

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

COMMON CAUSE, *et al.*,

PLAINTIFFS,

v.

ROBERT A. RUCHO, in his official capacity as  
Chairman of the North Carolina Senate  
Redistricting Committee for the 2016 Extra  
Session and Co-Chairman of the Joint Select  
Committee on Congressional Redistricting,  
*et al.*,

DEFENDANTS.

CIVIL ACTION  
NO. 1:16-CV-1026-WO-JEP

THREE-JUDGE COURT

LEAGUE OF WOMEN VOTERS OF NORTH  
CAROLINA, *et al.*,

PLAINTIFFS,

v.

ROBERT A. RUCHO, in his official capacity as  
Chairman of the North Carolina Senate  
Redistricting Committee for the 2016 Extra  
Session and Co-Chairman of the 2016 Joint  
Select Committee on Congressional  
Redistricting, *et al.*,

DEFENDANTS.

CIVIL ACTION  
NO. 1:16-CV-1164-WO-JEP

THREE JUDGE PANEL

**MEMORANDUM REGARDING REMEDIES FROM THE COMMON CAUSE  
AND LEAGUE OF WOMEN VOTERS PLAINTIFFS**

The *Common Cause* and *League of Women Voters* plaintiffs (together, “plaintiffs”) jointly submit this memorandum, as directed by the Court, in response to the remedies section of this Court’s Memorandum Opinion dated August 27, 2018.

As an initial matter, plaintiffs are grateful to the Court for its expeditious decision. Setting aside any impact on the 2018 election, addressed below, the Court’s prompt action will enable the important issues raised by this case to be decided by the Supreme Court in the October 2018 Term, in time to have a meaningful impact on redistricting in North Carolina well in advance of the 2020 elections.

This memorandum addresses two issues: (1) whether the Court should order a new districting plan in time for the impending 2018 election; and (2) how a new plan to remedy the unconstitutional 2016 Plan should be created.

### **The 2018 Election**

The Court asked the parties to “file briefs addressing whether [it] should allow the State to conduct any future elections using the 2016 Plan,” including specifically the November 6, 2018 general election for members of the House of Representatives. Mem. Op., Dkt. 142, p. 290. After careful consultation, particularly with the institutional clients Common Cause, the League of Women Voters, and the North Carolina Democratic Party, plaintiffs have reluctantly concluded that—on the unique facts presented here—attempting to impose a new districting plan in time for the 2018 election would be too disruptive and potentially counterproductive.

Plaintiffs are in complete agreement with the Court that this is an exceptional case. The Legislative Defendants have twice enacted congressional districting plans in violation of the Constitution. They have publicly expressed—with not even a fig leaf of cover—their invidious intent to subordinate supporters of the Democratic Party and entrench the Republican Party in power. They have violated their oaths to the Constitution of the United States and have created the lamentable situation in which “North Carolina voters now have been deprived of a constitutional congressional districting plan—and, therefore, constitutional representation in Congress—for six years and three election cycles.” Mem. Op., Dkt. 142, p. 292. And, separate from the districting plan at issue here, they have shamelessly attacked North Carolina’s democratic institutions in a multitude of ways, many of which have already created uncertainty in the current election cycle. In short, the Legislative Defendants have done nothing to warrant any favorable consideration from this Court.

Moreover, both this Court and plaintiffs have worked zealously to bring this case to closure so as to permit the 2018 elections to proceed under a constitutionally compliant districting plan. Plaintiffs filed this lawsuit promptly after the creation of the 2016 Plan with the express goal of obtaining a remedy in time for the 2018 elections, which were then over two years away. Taken as a whole, the arguments presented by plaintiffs attempted to address preemptively every possible issue that could be raised in objection to their case. Indeed, as this Court correctly noted in its recent opinion, the *Common Cause* Plaintiffs alleged district-specific standing throughout the litigation, long before

*Gill v. Whitford* was decided, and at trial both sets of plaintiffs proved district-specific standing. Mem. Op., Dkt. 142, pp. 39-41.

