

No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,
Plaintiffs-Appellants,

v.

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

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

**APPELLANTS' EMERGENCY MOTION FOR
LIMITED INJUNCTION PENDING APPEAL**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	Error! Bookmark not defined.
LOCAL RULE 27(a) STATEMENT.....	i
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	4
A. Factual Background.....	4
B. Procedural History.....	7
JURISDICTIONAL STATEMENT.....	9
ARGUMENT.....	11
I. Plaintiffs Are Likely to Succeed on the Merits.....	12
A. Plaintiffs Satisfy All Three <i>Gingles</i> Preconditions.....	12
B. The Totality of the Circumstances Supports Plaintiffs’ Claim.....	17
II. The Remaining Factors Strongly Favor an Injunction Pending Appeal.....	20
A. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief.....	20
B. The Equities and Public Interest Favor Injunctive Relief.....	21
III. <i>Purcell</i> Does Not Counsel Against a Preliminary Injunction Here.....	21
CONCLUSION.....	24
CERTIFICATE OF COMPLIANCE.....	25
CERTIFICATE OF SERVICE.....	26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Allen v. Milligan</i> , 599 U.S. 1 (2023).....	<i>passim</i>
<i>Ams. United for Separation of Church & State v. City of Grand Rapids</i> , 922 F.2d 303 (6th Cir. 1990).....	10
<i>Disability Rights N.C. v. N.C. State Bd. of Elections</i> , No. 5:21-CV-361-BO, 2022 WL 2678884 (E.D.N.C. July 11, 2022).....	21
<i>District of Columbia v. Trump</i> , 959 F.3d 126 (4th Cir. 2020).....	9
<i>Gingles v. Edmisten</i> , 590 F. Supp. 345 (E.D.N.C. 1984).....	19
<i>Grimmett v. Freeman</i> , 2022 WL 3696689 (4th Cir. Aug. 25, 2022).....	11
<i>Harper v. Hall (Harper I)</i> , 868 S.E.2d 499 (N.C. 2022), <i>overruled on reh'g by Harper v. Hall (Harper III)</i> , 886 S.E.2d 393 (N.C. 2023).....	5
<i>Harris v. McCrory</i> , 159 F. Supp. 3d 600 (M.D.N.C. 2016).....	16, 17
<i>IDS Life Ins. Co. v. SunAmerica, Inc.</i> , 103 F.3d 524 (7th Cir. 1996).....	9
<i>Johnson v. De Grandy</i> , 512 U.S. 997 (1994).....	12
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014).....	17, 18, 20, 21

Liebmann v. Goden,
629 F. Supp. 3d 314 (D. Md. 2022)..... 10

LULAC v. Perry,
548 U.S. 399 (2006) 17

Merrill v. Milligan,
142 S. Ct. 879 (2022).....3, 22, 23

N.C. State Conf. of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016)..... 16, 18

N.C. State Conf. of the NAACP v. Raymond,
981 F.3d 295 (4th Cir. 2020)..... 18

Nken v. Holder,
556 U.S. 418 (2009) 11

Purcell v. Gonzalez,
549 U.S. 1 (2006).....2, 3, 21, 22

Stephenson v. Bartlett,
562 S.E.2d 377 (N.C. 2002)..... 13

Thornburg v. Gingles,
478 U.S. 30 (1986).....*passim*

Wudi Indus. (Shanghai) Co. v. Wong,
70 F.4th 183 (4th Cir. 2023) 11

Statutes

52 U.S.C. § 10301(b) 12

2023 N.C. Sess. Laws 146.....5

Voting Rights Act Section 2.....*passim*

LOCAL RULE 27(a) STATEMENT

Pursuant to Local Rule 27(a), counsel for Appellees have been informed of Appellants' intent to seek the relief requested in this motion. Counsel for the Legislative Defendant Appellees advised that they do not consent to the motion and intend to file a response. Counsel for the State Board Defendant Appellees state that they take no position on the motion and do not currently intend to file a response, but cannot say for certain until reviewing the full motion.

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INTRODUCTION

This is an extraordinary situation in which the district court's unjustifiable delay in deciding Plaintiffs' motion for preliminary injunction has resulted in a constructive denial that, absent this Court's immediate intervention, will irreparably harm over 100,000 Black voters in northeastern North Carolina's Black Belt counties. Plaintiffs filed this action on November 20, 2023, challenging two districts in North Carolina's 2023 enacted Senate map under Section 2 of the Voting Rights Act. The Section 2 violation here is as clear as you will ever see, and the proper remedy is just as obvious—change a single boundary between two districts without altering *any* other enacted district, and Black voters in the Black Belt counties will have the opportunity to elect candidates of their choice. Plaintiffs moved for a preliminary injunction on November 22 and asked to expedite proceedings so that two new districts could be adopted without moving the March 5, 2024 primaries.

The district court refused to expedite proceedings, extended the Defendants' time to respond, and its delay in deciding the preliminary injunction motion has already made it impossible to afford relief without moving the March 5 primaries. Making matters worse, the court this morning issued an order making clear that it will not decide the motion in time to stop absentee and UOCAVA ballots from being mailed to voters on January 19 listing primary candidates for the challenged districts. If those ballots go out listing primary candidates for those districts, Legislative

Defendants surely will say that it conclusively forecloses relief for the 2024 elections under *Purcell*. Yet the court's latest order set a hearing for January 10 (too late to stop invalid absentee and UOCAVA ballots from going out, according to the State Board of Elections' December 22 submission), stated that the court intends to "employ a judicious deliberative process" in deciding the motion, and offered various reasons the court may deny a preliminary injunction, including the *Purcell* doctrine (even though it is the court's delay that has made *Purcell* an issue). To be clear, a January 10 preliminary injunction hearing is 7 weeks after Plaintiffs filed their motion, during which time candidate filing began and ended. And even if the court granted the motion the same day, it will be too late to stop ballots from being mailed to voters a week later listing primary candidates for the challenged districts.

