

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION**

RODNEY D. PIERCE; *et al.*,

Plaintiffs,

v.

THE NORTH CAROLINA STATE
BOARD OF ELECTIONS; *et al.*,

Defendants.

Case No. 4:23-cv-193-D

**LEGISLATIVE DEFENDANTS' RESPONSE TO THE SUPPLEMENTAL
DECLARATION OF DR. BARRETO**

During the January 10, 2024, hearing on Plaintiffs' Motion for Preliminary Injunction, this Court questioned counsel for both Plaintiffs and Legislative Defendants on Dr. Barreto's finding in Appendix B, Table B1 that the 2023 Enacted Senate District 2 would elect the black preferred candidate according to past Senate election results reconstituted within SD2. [D.E. 17-2 p. 21]. To be precise, Dr. Barreto's analysis shows that the 2022 Democratic Senate slate he used would have won 54.1% of the vote in SD2, a robust margin over the 45.9% of the vote share for whatever Republican slate he used. [*Id.*] Because endogenous elections, or elections for the office at issue, are "more probative than exogenous elections," *Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999), this evidence—in Plaintiffs' own sponsored report—that black-preferred candidates can prevail in SD2 defeats Plaintiffs' ability to make a strong showing of likelihood of success on the third *Gingles* precondition (even as Plaintiffs construe it).

Quick to believe this was a typo Plaintiffs asked for leave to file a supplemental report, which this Court allowed. On January 12, 2024, Plaintiffs filed a supplemental report from Dr. Barreto. [D.E. 55-1]. Once the Fourth Circuit returned the mandate after it dismissed Plaintiffs' failed pre-ruling appeal, [D.E. 56], this Court allowed Defendants to respond to Dr. Barreto's supplemental report by January 22, 2024. [D.E. 57].

Dr. Barreto's supplemental declaration raises more questions than it answers, casts doubt on all Dr. Barreto's conclusions, and defeats Plaintiffs' motion.

1. Far from a typo, Dr. Barreto's supplemental declaration acknowledges that his original calculations projecting a victory for the black preferred candidate in 2023 Enacted Senate District 2 in Senate contests are correct. Perhaps in response to this Court's questions at the hearing about the legal significance of those calculations, Dr. Barreto uses the rest of his declaration to explain away this finding. What he says makes little sense, and the flaws he announces (if true) cannot be cabined to the portion of his analysis he dislikes.

To begin, Dr. Barreto declares that his table includes only vote shares in Halifax, Warren, and Martin counties. That signals that something has gone wrong or at least that Dr. Barreto is doing something unusual that requires further vetting. Table B1 purports to be a reconstituted election analysis, which "is a relatively simple method that extracts actual election results from a variety of statewide and local races that subsume the area being analyzed and determines, precinct-by-precinct within the [evaluated] district, the racial composition of the vote and the 'winner' within the [evaluated] district." *Rodriguez v. Bexar Cnty., Tex.*, 385 F.3d 853, 861 (5th Cir. 2004). Thus, under a legitimate reconstituted election analysis, a representation that 54.1% of the vote in "Senate District 2" went to the Democratic candidate(s) is a representation about all the precincts in SD2—not just some of them. Dr. Barreto's new disclosure that his analysis "is reporting only

the 2022 vote shares in Halifax, Warren, and Martin counties,” [D.E. 55-1 p. 2], is a new admission that he either made an error in the analysis or at least that he conducted it in a way that is unusual (and hence requires further evaluation). Notably, these claims appear nowhere in his original declaration. Dr. Barreto’s choice to make this disclosure in a belated and self-serving fashion undermines his credibility. The Court should not trust Dr. Barreto’s analysis under these circumstances.

Moreover, Dr. Barreto’s new representation cannot seem to be cabined to the contests he would prefer the Court ignore. Table B1 represents that the same “Senate District 2” is utilized as to *all* elections Dr. Barreto plugged into his reconstituted election analysis, including the exogenous races that purport to show Republican victories.¹ Dr. Barreto cannot credibly ask the Court to discount the results as to 2022 Senate contests on the ground that only three counties are accounted for, and at the same time ask the Court to credit the remaining outcomes. Either Table 1 is credible or it is not.

Dr. Barreto’s other assertions likewise raise more questions than answers. Dr. Barreto opines, without any evidentiary support, that the reason there was no contested election in former Senate District 1 in 2022 is because “that district was so heavily Republican that no Democratic candidate ran.”² [D.E. 55-1 p. 2]. That is difficult to understand: Dr. Barreto’s table shows that whatever Democratic candidate or candidates he used for the analysis prevailed, so some Democratic candidate must have been on some relevant ballot. He also claims that his analysis excludes uncontested elections, [*id.*], but that would not seem to provide a basis to discount the

¹ As noted, these races are less probative than Senate races. *Johnson*, 196 F.3d at 1222.