This Court responded with diligence, moving the case through discovery and trial by October 2017 and issuing an opinion on the merits in January 2018. The Court correctly held that, to the extent a district-specific showing of standing might be required, it had been established at trial. Mem. Op., Dkt. 118, pp. 37-39, p. 37 fn.9. Nonetheless, evidently swayed by the Legislative Defendants' false assertion that "th[is] [C]ourt based its decision entirely on statewide theories of harm," Legislative Defs.' Suppl. Br. at 1, *Rucho v. Common Cause*, No. 17-1295 (U.S. June 20, 2018), the Supreme Court remanded this case for further consideration in light of *Gill*. *Rucho v. Common Cause*, 138 S. Ct. 2679 (2018). Again, this Court responded quickly, directing briefing, evaluating supplemental declarations, ordering depositions, and issuing a new opinion on August 27, only two months after the Supreme Court issued its remand order.

This case has always been about good government. Common Cause and the League of Women Voters are dedicated to advancing non-partisan principles of good government. The North Carolina Democratic Party is dedicated to good government in which the partisan views of its members can fairly be heard. Plaintiffs have reluctantly concluded that, under these very unique circumstances, it will be too disruptive—and counterproductive to the organizational plaintiffs' respective missions—to impose a remedial plan in time for the 2018 election, now little more than two months away.

First, plaintiffs have considered the time that the map-drawing process would take and the uncertainty that would persist in the meantime. Whether the new plan is drawn by a special master or the General Assembly, creation of a new plan and its approval by this Court will take some weeks. For instance, if the plan is designed by the General Assembly, this Court has given the General Assembly until September 17, 2018 to draw a new map and has ordered the disclosure “soon after” that date of materials that bear on the fairness of that exercise. Mem. Op., Dkt. 142, pp. 292-93. Assuming the General Assembly meets the Court’s September 17 deadline, it would take a few days thereafter for the General Assembly to make its disclosure and for plaintiffs to consider those materials and file objections. The Court would then need a short time to consider the new plan and any objections, and either approve that plan or select instead one drawn by the special master.

With that September 17 deadline, this process could not realistically be completed before October 1, 2018—at which point, there will be just five weeks before Election Day, and even less time before early voting is set to commence. Only then, once the new plan is approved, would candidates be able to declare themselves for the new districts and begin their campaigns. And only then would voters be able to be educated about the different candidates and their positions, which will be a particularly challenging exercise when voters change districts as a result of a new plan.

In addition, while all of this is taking place, the Legislative Defendants would no doubt seek a stay from the U.S. Supreme Court. They have already informed plaintiffs in

writing that they believe that the mere *appointment* of a special master “would constitute an abuse of the [C]ourt’s discretion,” and that “[i]f the [C]ourt appoints a special master, [they] will immediately appeal and seek a stay of any such order.” While plaintiffs vigorously disagree, they are mindful that, when this Court issued its ruling in January 2018, the Legislative Defendants sought, and obtained, a stay. At that juncture, there was ample time for the new court-ordered plan to be created and implemented in advance of the 2018 primary and general elections. Even so, the Supreme Court order granting the stay generated only two noted dissents, from Justices Ginsberg and Sotomayor. With the 2018 election now so much closer, plaintiffs cannot comfortably predict a different outcome. This could create a situation in which this Court orders a new map to govern on Election Day 2018, candidates and officeholders begin to act in reliance on that order, and the Supreme Court intervenes, changing the rules yet again.

In light of the specific timing here, and the confusion already being felt by voters because of the Legislative Defendants’ attempts to alter the state constitution, these possibilities lead plaintiffs to conclude that the uncertainty induced by redrawing congressional districts now would be too great. Plaintiffs still strongly believe—and have always maintained—that every election conducted under an unconstitutional plan visits irreparable harm on voters. That said, given these unique facts, plaintiffs have concluded that a statewide redistricting just weeks before Election Day would not be a good-government solution.