There is still time to grant relief for the 2024 elections if this Court steps in. The State Board's submission confirms that it is administratively feasible to hold primaries for the two new districts on May 14, when North Carolina will hold runoff primaries anyway. But the district court's inaction has already prevented Plaintiffs from obtaining relief in time for March primaries and now threatens their ability to obtain relief in time for May primaries. This Court has appellate jurisdiction based on the district court's constructive denial of a preliminary injunction.

The Court should grant a limited injunction pending appeal prohibiting the State Board from proceeding with elections using the two challenged Senate

districts, including by enjoining the State Board from listing primary candidates for those districts on the absentee and UOCAVA ballots being mailed to voters in those districts on January 19. Plaintiffs respectfully request that the Court expedite briefing on this motion and issue a decision by **January 9** in light of the State Board's explanation of the time needed to prepare those ballots before January 19. Plaintiffs are concurrently moving to expedite this appeal to enable a decision, and remedial proceedings, in time to hold primaries in two new districts on May 14.

Plaintiffs are entitled to this relief. They are exceedingly likely to prevail on the merits of their claim, as the challenged districts obviously violate Section 2 under the standards the Supreme Court reaffirmed just months ago in *Allen v. Milligan*, 599 U.S. 1 (2023). It is beyond dispute that all three *Gingles* preconditions are satisfied and that, under the totality of the circumstances, the challenged districts deny Black voters in the Black Belt counties equal access to the political process. And forcing Black voters to vote in unlawful districts causes them irreparable harm.

Legislative Defendants knew that the challenged districts violate the VRA, and they waited until the eleventh hour to enact them in an attempt to thwart a remedy for the 2024 elections. They should not be rewarded by getting to conduct one election under an illegal map. And *Purcell* does not bar relief where the merits are so clearcut and the remedy so modest and easy to implement. *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh and Alito, JJ., concurring). This is especially

true when the State will already be holding runoff primaries in May.

To enable a decision of this Court on this motion for injunction pending appeal by January 9, Plaintiffs respectfully request that the Court order the Defendants to respond by January 3 at 5 p.m., and Plaintiffs to reply by January 5 at 12 p.m.

STATEMENT OF THE CASE

Appellants (Plaintiffs) are Black registered voters who reside in Halifax and Martin Counties in northeastern North Carolina. Am. Compl. ¶¶ 10-12, *Pierce et al. v. The North Carolina State Board of Elections et al. (Pierce)*, No. 4:23-cv-193-D (Nov. 20, 2023), ECF 13. Appellees are the North Carolina State Board of Elections and its members (State Board Defendants) and North Carolina's legislative leaders (Legislative Defendants). *Id.* ¶¶ 13-20.

A. Factual Background

The Black Belt is a region stretching across the South in which Black residents historically outnumbered whites. *Id.* ¶ 36. Today, eight contiguous counties in northeastern North Carolina—Bertie, Hertford, Edgecombe, Northampton, Halifax, Vance, Warren, and Washington—have majority-Black populations, while other nearby counties have substantial Black populations, including Martin, Gates, and Chowan. Esselstyn Rep. ¶ 17 & attach. C (attached as Exhibit 1). North Carolina as a whole gained more than 900,000 residents between 2010 and 2020, with substantially greater growth among the Black population and a drop in the white

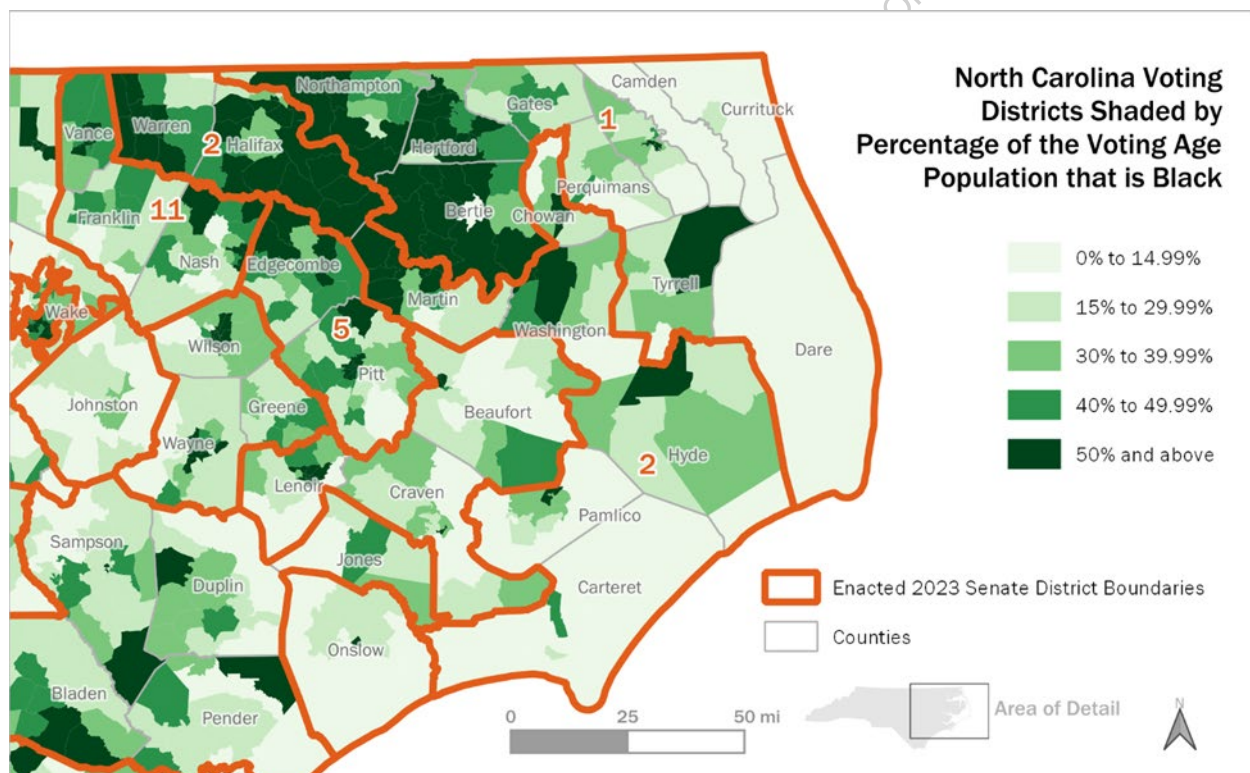
share of the total population. Esselstyn Rep. ¶¶ 14-16; Barreto Rep. ¶¶ 9, 13 (attached as Exhibit 2).

