No. 25-2180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY PIERCE and MOSES MATHEWS,
Plaintiffs-Appellants,
v.
NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Hon. James C. Dever III, No. 23-cv-193-D

PETITION FOR INITIAL, EXPEDITED HEARING EN BANC, AND TO EXPEDITE CONSIDERATION OF THIS PETITION

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INTRODUCTION

This exceptionally important and time-sensitive appeal presents a paradigmatic occasion for expedited initial hearing en banc under Federal Rule of Appellate Procedure 40(g).

In 2023, North Carolina's legislature redistricted the state Senate map to "crack[] the state's Black Belt right down the middle." *Pierce v. North Carolina State Board of Elections*, 97 F.4th 194, 229 (4th Cir. 2024) (Gregory, J., dissenting). It cracked the Black population across Senate Districts 1 and 2, leaving each with roughly 30% Black voting-age population. Under a "faithful application" of the *Gingles* framework, that plainly violates § 2. *Allen v. Milligan*, 599 U.S. 1, 42 (2023). Compact, majority-Black districts can easily be drawn under *Gingles* One—indeed, one can be formed without splitting a single county. The court found *Gingles* Two satisfied. As to *Gingles* Three, voting is starkly racially polarized, and defendants' own expert admitted that "White voters vote sufficiently as a bloc to enable them usually to defeat the minority's preferred candidate" in both districts. D.E.119 at 81-82. In 2024, Black-preferred Senate candidates lost by *over 14 points* in both districts.

Yet the district court denied relief. Under its novel "district-effectiveness analysis" rule, racially polarized voting is not "legally significant" if a hypothesized sub-50%-BVAP district might elect a Black-preferred candidate. That radical rule—which means that *any* white crossover voting negates *Gingles* Three—would gut Section 2. It conflicts with *Milligan*, *Cooper v. Harris*, 581 U.S. 285 (2017), and decades of precedent recognizing that the *Gingles* inquiry turns on whether white bloc voting *usually* defeats Black-preferred candidates in the challenged districts—not whether some hypothetical crossover district might perform.

The decision below compounds that grievous error with many others, including treating the drawing of a majority-Black demonstration district as disqualifying under *Gingles One*. And it misreads nearly every Senate Factor. The court repeatedly invoked this Court's prior panel opinion affirming the denial of a preliminary injunction to justify its holdings, ensuring that panel review now would be mired in disputes over its supposed precedential force.

Time is short. Candidate filing for the 2026 primaries begins December 1, 2025. Only immediate en banc review can ensure uniformity

with Supreme Court precedent and prevent an obvious, highly consequential Section 2 violation from persisting through another election cycle.

RELEVANT BACKGROUND

A. Plaintiffs' VRA Section 2 Claim

Plaintiffs—Black voters from Halifax and Martin Counties—filed suit in November 2023, less than a month after the plan's enactment, alleging that the plan dilutes Black voting strength in violation of VRA § 2. They seek replacement of SD1 and SD2 with two new districts, one giving Black voters a fair opportunity to elect their preferred candidates. The proposed remedy can be implemented entirely within the footprint of the existing districts.

B. The Preliminary Injunction Denial and Prior Appeal

Plaintiffs moved for a preliminary injunction and sought expedited proceedings, but the district court denied expedition and later denied the preliminary injunction, holding that Plaintiffs had not shown "legally significant" racially polarized voting under *Gingles* Three. D.E.23, D.E.61 at 45.

A divided panel of this Court affirmed. *Pierce*, 97 F.4th 194. The majority acknowledged that a central premise of the district court's

ruling—requiring a "district effectiveness analysis" to prove a § 2 violation—was "inaccurate," but nonetheless deemed such analysis "probative." *Id.* at 218.

Judge Gregory dissented, explaining that the majority's "district effectiveness" gloss imposed "an insurmountable roadblock" for § 2 plaintiffs and that the record already showed what *Gingles* Three requires: white bloc voting that usually defeats Black-preferred candidates in the challenged districts. *Id.* at 237. He also faulted the district court for disregarding North Carolina's continuing history of racial discrimination and warned that the majority's approach would effectively shield vote-dilution from review.

The Court denied rehearing en banc.