The Court made two specific suggestions for how to implement a new districting plan in time for the 2018 elections. First, it proposed conducting the November 2018 general election as scheduled, without a primary. Plaintiffs recognize that the General Assembly has eliminated primaries for certain offices for nakedly partisan reasons, depriving it of the right to object to this proposal. But plaintiffs believe strongly in the importance of primary elections. Indeed, the North Carolina Democratic Party sued (albeit unsuccessfully) to block the General Assembly's action. In its view, the General Assembly's abolition of primary races for judicial elections violated the rights of its members to assemble and select a candidate of their choice. *See North Carolina Dem. Party v. Berger*, 717 F. App'x 304 (4th Cir. 2018) (per curiam). An open election would turn more on how many candidates decide to run than on the substantive positions of the two candidates selected to represent the two major parties by their members. Plaintiffs do not believe that would serve democracy in North Carolina.

Second, the Court proposed holding a new round of primary elections on November 6 and holding a general election at a later time. That would impose more order on the process. However, it is still an exceedingly tight timeline to allow qualified candidates to be identified and come forward in the five weeks between the possible issuance of a new plan and the primary date. More troubling to us, holding elections at non-standard times tends to depress turnout, particularly of young and minority voters. And while potentially lower turnout, standing alone, is not a reason to delay implementing a remedy for a constitutional violation, because these populations tend to

support the Democratic Party, it is entirely possible that this proposal would actually hurt, rather than help, the electoral prospects of the Democratic Party—exactly what the Legislative Defendants sought to do through the unconstitutional 2016 Plan.

Finally, there are almost insurmountable mechanical problems of arranging for all of this. Drawing new maps by October 1 is not the end of the process. Individual voters need to be assigned to the newly-drawn districts based on their street addresses by a process known as geocoding, which could take between one and three weeks after October 1. *See* Second Declaration of Kim Westbrook Strach, *Covington v. North Carolina*, No. 1:15-cv-399, Dkt. 117-1, ¶ 23 (attached as Exhibit A). Ballot preparation, proofing, and logic-and-accuracy (“L&A”) testing could then add another three weeks. *Id.* at ¶ 25; *see also* N.C. Elections Board’s Response to Petitions for Writ of Supersedeas or Prohibition at 2, *Cooper v. Berger*, No. 267P18 (N.C. Aug. 29, 2018) (attached as Exhibit B) (Attorney General taking the position, on behalf of the Board of Elections, that “the Board [must] begin ballot-related work at least twenty-one days before the deadline for the release of absentee ballots”). Thus, ballots might not be finalized and ready for mailing until November. Federal and state law then require 45 days between the mailing of absentee ballots and the election, *see* 52 U.S.C. § 20302(a)(8)(A); N.C. Gen. Stat. § 163A-1305, making mid-December the earliest feasible date for an election.

The North Carolina Attorney General represents the State of North Carolina and the North Carolina Board of Elections and is not aligned in any way with the Legislative Defendants. It is plaintiffs’ understanding that the Attorney General will be filing a brief



today agreeing that, given the September timing for adoption of a new map, the risk of disruption and voter confusion is too great.

In the end, notwithstanding the blatant illegality of the 2016 Plan—and with the utmost frustration and regret—plaintiffs must endorse the wisdom of the case law abstaining from intervention when elections are truly imminent, the changes involved are so substantial, and the state election machinery is underway.

### **A New Districting Plan**

The Court also asked that the parties address “whether this Court should allow the General Assembly another opportunity to draw a constitutionally compliant congressional districting plan.” Plaintiffs believe the General Assembly’s repeated and defiant failures to comply with the law disentitle it to one more chance. As this Court noted in its opinion, “When a court finds a remedial districting plan also violates the Constitution, courts do not generally afford a legislature a second ‘bite-at-the-apple’ to enact a constitutionally compliant plan.” Mem. Op., Dkt. 142, p. 290 (citing *North Carolina v. Covington*, 138 S. Ct. 2548, 2553-54 (2018)).