Following the 2020 census, the General Assembly enacted congressional and state legislative maps that North Carolina courts later invalidated as unconstitutional. *Pierce*, ECF 13, ¶¶ 29-31; see *Harper v. Hall (Harper I)*, 868 S.E.2d 499, 551-52 (N.C. 2022), *overruled on reh'g by Harper v. Hall (Harper III)*, 886 S.E.2d 393 (N.C. 2023). However, after judicial elections and further litigation, the North Carolina Supreme Court on April 28, 2023 overruled that decision and authorized the General Assembly to enact new maps. *Harper III*, 886 S.E.2d at 449.

Six months later, on October 25, 2023, the General Assembly enacted a new Senate map. 2023 N.C. Sess. Laws 146. At that time, the General Assembly had before it: (1) 2020 census data on the racial composition of each county in North Carolina, N.C. Gen. Assembly, *SL 2023-146 - StatPack Report w Race*, <https://bit.ly/3R7Xw3q>; (2) an analysis finding racially polarized voting in the Black Belt counties in recent elections, Barreto Rep. ¶ 22. The General Assembly also knew that in 2022, two Black-preferred candidates in districts containing Black Belt counties were defeated by white candidates: Valerie Jordan in District 3 and Mark Speed in District 11.

The General Assembly either failed to conduct or failed to consider any VRA analysis with respect to the 2023 Senate map. Instead, it enacted a map that cracks

Black voters in the Black Belt counties across multiple districts, diluting those voters' electoral influence. Barreto Rep. ¶¶ 15, 33. Specifically, District 1 includes Northampton, Bertie, Hertford, and Gates Counties, while District 2 includes Warren, Halifax, Martin, Washington, and Chowan Counties. S.L. 2023-146 Senate, <https://bit.ly/47zTICU>. This cracking is vividly illustrated by the figure below, which superimposes the district boundaries on a heat map showing voting districts shaded by the percentage of the voting age population that is Black:



Esselstyn Rep. 10 fig. 5; see S.L. 2023-146 Senate, <https://bit.ly/47zTICU>.

Black voters cannot elect their candidates of choice in District 1 or District 2 in the enacted map. Barreto Rep. ¶ 33.

North Carolina's 2024 primaries are scheduled for March 5, 2024, and its runoff primaries for May 14.

B. Procedural History

Plaintiffs filed this action on November 20, 2023, just 26 days after enactment of the map, and moved for a preliminary injunction two days later. ECF 1, 16. They assert that the enacted map violates Section 2 of the VRA by cracking Black voters in northeastern North Carolina's Black Belt counties between Districts 1 and 2. Plaintiffs seek a remedy replacing Districts 1 and 2 with two new districts, one of which gives Black voters the opportunity to elect their preferred candidates. Plaintiffs' proposed remedy does not alter the boundaries of any other district.¹

Plaintiffs moved to expedite briefing and decision on their preliminary injunction motion. ECF 5. On November 27, the district court denied the motion to expedite, directing that "[d]efendants may file a response to plaintiffs' motion for a preliminary injunction in accordance with this court's local rules," *i.e.*, by December 13. ECF 23 at 4. On December 6, however, Legislative Defendants sought a nine-day extension. ECF 25. On December 8—contradicting its earlier order—the district court granted the extension over Plaintiffs' opposition. ECF 28.

¹ Plaintiffs have standing because they reside in District 2 under the enacted map. Pierce Decl. (attached as Exhibit 4); Matthews Decl. (attached as Exhibit 5).

On December 11, Plaintiffs asked the district court to confirm that it would decide the preliminary injunction motion by December 29. ECF 29. On December 22, defendants filed their responses. The State Board took no position on the merits but indicated that, to implement new districts without moving the March 5 primaries, the new districts needed to be in place in time to allow candidate filing to begin by January 5. ECF 40 at 3.

The State Board further stated that, if relief is ordered after January 5, 2024, it “recommends moving the affected election contests to May 14, 2024, the date currently set for a second primary” in North Carolina. *Id.* at 4. The State Board stated that it is “administratively feasible” to hold primaries for two new districts on May 14, and that such changes have occurred “with some frequency in North Carolina in recent years.” *Id.* at 5. The Board stated that, to hold the primaries on May 14, new districts would need to be in place to enable candidate filing to conclude before March 15. *Id.*

Relatedly, the State Board stated that it needs “seven business days” to implement changes to the absentee and UOCAVA ballots that are set to go out on January 19. *Id.* at 4. In other words, if this Court issues an injunction by January 9 prohibiting the Board from proceeding with Senate contests in the two challenged districts, it can ensure that primary candidates for those districts are not listed on the ballots being mailed to voters in those districts on January 19.