C. The Trial and Final Decision

The district court conducted a bench trial from February 3-7, 2025. Plaintiffs presented lay testimony and four experts. Blakeman Esselstyn offered illustrative majority-Black districts satisfying *Gingles* One, and Dr. Jonathan Mattingly applied North Carolina's county-clustering algorithm. Dr. Loren Collingwood showed severe racially polarized voting in SD1 and SD2, with white bloc voting almost always defeating Black-

preferred candidates. Dr. Traci Burch described North Carolina's long record of racial appeals in campaigns and persistent socioeconomic disparities that hinder Black political participation.

Legislative Defendants called Dr. Sean Trende, who admitted that his report contained material errors. Dr. John Alford conceded that "White voters vote sufficiently as a bloc to enable them usually to defeat the minority's preferred candidate in Senate District 1 and Senate District 2"—acknowledging that *Gingles* Three was satisfied. D.E.119 at 81-82. Dr. Donald Critchlow opined that North Carolina campaigns rarely featured racial appeals based on a cherrypicked newspaper survey. And Dr. Andrew Taylor testified that North Carolina's racial disparities in socioeconomic factors were not unusual nationally.

On September 30, 2025, the district court denied Plaintiffs' claim. The court held that Plaintiffs had failed to satisfy *Gingles* One's requirement for a reasonably configured majority-Black district, even though one demonstration district was majority-Black and composed entirely of whole counties. The court found *Gingles* Two satisfied. Op.50-51. On *Gingles* Three, the court concluded that racially polarized voting was not "legally significant." Op.69. And on the totality of circumstances,

the court discounted unrebutted evidence of ongoing racial discrimination, socioeconomic disparities, and racial appeals in political campaigns.

D. The Upcoming Election Schedule

North Carolina's 2026 primaries are on March 3, 2026; candidate filing runs from December 1-19, 2025.

ARGUMENT

I. The District Court's Decision Piles Error On Error And Warrants Immediate Correction For The 2026 Elections

The district court's judgment rests on a cascade of fundamental legal errors. The court dismissed Plaintiffs' evidence of reasonably configured majority-Black districts under *Gingles* One, disregarded undisputed proof of legally significant racially polarized voting under *Gingles* Three, and discounted the Senate Factors through novel legal tests no court has endorsed. The court's decision also rests on numerous factual errors plaintiffs will detail in their merits brief, but the extreme legal errors warrant en banc review.

A. The District Court Misconstrued *Gingles* One

Gingles One requires proof that "the minority group [is] sufficiently large and geographically compact to constitute a majority in a reasonably

configured district." *Milligan*, 599 U.S. at 18; *see Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Plaintiffs presented multiple illustrative districts that are majority-Black, contiguous, compact, and respect traditional redistricting principles. The district court nevertheless found *Gingles* One unsatisfied—an error explained only by the court's repeated misstatements of law and refusal to credit unrebutted record evidence.

As the district court acknowledged, two of Plaintiffs' illustrative districts, Demonstration Districts A and C, exceed 50% BVAP under the decennial census. Op.36 n.9. District A splits no counties or precincts and District C splits only one county and no precincts. D.E.126 at 29, 193; Op.44. Both districts better preserve the Black Belt community of interest and are more compact than enacted SD1 and SD2. D.E.126 at 18-19, 28-29.

Faced with this overwhelming showing, the court rewrote the legal standard. The court insisted that Plaintiffs prove the Black "population" of northeastern North Carolina is "sufficiently geographically compact" in the abstract—declaring that *Gingles* "focuses on the compactness of the minority population itself, not the shape of the proposed minority district." Op.40-41. But *Gingles* and *Milligan* judge minority voters'

compactness by asking *whether* they can "constitute a majority in a reasonably configured *district*." *Milligan*, 599 U.S. at 18 (emphasis added); *Gingles*, 478 U.S. at 50-51. That Plaintiffs drew multiple majority-Black districts that are more compact than enacted SD1 and SD2 proves the minority community is geographically compact in the only way *Gingles* cares about. Indeed, district compactness was the only thing *Milligan* considered. 599 U.S. at 20.

