast Greensboro is cleaved on the basis of race, with the white voters pulled into a non-contiguous, predominantly white district, and voters of color assigned to the adjacent majority black district—District 2. Moreover, employing a statistical analysis recently endorsed by the Fourth Circuit, Dr. Jowei Chen confirmed that partisan motivations cannot explain the specific way in which the lines of District 2 were drawn; only race explains the level at which black voters were packed into the district.

Additionally, Individual Plaintiffs, though not required to do so, will demonstrate that black voters have a long history of electing their candidates of choice in Greensboro. Where African-American voters consistently elect the candidates of their choice in districts that are not majority black, the second and third prongs of *Gingles* cannot be satisfied and a Section 2 remedy is not compelled. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Legislative proponents argued that the challenged plan was necessary to create three districts in which black voters would elect their preferred candidates, but black

voters were already electing three African-Americans to the council (two from districts and one at-large), and were, in fact, electing an even greater number of candidates of their choosing. The enacted plan simply restricts black political participation to three single-member districts, instead of allowing it to be exercised in every citywide election. The Constitution cannot tolerate this, and the Voting Rights Act certainly does not compel it.

V. State Constitutional Claims

Individual Plaintiffs also have independent state constitutional grounds for their one person, one vote claims, and these state constitutional grounds are even stronger than the federal constitutional grounds. Article I, Section 19, of the North Carolina constitution provides that "no person shall be denied the equal protection of the laws." It is well settled in this state that "the right to vote on equal terms is a fundamental right." *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990); *James v. Bartlett*, 359 N.C. 260, 269-70, 607 S.E.2d 638, 644 (2005); *State ex rel. Martin v. Preston*, 325 N.C. 438, 454, 385 S.E.2d 473, 481 (1989).

In two recent cases, the North Carolina Supreme Court has found that the one person, one vote protection in the state Constitution is stronger than the protection federal courts have deemed appropriate through the federal Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 371-72, 379, 562 S.E.2d 377, 390, 395 (2002) (holding that even where the federal Constitution does not, the state Constitution requires a more restricted deviation range for legislative districts (plus or minus 5%, rather than just overall 10%), affirmatively rejects the use of single- and multi-districts in the same plan, and creates a check on partisan considerations in state legislative redistricting); *Blankenship v. Bartlett*,

363 N.C. 518, 522-24, 681 S.E.2d 759, 763-64 (2009) (applying one person, one vote to state judicial elections, although the federal analogue is inapplicable, and further noting heightened scrutiny was warranted under the state equal protection clause when an election scheme unequally weighted votes). Thus, even if this were a close question under federal law, which it is not, the state Constitution certainly demands invalidation of the challenged law.

VI. Lack of a Defendant with a Vested Interest

This Court has raised the possibility of appointing outside counsel, perhaps a law professor, to brief or argue the defense's case, since the Board of Elections' position is that its lack of involvement in the enactment of the law (and concomitant lack of insight into the motivations for the law) of necessity limits its defense of the law. This is unnecessary. The Fourth Circuit in *Wright*, presented with a nearly identical situation—where the legislature, without the input and indeed over the protest of local governing boards, enacted a law, but then successfully resisted attempts to be sued over its constitutionality—was amply satisfied that the county board of elections was an adequate defendant, even if reluctant. 787 F.3d at 262-63. Because the county board of elections is the proper party defendant here, *Wright*, 787 F.3d at 262, creating a case or controversy upon which this Court can rule, Plaintiffs must (and will) satisfy their affirmative burden of proof in establishing the statute's unconstitutionality. But where state law plainly

would have authorized a timely motion to intervene by the legislative proponents,[4] *see* N.C. GEN. STAT. § 1-72.2, amended by 2014 N.C. Sess. Laws 115 (authorizing intervention by state legislature in judicial challenges to state law), and both legislative proponents and the attorney general's office have declined to intervene, *see* Ex. 216 (attorney general declining to intervene); Ex. 215, Kasica Deposition Designations (Wade supported private citizens' intervention), this Court should not feel compelled to (and is not legally obligated to) invite other counsel to mount a defense of the statute (nor assume for the Court the cost of defending the law when non-parties had the financial resources and standing to do so). Finally, the type of judicial intervention being contemplated is an unusual step, usually reserved for (and only very rarely utilized in) cases in appellate courts,[5] and Plaintiffs are aware of no other case where a district court has ordered such outside involvement. Indeed, the only parties with the authority to defend the law are proper defendants and intervenors who both have satisfied Federal Rule of Civil Procedure 24 and have standing. *See, e.g., Karcher v. May*, 484 U.S. 72, 84 (1987); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully ask this Court to find for them on all counts and permanently enjoin the challenged law.

[4] Individual Plaintiffs do not believe such intervention would be timely now, and do not concede that the legislators would have standing or that intervention would be timely on appeal.

[5] Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae to Defend Abandoned Lower Court Decisions*? 63 STAN. L. REV. 907, 966 (2011) (appointing "amicus" counsel not appropriate at the trial level).

This the 17th day of January, 2017.

/s/ Allison J. Riggs
Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
N.C. State Bar No. 40028
allison@southerncoalition.org
Emily E. Seawell
N.C. State Bar No. 50207
emily@southerncoalition.org
Southern Coalition for Social Justice
1415 West Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380, ext. 115
Facsimile: 919-323-3942
Attorneys for Plaintiffs Lewis A. Brandon III, Joyce Johnson, Nelson Johnson, Richard Alan Koritz, Sandra Self Koritz, Charli Mae Sykes, Maurice Warren II, and Georgeanna Womack

/s/ Jim W. Phillips
Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com
Julia C. Ambrose
N.C. State Bar No. 37534
jambrose@brookspierce.com

/s/ Bryan Starrett
Bryan Starrett
N.C. State Bar No. 40100
bstarrett@brookspierce.com
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336/373-8850
Attorneys for The City of Greensboro

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served copies of the foregoing document on all parties who have entered an electronic appearance in this action through the ECF filing system.

This the 17th day of January, 2017.

/s/ Allison J. Riggs

Allison J. Riggs