In their reply filed the next business day (December 26), Plaintiffs asked the district court to decide their preliminary injunction motion by December 28 in light of the Board's filing.

This morning, December 29, the district court issued an order confirming that it will not decide the preliminary injunction motion in time to afford relief without moving the March 5 primaries. ECF 43 (Exhibit 7). The order further confirms that the court has no intention of deciding the motion soon enough to implement a remedy *even if* primaries for the affected districts were moved to May 14 as the State Board recommended. Indeed, the court set a preliminary injunction hearing for January 10—the day *after* an injunction is needed to prevent primary candidates for the challenged districts from being listed on the ballots mailed to voters on January 19.

JURISDICTIONAL STATEMENT

The district court has constructively denied Plaintiffs' preliminary injunction motion, giving this Court jurisdiction over Plaintiffs' appeal. A district court's "unreasonable or inexplicable delay" in ruling on a time-sensitive motion can be "tantamount to a denial" that can be appealed. *District of Columbia v. Trump*, 959 F.3d 126, 131-32 (4th Cir. 2020); *see IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996) ("A showing of unjustifiable delay coupled with irreparable injury if an immediate appeal is not allowed is enough to make a constructive denial

appealable, if a formal denial would be.”); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 306 (6th Cir. 1990) (district court delay in ruling until movant’s “interest is almost non-existent” is “tantamount to denying” the motion and therefore appealable); *Liebmann v. Goden*, 629 F. Supp. 3d 314, 332-33 (D. Md. 2022) (“[A] ‘deferral of consideration’ is ‘transformed into a constructive denial of relief’ ... when a ‘showing of unjustifiable delay’ is ‘coupled with irreparable injury if an immediate appeal is not allowed.’” (quoting *Cont’l Cas. Co. v. Staffing Concepts, Inc.*, 538 F.3d 577, 580 (7th Cir. 2008))). Legislative Defendants recently filed an appeal in this Court asserting jurisdiction on precisely these grounds. Appellants’ Opening Br. at 3-4, 42-46, *N.C. State Conf. of NAACP et al. v. Berger et al.*, No. 19-2048 (4th Cir. Oct. 2, 2019), Doc. 40-1.

The district court here unjustifiably delayed deciding Plaintiffs’ motion and thereby constructively denied it. Despite the urgently time-sensitive nature of the relief Plaintiffs seek, the court refused to expedite proceedings, then granted the Defendants an extension to respond in contradiction of the court’s prior order, and confirmed this morning that the court has no intention of deciding the preliminary injunction motion in time to stop ballots from being mailed to voters listing primary candidates for the challenged districts (ECF 43). Under these circumstances, the court’s inaction is tantamount to a denial. For the reasons described *infra*, Black

voters in northeastern North Carolina will suffer irreparable harm if an immediate appeal is not permitted. This Court has jurisdiction to act to prevent that harm.²

ARGUMENT

This Court may “grant[] an injunction while an appeal is pending.” Fed. R. App. P. 8(a)(1)(C). The Court considers: (1) whether the movant “has made a strong showing that [it] is likely to succeed on the merits”; (2) whether the movant “will be irreparably injured absent” an injunction; (3) whether an injunction “will substantially injure the other parties”; and (4) “where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009); see *Grimmett v. Freeman*, 2022 WL 3696689, at *1-2 (4th Cir. Aug. 25, 2022) (granting injunction pending appeal).

All factors support a limited injunction pending appeal here preventing the State Board from proceeding with elections for the two challenged Senate districts, including by listing primary candidates for the two challenged districts on absentee and UOCAVA ballots being mailed to voters in those districts on January 19, while this Court decides Plaintiffs’ appeal. Elections in the other 48 enacted districts can proceed exactly as planned. If this Court later rules against Plaintiffs in this appeal, the State Board can simply proceed with primaries for the two challenged districts on North Carolina’s existing May 14 runoff primary date.

² Under these circumstances, moving the district court for the requested injunction pending appeal “would be impracticable.” Fed. R. App. P. 8(a)(2)(A)(i); see *Wudi Indus. (Shanghai) Co. v. Wong*, 70 F.4th 183, 193 n.4 (4th Cir. 2023).