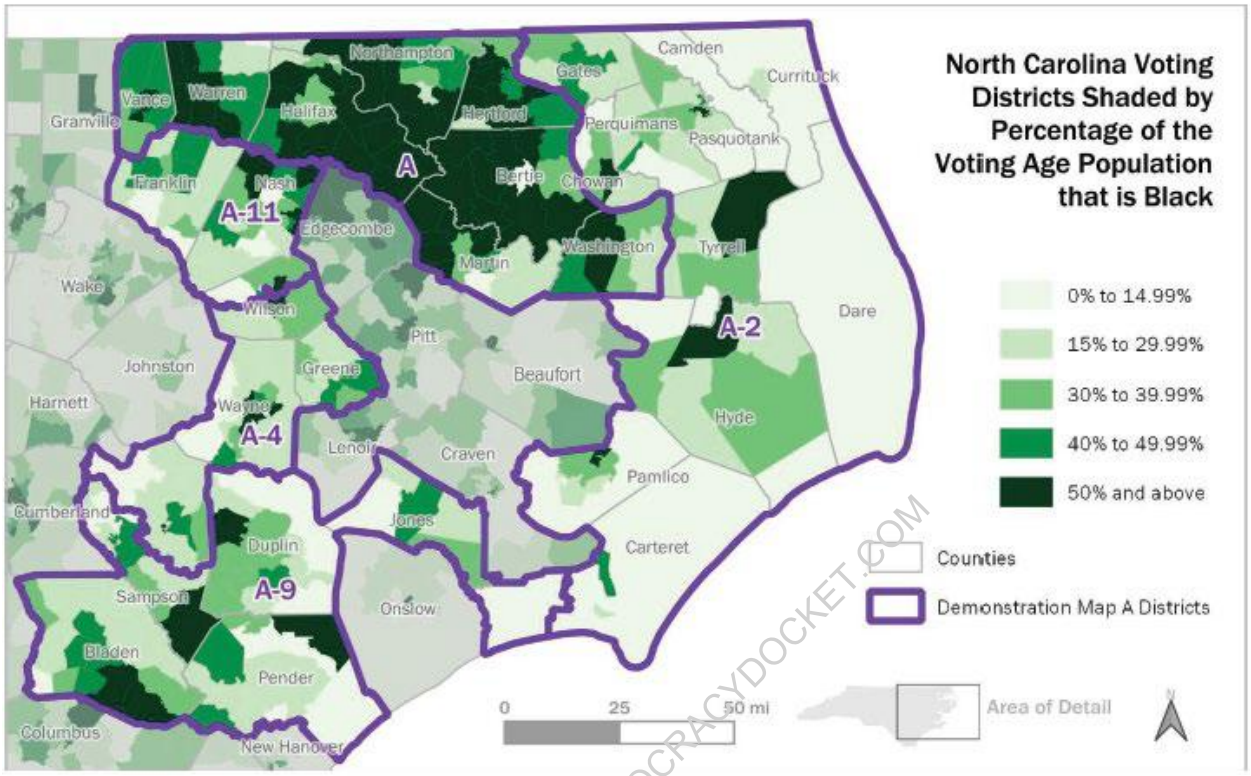
The district court then discounted Demonstration District D—a majority-Black CVAP district that split only one county and did not require altering any district boundary other than SD1 and SD2—based on an unprecedented legal conclusion that CVAP figures may not be used in VRA cases unless they *lower* a district's minority-population estimate. Op.38-39. The court held that CVAP would be appropriate if there was a "significant black noncitizen population" such that BVAP would overestimate black voting power, Op.39, but was categorically inappropriate where, as here, the presence of *non-Black* noncitizens means that Blacks are a *higher* percentage of the citizen voting-age-population, *see* Op.36; PX69 14 n.6. The court also perplexingly asserted that it had "no way of knowing" whether CVAP results were produced by

"sampling error" because plaintiffs did not "report the margins of error." Op.39. Plaintiffs presented detailed, unrebutted margin of error calculations, showing that any error was tiny and that District D's 50.14% Black CVAP estimate was conservative, D.E.126 at 14-15, 34. Defendants' expert conceded that District D's CVAP percentage established that it was "more likely than not" a majority-Black district. *Id.*