² This is an especially odd claim since the districts used in the 2022 elections were subjected to significant testing on so-called “partisan fairness” metrics, under the, now defunct, requirements of *Harper v. Hall*, 383 N.C. 89, 108, 881 S.E.2d 156, 170 (N.C. 2022).

Senate results, since uncontested elections are not generally regarded as probative. That would seem to be a respect in which Dr. Barreto correctly performed that analysis and not a basis to (selectively) throw out the results. In any event, if that choice somehow undermines the outcome as to SD2 in Senate elections, then this effect cannot be cabined to the contests Dr. Barreto would prefer the Court ignore.

Then, Dr. Barreto purports to perform back-of-the napkin math adding up “tally the total votes cast across all of the 2022 State Senate elections,” including in uncontested races, [D.E. 55-1 p. 2], but if that were the right way to do the analysis, why did Dr. Barreto not do that initially? And why not across the board? It is a mystery what elections he is using or how he is using them, because he does not show his work and did not disclose his backup data.³ And it is a mystery how Dr. Barreto can concoct all types of new ways to perform this “relatively simple method,” *Rodriguez*, 385 F.3d at 861, only after being questioned about it. What other new revelations, methods, admissions, errors, and shifts might Dr. Barreto disclose if questioned about his report further?

That, ultimately, is the problem. These sorts of conflicting and unsubstantiated claims are the precise reason that redistricting litigation should not be “a game of ambush,” *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023), and why experts in these cases should be subject to vigorous cross examination and thorough expert rebuttal reports—none of which were available to Legislative

³ Legislative Defendants maintain that they did not receive the entirety of Dr. Barreto’s backup data. For example, while the North Carolina election results speak for themselves, and do show that Senate District 1 was uncontested in 2022, those results do not allow them to verify Dr. Barreto’s now competing assertions as to whether that election was used, and if so, how it was used. With the short time available to them, Legislative Defendants chose to use their expert’s limited time to produce a report, instead of arguing about more fulsome backup data that would have come too late to be of any use. As this case proceeds, Legislative Defendants intend to seek these materials, including via motion to the Court, if required.

Defendants with the lightning speed Plaintiffs demanded of this proceeding. The Court should not permit Plaintiffs to demand proceedings at this unreasonable pace, to proffer expert opinion that undermines their claim, proffer yet more expert opinion that attacks the prior opinion on a selective and confusing basis, and then declare “[t]his case involves an egregious and clear-cut violation of Section 2.” [D.E. 17 p. 1]. If anything has become clear at this stage, it is that nothing is clear about Plaintiffs’ claim.⁴

2. Nothing in Dr. Barreto’s report suggests a need for Senate District 2 to have a 50% BVAP level or higher for the black preferred candidate to prevail.⁵ This is likely because Dr. Barreto only found “statistically significant” racially polarized voting, not “legally significant racially polarized voting” as required under the third *Gingles* prong. *See e.g.* Legislative Defendants Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction. [D.E. 39 pp. 18-21].

In short, Dr. Barreto’s supplemental declaration bolsters only the clear deficiencies in Plaintiffs claims, and does nothing to improve the likelihood that they succeed on the merits. For these reasons, and the reasons further stated in Legislative Defendants’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction and at the oral argument, Legislative Defendants’ respectfully request that the Court deny Plaintiffs’ Motion for Preliminary Injunction.

⁴ For that reason, if Plaintiffs were to respond that Legislative Defendants have somehow misunderstood Dr. Barreto’s supplemental declaration, such an assertion would only prove the point. The Court needs more time with this case to get real answers to these questions.

⁵ Notably Legislative Defendants’ expert, Dr. Alford, reached the conclusion that it was unlikely any of these districts needed 50% BVAP for a black preferred candidate to prevail, [D.E. 39-7 p. 3], a conclusion corroborated by figures 3 and 4 in Dr. Barreto’s original report. This is also corroborated by evidence submitted in other cases showing that black democrats won in senate districts with less than 50% BVAP in the Northeastern portion of the state. [D.E. 39-3; 39-8].

Respectfully submitted, this the 22nd day of January, 2024.

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* *Appeared via Special Notice*

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification to counsel of record.

This the 22nd day of January, 2024.

**NELSON MULLINS RILEY &
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