I. Plaintiffs Are Likely to Succeed on the Merits

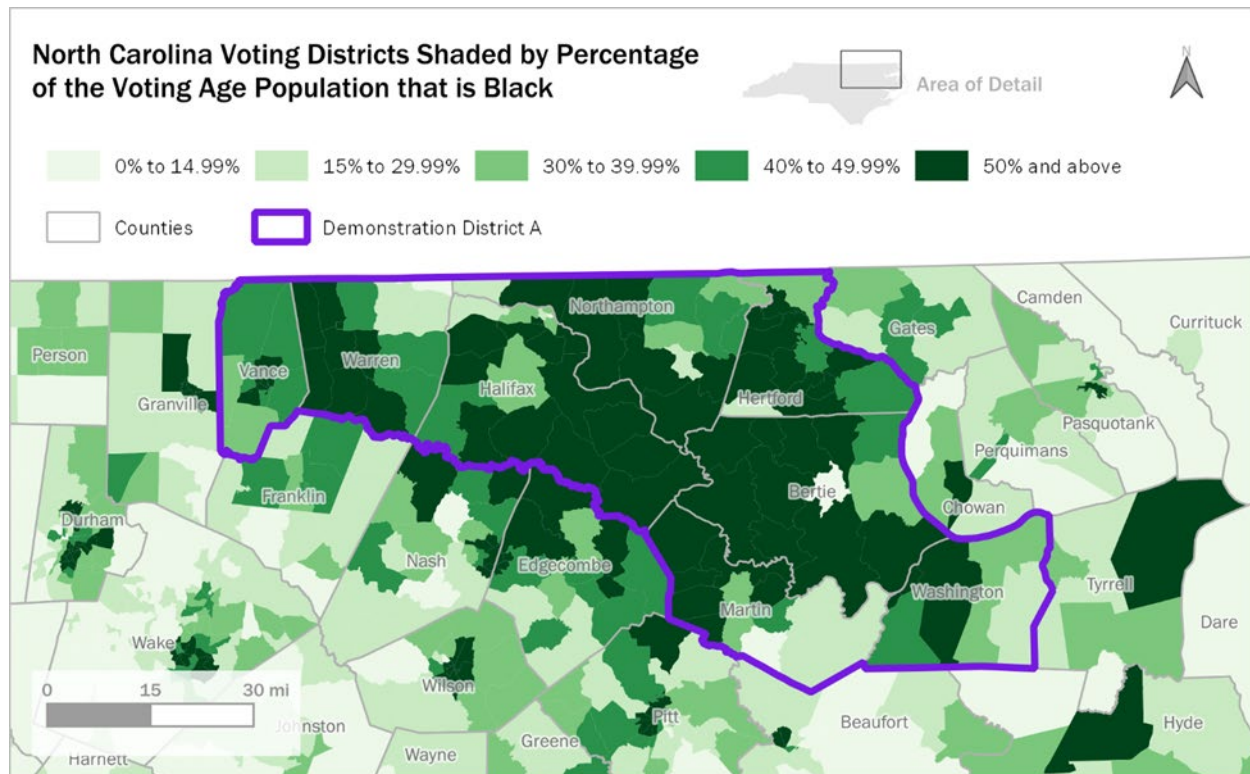
Plaintiffs are overwhelmingly likely to prevail in establishing that the 2023 enacted Senate map violates Section 2 of the VRA because it “dilute[s] the voting strength of politically cohesive minority group members” “by fragmenting [them] among several districts where a bloc-voting majority can routinely outvote them.” *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994). Plaintiffs easily satisfy all three of the preconditions the Supreme Court identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and recently reaffirmed in *Allen v. Milligan*, 599 U.S. 1, 18 (2023). And the “totality of the circumstances,” 52 U.S.C. § 10301(b), establishes that the cracking of Black voters in the Black Belt counties between Districts 1 and 2 dilutes their votes and prevents them from electing candidates of their choice.

A. Plaintiffs Satisfy All Three *Gingles* Preconditions

Plaintiffs easily established that (1) Black voters in the relevant area are “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) they are “politically cohesive”; and (3) “the white majority votes sufficiently as a bloc to enable it ... usually to defeat [Black voters’] preferred candidate.” *Gingles*, 478 U.S. at 50-51; *Milligan*, 599 U.S. at 18.

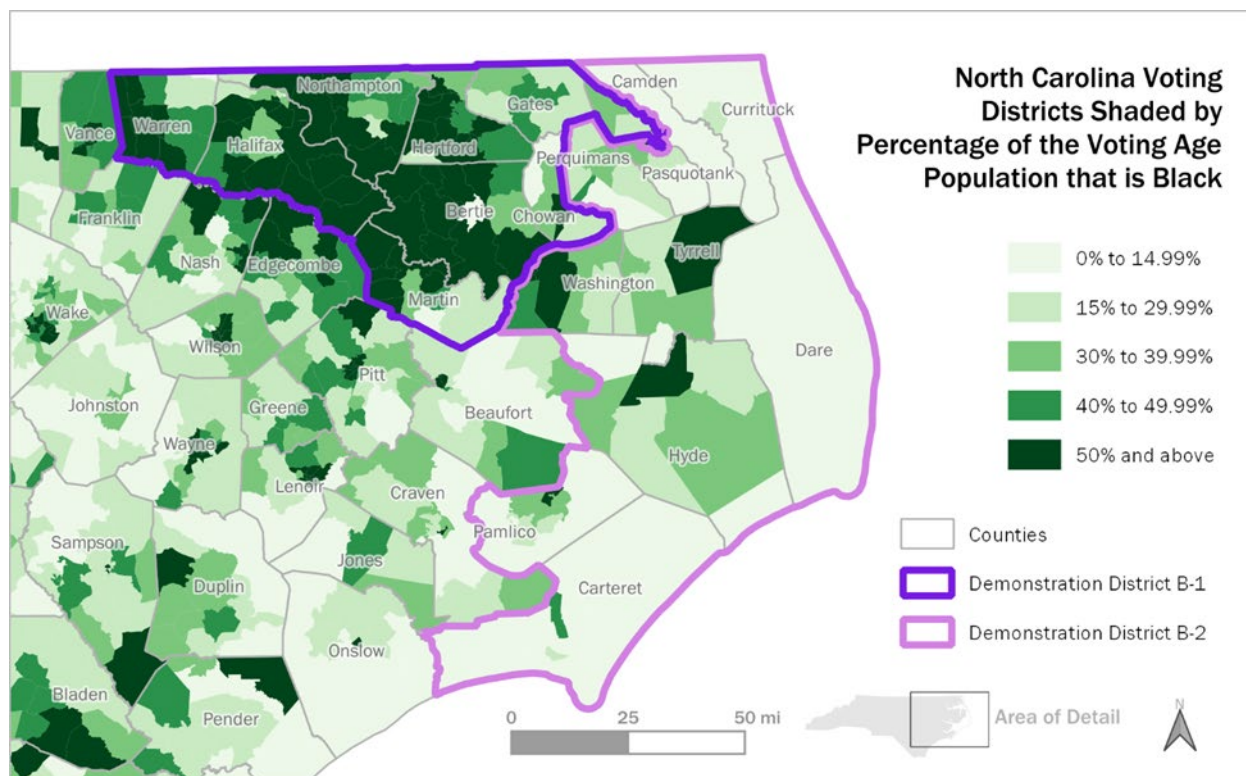
First, it is easy to draw a reasonably configured majority-Black district in the Black Belt counties. *Milligan*, 599 U.S. at 18. The Black population thus “has the potential to elect a representative of its own choice in some single-member district”