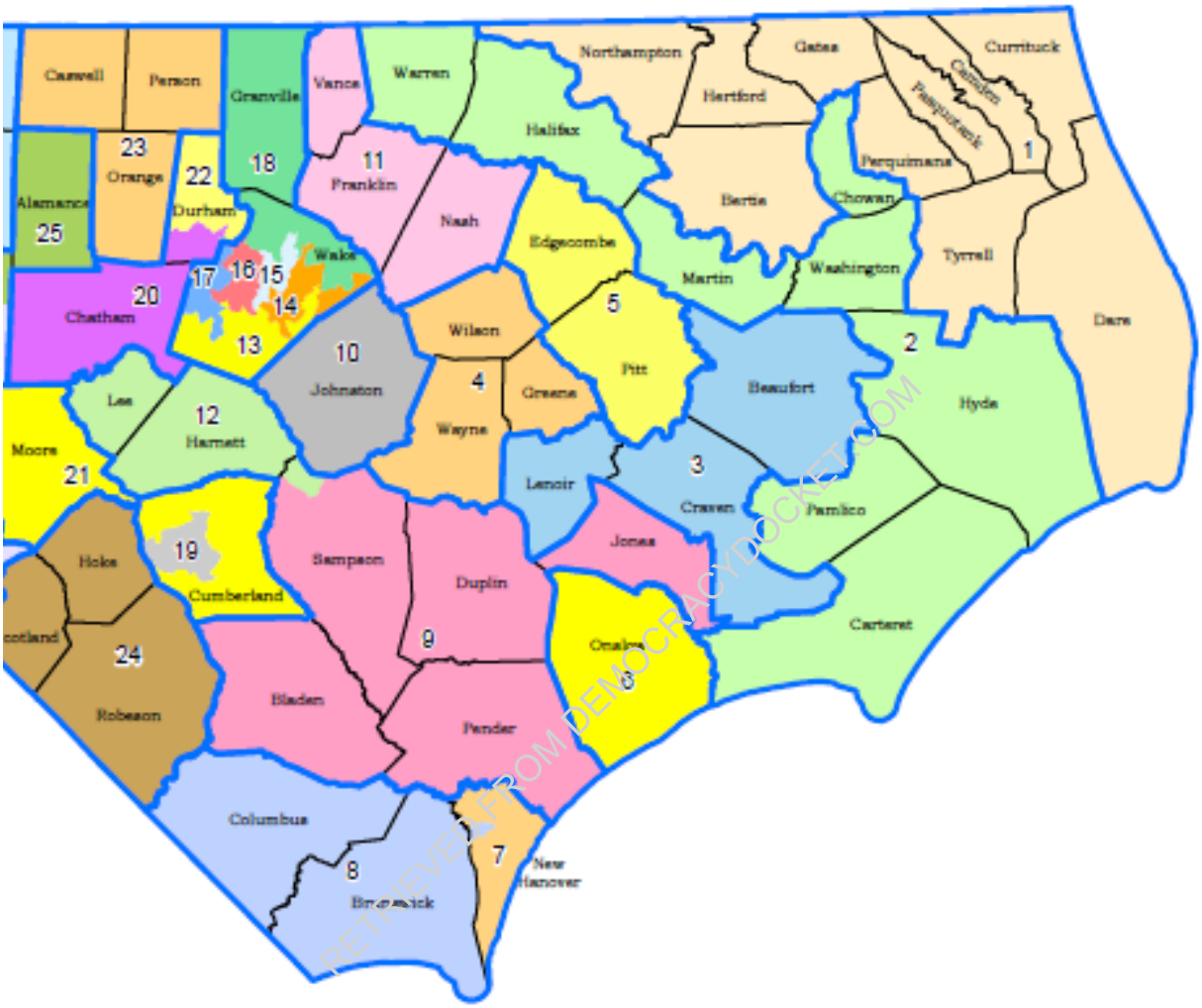
The court then asserted that Districts C and D (but not A) were unreasonable because they contained "appendage[s]," Op.42-43—but the so-called appendages were contained within a single county and tracked city or precinct boundaries.

Because District A did not split a single county, the court looked *outside* its boundaries to declare it unreasonable, holding that applying North Carolina's county-grouping algorithm while freezing District A would result in a 23-county grouping containing multiple districts. Op.44-45. But applying state-law district configuration requirements cannot possibly render a district unreasonably configured. And these districts are no more visually "outlandish"—to use the court's term—than the enacted map:

Figure 9: Demonstration Map A districts that differ from enacted 2023 plan



Enacted Senate Map:



The court also found that District A would "crack[]" an "adjacent performing crossover district," District 5. Op.46. This is demonstrably wrong. District A does not contain *either* of District 5's two counties and it is easy to draw a map that contains both districts. D.E.126 at 20. The district court held that plaintiffs should have applied a state-law

districting algorithm that changed District 5 and had no "legal justification to 'freeze'" District 5 when drawing a map around District A. Op.47. But if (as the district court held) federal law requires preserving District 5, that *is* the justification for freezing it. The court's theory seemed to be that District A is unreasonable because if you ignore federal law and blindly follow a state-districting algorithm that alters a federally-required neighboring district, the resulting map violates federal law. Op.46-47. That Catch-22 of a holding is plainly incorrect.