The Court should assign the map-drawing project to a qualified special master, with the direction to create a new map. In performing this task, the special master may consider the maps drawn by Dr. Chen, including but not limited to Plan 2-297.

### **Judgment**

Finally, plaintiffs respectfully urge the Court to promptly enter a Final Judgment that (a) declares Districts 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13, and the 2016 Plan as a

whole, unconstitutional, null and void; and (b) permanently enjoins the State of North Carolina from conducting any future primary or general elections under the 2016 Plan after November 6, 2018. *See* Mem. Op., Dkt. 142, p. 290. Plaintiffs submit for the Court's consideration the final judgment issued by the three-judge panel in *Covington v. North Carolina*, No. 1:1-cv-399, Dkt. 125 (M.D.N.C. Aug. 15, 2016) (attached as Exhibit C), as an example of such an order.

Respectfully submitted, this the 31st day of August, 2018.

*/s/ Edwin M. Speas, Jr.*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel and parties of record.

This 31st day of August, 2018.

/s/ Edwin M. Speas, Jr.  
Edwin M. Speas, Jr.

# **EXHIBIT A**

**Second Declaration of Kim Westbrook  
Strach from *Covington v. North Carolina***

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
NO. 1:15-CV-00399**

SANDRA LITTLE COVINGTON, *et al.*, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 THE STATE OF NORTH CAROLINA, )  
 *et al.*, )  
 Defendants. )  
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**SECOND DECLARATION OF  
KIM WESTBROOK STRACH**

NOW COMES Kim Westbrook Strach, who under penalty of perjury states as follows:

1. I am over 18 years of age, legally competent to give this declaration and have personal knowledge of the facts set forth in it.

2. I am the Executive Director of the North Carolina State Board of Elections (“State Board”), a position I have held since May 2013. My statutory duties as Executive Director of the State Board include staffing, administration, and execution of the State Board’s decisions and orders. I am also the Chief Elections Officer for the State of North Carolina under the National Voter Registration Act of 1993 (“NVRA”). As Executive Director of the State Board, I am responsible for the administration of elections in the State of North Carolina. The State Board has supervisory responsibilities for the 100 county boards of elections, and as Executive Director of the State Board, I provide guidance to the directors of the county boards.

**Exhibit 1**

3. As the Executive Director of the State Board and Chief Elections Officer for the State of North Carolina, I am familiar with the procedures for registration and voting in this State. I am also responsible for implementing the laws passed by the North Carolina General Assembly, supervising the conduct of orderly, fair, and open elections, and ensuring that elections in North Carolina are administered in such a way as to preserve the integrity of and protect the public confidence in the democratic process.

## **I. SUMMARY OF 2016 ELECTION CYCLE**

### ***March Primary***

4. Candidate filing for the 2016 elections cycle began at noon on December 1, 2015 and ended at noon on December 21, 2015.

5. If a primary was required in a particular contest, that election was added to a statewide primary election held on March 15, 2016 (the “March Primary”).

6. Absentee voting for the March Primary began on January 25, 2016. The Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) requires that ballots be available no later than 45 days before an election involving a federal office, while state law requires ballots be available no later than 50 days prior to a primary election in an even-numbered year.<sup>1</sup> Ultimately more than 55,000 voters requested absentee ballots during the March Primary, more than 3,700 of which were requested by military and overseas voters.

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<sup>1</sup> N.C. GEN. STAT. § 163-227.3 requires that absentee ballots be available 60 days in advance of a general election in an even-numbered year.

7. On February 5, 2016, the State Board suspended ongoing primary elections for the United States House of Representatives pursuant to an order issued in *Harris et al. v. McCrory et al.*, No. 13-cv-949 (MDNC Feb. 5, 2016).

8. Because absentee voting had already begun, logistical constraints surrounding the printing of ballots and coding of the election within the Statewide Elections Information Management System (“SEIMS”) prevented county boards of elections from removing congressional races from March Primary ballots. Accordingly, congressional primary candidates appeared on ballots, though votes cast in those contests were not made public by the State Board.