that “comports with traditional districting criteria.” *Id.* Plaintiffs presented on such district, Demonstration District A, that is made up of whole counties:



Esselstyn Rep. 12 fig. 6. Demonstration District A’s Black voting age population (BVAP) is 51.47%, and the Black citizen voting age population (Black CVAP) is 53.12%. *Id.* at 12 tbl. 3.

Plaintiffs also showed that it is feasible to create a majority-Black district without altering the boundaries of any district besides Districts 1 and 2 in the enacted map. Demonstration District B-1, shown below, thus preserves the county clusters required by *Stephenson v. Bartlett*, 562 S.E.2d 377, 396-97 (N.C. 2002), to the greatest possible extent, preserves the current minority opportunity district in Pitt and Edgecombe Counties (District 5), and splits only one county:



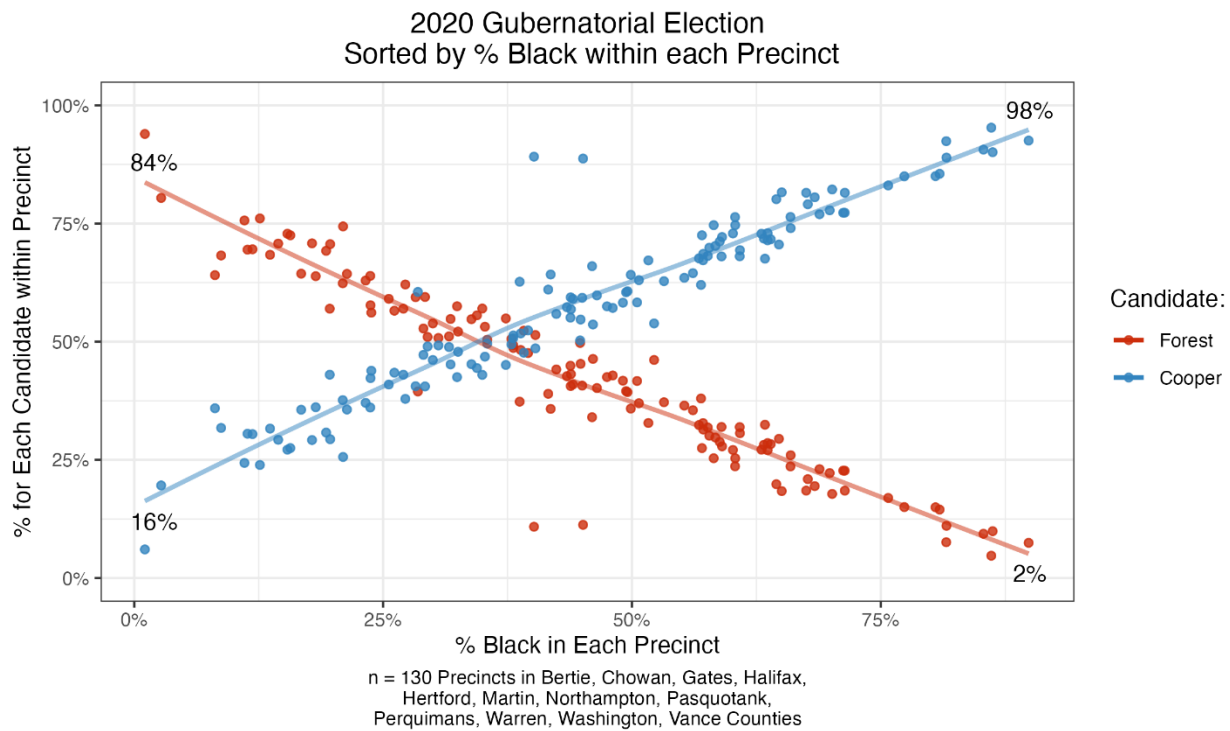
Esselstyn Rep. 15 fig. 8; *see id.* ¶¶ 35, 37, 39-51. Demonstration District B-1’s Black CVAP is 50.19% and its BVAP is 48.41%. *Id.* at 13 tbl. 4.

Demonstration Districts A and B-1 are each more compact than both Districts 1 and 2 in the enacted map, *id.* ¶¶ 42-43 & tbls. 2-4, and adhere to other traditional redistricting criteria, *id.* ¶¶ 38-51. Plaintiffs accordingly meet the first precondition.

Second, Legislative Defendants do not dispute that Black voters in the relevant are “politically cohesive.” *Gingles*, 478 U.S. at 51; *Milligan*, 599 U.S. at 18. Nor could they. Plaintiffs’ expert Dr. Matt Barreto analyzed 31 elections in 2020 and 2022 and found that Black voters in the region supported the same candidates by a ratio of 9-to-1 or greater. Barreto Rep. ¶¶ 11, 22, 24, 26-29.