Finally, the district court asserted that all plans failed *Gingles* One because race "predominated" in their construction. Op.48-50. That conclusion flagrantly contradicts record evidence the court simply ignored, including proof that plaintiffs' expert rejected configurations with higher Black populations because they were less compact or did not preserve political subdivisions. D.E.126 at 29-30. It is also wrong as a matter of law. The court held that the *fact* that plaintiffs' expert "made decisions designed to draw majority-Black districts" established racial predominance. Op.48. *Milligan* rejected exactly this holding. 599 U.S. at 32-33. And the court's holding that a demonstrative district consisting entirely of whole counties fails *Gingles* 1 because race "predominated"

over other considerations highlights the very serious concerns this Court should have with the decision below.

B. The District Court Misconstrued *Gingles* Three

Gingles Three asks whether the white majority "votes sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51; *Milligan*, 599 U.S. at 18. Defendants' own racially polarized voting expert conceded that "White voters vote sufficiently as a bloc to enable them usually to defeat the minority's preferred candidate in Senate District 1 and Senate District 2." D.E.119 at 81-82. That should have ended the matter. But the district court nevertheless invented an irrelevant "district-effectiveness" analysis to find that Plaintiffs failed to satisfy *Gingles* Three.

Plaintiffs plainly satisfied *Gingles* Three. It was undisputed that around 80% or more of white voters consistently voted against the Black-preferred candidates in SD1 and SD2, a rate markedly higher than the statewide opposition rate of about 71%. D.E.126 at 52-55; D.E.119 at 81. It was also undisputed that white-preferred candidates beat Black-preferred candidates in 88-91% of contests in SD1 and SD2 over the last five cycles—and in the last three cycles, 100% of contests in SD1 and 98%

in SD2. *Id.* at 58, 67. In 2024 alone, the white-preferred candidate won all 16 contests in SD1 (average margin 13 points) and 15 of 16 in SD2 (average margin 13.1 points). *Id.* at 64-65. In the two endogenous 2024 Senate races, white-preferred candidates prevailed by 14.4 points (SD1) and 14.3 points (SD2). *Id.*

This proof was unrebutted. Legislative Defendants' RPV expert, Professor Alford, agreed with Dr. Collingwood's EI estimates, methods, geographies, election set, and blocking analysis. D.E.119 at 72-77, 81-82. And using the 23 statewide elections the General Assembly internally analyzed from 2016 to 2022, the white-preferred candidate prevailed in SD1 and SD2 every single time. JX6 at 27-72; D.E.119 at 23.

The district court did not address *any of this evidence*. Instead, citing this Court's preliminary injunction opinion, the court held that racially polarized voting in SD1 and SD2 is not "legally significant" because a remedial district in the region could perform with less than 50% BVAP. Op.53; *see* Op.51-72. It is impossible to overstate what a striking conclusion that is and how dramatically such a rule would upend the VRA. If the district court were right, Black voters who are currently unable to elect their candidates of choice under an actual enacted plan

would nevertheless be unable to invoke § 2 because, in a hypothetical district that *does not exist*, those same voters could elect their preferred candidate with something less than a majority-Black district.

This is plain legal error that is contrary to 40 years of § 2 law. *Gingles* Three requires only that white bloc voting "usually" defeat Black-preferred candidates in the enacted districts. 478 U.S. at 51. Nothing in *Gingles* or its progeny imposes an additional burden to prove the precise BVAP level at which a hypothetical remedial district might perform, much less a requirement that the level exceed 50%. Indeed, that requirement means that if *any* white voters cross over to support Black-preferred candidates, § 2 does not apply.

The district court's holding is irreconcilable with the Supreme Court's square holdings that crossover districts with BVAPs *below* 50% may serve as lawful and effective § 2 remedies. *Cooper*, 581 U.S. at 306. Indeed, the Supreme Court found liability in both *Gingles* and *Milligan* without any "district-effectiveness" analysis. The district court's holding bears out the dissenting judge's concern that this Court's preliminary injunction opinion could be read to greenlight the use of a "district

effectiveness" requirement to impose "an insurmountable roadblock" inconsistent with § 2. *Pierce*, 97 F.4th at 237 (Gregory, J., dissenting).

That legal error consumed virtually all of the district court's *Gingles* Three analysis, and correcting it is enough to reverse the court's *Gingles* Three conclusion. The court's *Gingles* Three analysis was also replete with factual misstatements and inconsistent treatment of the witnesses, which plaintiffs will detail in their merits brief. But ultimately it is irrelevant whether the average BVAP needed for Black-preferred candidates to win in these counties is in the high 40s or the low 40s—the principal question the court analyzed. The challenged districts' BVAPs are 29.49% and 30.01%, D.E.126 at 5; D.E.119 at 18-19—numbers that remarkably never appear in the district court's opinion. Indeed, the district court's discussion of how Black-preferred candidates perform in cross-over districts studiously avoids any discussion of their decisive defeats in 2024 in the actual districts here, Op.69-72—even though at the preliminary injunction stage, the district court said such elections were the *most* important. D.E.61 at 38.

There is no factual dispute that "white voters vote sufficiently as a bloc to enable them usually to defeat the minority's preferred candidate

in Senate District 1 and Senate District 2." D.E.126 at 52. *Gingles* Three is satisfied.

C. The District Court Misconstrued the Senate Factors

The district court's Senate Factor analysis was riddled with legal error. We highlight a few errors:

On **Factor One,** North Carolina's history of voting-related discrimination is unbroken and recent. During the prior redistricting cycle alone, maps were struck down *three times* as unconstitutional racial gerrymanders. *Cooper*, 581 U.S. 285; *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016); *North Carolina v. Covington*, 585 U.S. 969 (2018). North Carolina's 2013 election law targeted Black voters "with almost surgical precision." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214, 223 (4th Cir. 2016). As of 2024, the State was still enforcing a felon-disenfranchisement law adopted for the purpose of racial exclusion. *N.C. A. Philip Randolph Inst. v. NCSBOE*, 730 F. Supp. 3d 185, 189 (M.D.N.C. 2024), aff'd, 2025 WL 2627027 (4th Cir. Sept. 12, 2025). The court wrote the redistricting cases off as "very old cases" even though they were from the *last* cycle, Op.75, and discounted *Randolph* because the law was "enacted more than 150 years ago," Op.76—even

though it "continue[d] to disproportionately" prevent Black voters from voting until last year. *Randolph*, 2025 WL 2627027, at *8.

On **Factor Five,** continuing effects of racial discrimination, the record showed massive racial disparities across education, employment, income, health, and criminal justice—disparities that both experts agreed stem in part from racial discrimination and that depress Black political participation. D.E.126 at 229-235; PX21 at 4-18.

The district court flatly ignored extensive causation evidence, including that identical resumes randomly assigned to have Black-associated names receive fewer callbacks, and that majority-Black rural census tracts were 10 times more likely to be food deserts than majority-White rural census tracts. PX21 at 4-18; PX117 at 7; D.E.120 at 19. The court then invented a novel causation test no other court has applied, faulting Plaintiffs for not conducting a randomized controlled trial to account for the district court's *post-trial, extra-record, citationless* hypothesized explanations for racial disparities, such as the trope that different "job interests" or "lifestyle choices" might explain racial disparities. Op.80.

On **Factor Six**, racial appeals in campaigns, Dr. Burch documented pervasive explicit and implicit racial appeals spanning decades, including the 2024 gubernatorial race and other recent statewide, congressional, legislative, and local contests. Some candidates openly invoked white supremacist rhetoric. D.E.126 at 128-38. The court brushed all that aside in favor of a defense expert who claimed to systematically measure racial appeals by searching North Carolina newspapers for the words "racism," "bigotry," and "issues"— but not racial, racist, racially, or bigoted. LDX61 at 5-12; D.E.120 at 90-91; *see* Op.91, 94-95. Even under that absurd method, he still found racial appeals in at least 15% of contests (3 of 20)—proof enough of their persistence. D.E.120 at 97-98, 103-04, 107-08.

On factor after factor, Plaintiffs offered extensive—and often unrebutted—evidence, which the district court ignored while leaning on invented legal requirements and arguments Legislative Defendants never pressed.

II. The Court Should Grant Initial En Banc Review

This case will determine whether North Carolina's Black Belt voters have a fair chance to elect candidates in the remaining three state

Senate elections this decade. But the district court's misinterpretations of Section 2 have far broader implications. This appeal merits initial en banc review in light of its importance, the serious time constraints, and the district court's purported reliance on this Court's prior preliminary injunction opinion to justify its legal conclusions—in particular to justify its holding that *any* white crossover voting forecloses a showing under *Gingles* Three. That holding would effectively eliminate Section 2.