Legislative Defendants’ own expert noted the “high cohesion demonstrated by Black voters” in the relevant area. ECF 39-7 (Alford Rep.) at 2.

Third, Dr. Barreto’s analysis shows that in northeastern North Carolina, “the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.” *Gingles*, 478 U.S. at 51; *Milligan*, 599 U.S. at 18. Across 31 elections in 2020 and 2022, white voters in the region opposed Black voters’ candidates of choice at rates as high as 85 percent, regularly voting in the exact opposite pattern of Black voters. Barreto Rep. ¶¶ 24-26. Dr. Barreto presented a scatterplot depicting precinct-by-precinct voting in the Black Belt counties in the 2020 gubernatorial election, starkly illustrating the racial polarization:



Barreto Rep. 12 fig. 4.

“Bloc voting by a white majority tends to prove that blacks will generally be unable to elect representatives of their choice.” *Gingles*, 478 U.S. at 68. And Dr. Barreto found that this is true here: “Under the newly enacted 2023 map, Black candidates of choice cannot win office in either Senate District 1 or 2, where the large Black population has been cracked between the two districts, rendering it too small to be influential.” *Id.* ¶ 33. Specifically, “both District 1 and District 2 in the 2023 enacted plan result in Black candidates of choice losing every single election” that Dr. Barreto analyzed from 2020 and 2022. *Id.* ¶¶ 35-36.

Consistent with Dr. Barreto’s analysis, this Court has also found that voting in parts of the State “is racially polarized,” including in the Black Belt counties. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016).

Legislative Defendants’ expert Dr. Alford confirmed the white bloc voting, agreeing with Dr. Barreto that “Black voters cohesively support candidates and ... those candidates do not receive support from the majority of White voters.” ECF 39-7 at 13. Dr. Alford stated that Dr. Barreto’s analysis did not show whether Black voters were more likely to support Black Democrats over White Democrats or Black Republicans over White Republicans, *id.*, but that is legally irrelevant.

The district court’s order today (ECF 43) points to *Harris v. McCrory*, 159 F. Supp. 3d 600, 624-25 (M.D.N.C. 2016), but the court there principally found that the General Assembly could not justify packing Black voters into Congressional

District 1 (CD1) on the basis of the VRA when it had not *conducted* any racially polarized voting analysis. Moreover, CD1 contained large portions of Durham; white cross-over voting in CD1 does not suggest white cross-over voting in the northeastern Black Belt counties at issue here, where Legislative Defendants' own expert *agrees* that white voters vote as a bloc *against* Black-preferred candidates.

B. The Totality of the Circumstances Supports Plaintiffs' Claim

Considering the “totality of the circumstances,” enacted Districts 1 and 2 deprive Black voters of equal access to the political process. *Gingles*, 478 U.S. at 47. The nine “Senate Factors” guide the totality analysis, *LULAC v. Perry*, 548 U.S. 399, 426 (2006), although they are not exclusive and “there is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other,” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (quoting *Gingles*, 478 U.S. at 45). “It will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances.” *Harris v. McCrory*, 159 F. Supp. 3d 600, 623 (M.D.N.C. 2016) (citation omitted), *aff'd sub nom. Cooper v. Harris*, 581 U.S. 285 (2017). Here, the Senate factors overwhelmingly support Plaintiffs' claim.

1. *North Carolina's ongoing history of official, voting-related discrimination.*

“[T]here is a long and shameful history of race-based voter suppression in North

Carolina.” *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 311 (4th Cir. 2020); *see McCrory*, 831 F.3d at 223. North Carolina “officially discriminated against its black citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970.” *Gingles*, 478 U.S. at 38-39; *see McCrory*, 831 F.3d at 223. “[T]he North Carolina legislature” continued “attempt[s] to suppress and dilute the voting rights of African Americans” through the 1980s, resulting in over 50 Department of Justice Section 5 objection letters and 55 successful private Section 2 lawsuits between 1980 and 2013. *McCrory*, 831 F.3d at 215, 223-24. And the General Assembly’s 2013 election law “target[ed] African Americans with almost surgical precision,” violating Section 2 and the Constitution. *Id.* at 214, 238.

2. *Voting is racially polarized in the Black Belt counties.* *Supra* § I.A.

3. *North Carolina’s voting practices enhance the opportunity for discrimination.* *Supra* § I.B.1.

4. *History of candidate slating in local elections.* This factor is not relevant.

5. *North Carolina’s discrimination has produced severe socioeconomic disparities.* Black North Carolinians “lag behind whites in several key socioeconomic indicators, including education, employment, income, access to transportation, and residential stability.” *League of Women Voters of N.C.*, 769 F.3d at 246; *see id.* at 235. Plaintiffs’ expert Dr. Traci Burch confirmed as much. Burch Rep. 10-16 (attached as Exhibit 3). Each of these factors, traceable at least in part

to historical and contemporary discrimination, reduces Black North Carolinians' access to the ballot and ability to elect candidates of their choice. *Id.* at 17.

6. *North Carolina political campaigns feature racial appeals.* “From the Reconstruction era to the present time, appeals to racial prejudice against black citizens have been effectively used by persons, either candidates or their supporters, as a means of influencing voters in North Carolina political campaigns.” *Gingles v. Edmisten*, 590 F. Supp. 345, 364 (E.D.N.C. 1984); *see* Burch Rep. 19. Such tactics persist today, including in races in 2020 and 2022. Burch Rep. 19-20.

7. *Black candidates are underrepresented in public office.* Black North Carolinians are slightly underrepresented in some offices relative to their share of the State's population. Burch Rep. 21-22. Two Black Senate candidates in the area relevant here, Valerie Jordan and Toby Fitch, lost their races in 2022.

8. *North Carolina is not responsive to its Black voters.* North Carolina's failure to remedy the persistent and dramatic socioeconomic disparities between Black and white North Carolinians shows the State's lack of responsiveness to the needs of its Black residents, especially in the Black Belt counties. *Supra* § I.B.5.

9. *No legitimate governmental interest justifies denying Black voters in the Black Belt counties the opportunity to elect their preferred Senate candidates.*

II. The Remaining Factors Strongly Favor an Injunction Pending Appeal

A. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief

Plaintiffs and over 100,000 other Black voters in the Black Belt counties will suffer irreparable harm if they are forced to vote in districts that unlawfully dilute their votes and prevent them from electing candidates of their choice in violation of Section 2. “Courts routinely deem restrictions on fundamental voting rights irreparable injury.” *League of Women Voters of N.C.*, 769 F.3d at 247. Discriminatory voting policies “are ‘the kind of serious violation of ... the Voting Rights Act for which courts have granted immediate relief.’” *Id.* (quoting *United States v. City of Cambridge*, 799 F.2d 137, 140 (4th Cir. 1986)). “[O]nce the election occurs, there can be no do-over and no redress,” so the injury to impacted voters “is real and completely irreparable if nothing is done.” *Id.*

Unless this Court grants an injunction pending appeal, the election will begin and the State Board will send out ballots on January 19 asking absentee and UOCAVA voters to vote for primary candidates in the current, unlawful districts. Although the Court could later order the State Board not to count those votes, Legislative Defendants are sure to contend that, if those ballots go out with primary candidates in the challenged districts, it would counsel against granting relief to the Plaintiffs and holding a primary on May 14 using valid districts that satisfy the VRA.

B. The Equities and Public Interest Favor Injunctive Relief

Defendants will not be injured by the requested injunction pending appeal, and the equities and public interest support granting such relief now. “The public interest is served by protecting federally guaranteed voting rights in North Carolina.” *Disability Rights N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884, at *7 (E.D.N.C. July 11, 2022). “By definition, ‘[t]he public interest ... favors permitting as many qualified voters to vote as possible’” in districts where those votes will not be diluted. *League of Women Voters of N.C.*, 769 F.3d at 247 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)).

Moreover, the limited injunction Plaintiffs seek would only temporarily stop election proceedings in two districts while the Court adjudicates this appeal. If the Court ultimately finds that there is no VRA violation, the Court can lift the injunction, absentee and UOCAVA ballots for enacted Districts 1 and 2 can go out in late March, and the primaries for those districts can go forward on May 14.

III. Purcell Does Not Counsel Against a Preliminary Injunction

In some election cases, injunctive relief may be denied where it would cause voter confusion or otherwise interfere with the running of an orderly election. *Purcell v. Gonzalez*, 549 U.S. 1 (2006). This is not one of those cases. If this Court acts promptly, it can decide this motion and the appeal in time to afford relief for the 2024 elections, with primaries in the two affected districts on May 14 as the State

Board recommended, when North Carolina will hold runoff primaries anyway, The Board has confirmed that this approach is not only “administratively feasible” but common in North Carolina. ECF 40 at 5. Indeed, the limited injunction pending appeal that Plaintiffs now seek would *reduce* confusion by ensuring that no ballots are sent out listing primary candidates for districts later found to be illegal.

In the court below, Legislative Defendants pointed to experiences in other States, but they ignored North Carolina’s consistent practice of adopting remedial maps in the context of litigation, without undermining the orderly administration of the elections in this State. As explained in the affidavit of Senator Dan Blue, as a consequence of litigation, “[a]t least once over each of the [last] five decades . . . , the General Assembly has redrawn one or more redistricting maps during the period between February and May of the election years for legislative and congressional elections and held primaries for those officials between May and September of those years.” Blue Aff. ¶ 2 (attached as Exhibit 6). All of these cases involved far more districts than the two districts at issue here. Nor can Legislative Defendants contend that it is infeasible to hold primaries for only two Senate districts in May, when that is when the primaries have happened in 12 of the last 17 cycles. *Id.* ¶ 3.

And as Justices Kavanaugh and Alito explained in *Merrill*, even where *Purcell* applies, it “might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying

merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.” 142 S. Ct. at 881 (Kavanaugh, J., concurring).

Here, the merits are entirely clearcut—indeed, the Supreme Court resoundingly reaffirmed in its later merits decision in *Milligan* that Section 2 of the VRA requires the creation of an additional minority opportunity district where the *Gingles* factors are satisfied, as here. Flouting that ruling, the General Assembly here adopted Senate districts that violate Section 2—and waited to do so for six months after the North Carolina Supreme Court authorized new maps in *Harper III*, creating the urgent threat of irreparable harm that Plaintiffs now face. To avoid that harm, Plaintiffs conducted the requisite expert analysis, brought this lawsuit, and sought a preliminary injunction within weeks of the map’s passage.³ The changes in question—altering two districts in a single map—can easily be achieved without significant cost, confusion, and hardship, as the State Board’s filing confirms.

³ Filing the lawsuit, preparing three expert reports (on demonstration districts, racially polarized voting, and the totality of the circumstances), and moving for a preliminary injunction within 4 weeks of the map’s passage, is not “slothfulness,” as the district court suggested. D.E. 43. Indeed, that is less time than the court gave Legislative Defendants to respond to the motion.

CONCLUSION

For the foregoing reasons, the Court should decide this motion by January 9, 2024 and grant the requested limited injunction pending appeal.

Dated: December 29, 2023

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CERTIFICATE OF COMPLIANCE

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Dated: December 29, 2023

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CERTIFICATE OF SERVICE

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