1. Plaintiffs filed suit nearly two years ago and have sought expedition at every stage. The court declined to expedite preliminary injunction proceedings, instead extending them. D.E.23, D.E.28. The court denied plaintiffs' request for an earlier trial. D.E.70-2, D.E.81. Candidate filing for 2026 begins December 1, 2025, and primaries are scheduled for March.

2. Legislative Defendants will surely contend that this appeal cannot be cleanly resolved by a new three-judge panel. The district court repeatedly invoked the preliminary injunction panel opinion as support for its incorrect holdings, including its holding that if a so-called "district effectiveness analysis" shows that there is *any* crossover voting and a Black-preferred candidate could be elected without a majority-Black

district, then *Gingles* Three is not satisfied. *See* Op.52-53. Citing the panel opinion, the court held that the purported existence of "notable crossover voting … demonstrates that legally significant racially polarized voting does not exist," Op.53—even though it was undisputed that any crossover voting was insufficient for Black-preferred candidates to win in the *challenged* Senate Districts. D.E.119 at 81-82.

The court also cited the panel opinion throughout its Senate Factors analysis, including to declare that evidence of discrimination from the 2010 or earlier cycles was too old. Op.76-77; *see Pierce*, 97 F.4th at 241 (Gregory, J., dissenting) ("courts regularly look to history to evaluate this factor"). And the court cited the panel's discussion of disentangling race from partisanship, Op.122—reasoning Judge Gregory warned could "threaten[] the viability of any Section 2 claim." 97 F.4th at 244.

While plaintiffs believe that their Section 2 claim would succeed under existing Circuit precedent, Legislative Defendants will contend that the prior panel opinion forecloses or at least heavily constrains reconsideration of the district court's holdings. The preliminary-injunction decision was an interlocutory ruling, made on a truncated record and heavily reliant on a standard of review that does not apply

here. But that opinion will complicate a new panel's consideration of this case, for example by forcing the parties to spend significant time interpreting the prior panel's statement that a district-effectiveness analysis could be "probative." Op.53.

3. Only initial hearing en banc ensures that the full Court addresses this case on a clean slate, without a flawed interlocutory decision. If time were not an issue, plaintiffs would not seek initial en banc review. But given the position Legislative Defendants have previously taken on *Purcell*, there is limited time for this Court's review, for remedial proceedings to occur, and for the State to implement new districts. Holding a panel *and* en banc hearing is unrealistic on this timeline. If a panel concludes that precedent compels it to bless the district court's egregiously wrong "district-effectiveness" holding, Plaintiffs will be denied an opportunity for en banc review before the 2026 elections. Indeed, depending how long a panel takes, Legislative Defendants may well argue that it is too late for 2028.

The challenged plan cracks apart more than 100,000 Black voters in northeastern Black Belt counties with some of the highest Black populations in the State. These are the very communities that gave rise

to *Gingles*, and whether § 2 still protects them is of profound local and national significance. En banc review now is the only way to ensure that Black voters are not denied relief by the calendar.

III. En Banc Proceedings Should Be Expedited To Allow Relief For 2026

If en banc review is granted, Plaintiffs respectfully propose the following expedited schedule:

- Opening Brief: October 21, 2025
- Response Brief(s): November 7, 2025
- Reply: November 12, 2025
- Oral Argument: Week of November 17, 2025

This schedule would facilitate a decision before candidate filing opens on December 1.

Alternatively, the Court could order a brief extension of the candidate-filing period for SD1 and SD2 to allow time for remedial proceedings. North Carolina's primaries are not until March 3, 2026—three months after the filing deadline—leaving ample flexibility to adjust the calendar, as the State has done in other recent redistricting cycles.

Finally, plaintiffs request that the Court expedite this petition and order an expedited response.

CONCLUSION

The Court should grant initial hearing en banc.

Dated: October 6, 2025

Respectfully submitted,

s/ Elisabeth S. Theodore

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Initial Hearing En Banc was filed electronically on October 6, 2025 and will, therefore, be served electronically upon all counsel.

s/ *Elisabeth S. Theodore*
Elisabeth S. Theodore

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g), the undersigned counsel for appellants certifies that:

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(d)(3) because it contains 3,900 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a) because it has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

s/ *Elisabeth S. Theodore*
Elisabeth S. Theodore