9. More than 2.33 million voters participated in the March Primary, surpassing all previous primaries in this State.

### *June Primary*

10. On February 23, 2016, Governor McCrory signed Session Laws 2016-1 and 2016-2, establishing a new districting plan for the United States House of Representatives and directing the State Board to open filing for a congressional primary election to be held June 7, 2016 (the “June Primary”).

11. On March 4, 2016, the Superior Court of Wake County overturned Session Law 2015-66, eliminating a retention election option formerly available to sitting justices on the Supreme Court of North Carolina. The State Board opened a special candidate filing period for the affected office, and a nonpartisan primary is now underway as part of the June Primary. Because justices are elected statewide, the additional contest required no jurisdictional changes within SEIMS—all voters in the State are eligible to participate.



12. Seventy-six (76) candidates filed for the U.S. House of Representatives during a special filing period that opened on March 16 and ended March 25. By comparison, 46 candidates filed in December 2015.

13. Absentee voting for the June Primary began on April 18. SEIMS records indicate that county boards of election have already mailed more than 55,300 ballots to voters in 108 states and U.S. territories, and an array of international locations. This total includes military voters serving overseas.

14. Early voting for the June Primary will run from May 26 to June 4.

#### ***November General Election***

15. A statewide general election for both state and federal office, including the office of President of the United States, will be held November 8 (the “November General Election”).

16. The State Board has required that county boards of election submit their early voting plans for approval on or before July 29. Early voting plans include detailed plans and operating hours for one-stop voting locations scouted and secured by county elections officials throughout the state.

17. Absentee voting for the November General Election begins September 9, three months after the June Primary.

18. Early voting will occur between October 27 and November 5, and may involve more than 36,000 voting hours at one-stop locations. *See* Paragraph 53, *infra*. In 2008—the most recent general election involving an open presidential contest— more than 55% of all votes were cast at early voting locations.

19. Overall participation increased roughly 4.3% between the 2008 and 2012 general elections. If a similar increase occurs in 2016, participation could surpass 4.7 million voters, a record in North Carolina.

## **II. LOGISTICAL CONSIDERATIONS REGARDING A SEPARATE PRIMARY FOR GENERAL ASSEMBLY**

20. Logistical considerations affecting a special primary held for seats in the General Assembly (a “Third Primary”) involve a number of complex administrative processes, statutory deadlines, and significant backwards-planning from the November General Election. All estimates are limited by uncertainty as to the scope of any redistricting that might be required by an order of the Court. A Third Primary would likely require cutting short the absentee voting period for both the Third Primary and for the November General Election, a critical opportunity relied upon by military and overseas voters.

### *Geocoding Changes*

21. Redistricting requires both state and county elections administrators to assign individual voters to their proper jurisdiction, a largely manual process that involves changes to each voter’s “geocode” in SEIMS. The complexity of reassignment procedures vary, depending on the number of jurisdictions that divide a particular county and the number of voters affected. If a county is not wholly nested within a jurisdiction, elections administrators must assign voters to the new jurisdiction on a street-by-street basis within SEIMS, often requiring the use of physical maps along with the time and attention of a county board’s most senior staff.

22. Until elections officials complete jurisdictional changes in SEIMS, ballot preparation and voting equipment coding cannot begin in those jurisdictions; neither can candidates positively identify which voters reside within the revised district. SEIMS jurisdictional data serves as the backbone to voting processes throughout the counties, and finalizing jurisdictional changes within SEIMS is a prerequisite to vital features of elections administration in our state.

23. While the scope of any possible redistricting required—should the Court strike down any aspect of the current districting plans—is currently unknown, staff estimates based on recent experience that geocoding would take approximately three (3) weeks after our agency receives new jurisdiction files. Changes following the recent congressional redistricting plan affecting North Carolina’s 13 congressional districts took more than two (2) weeks. This task was completed within a short timeframe because 87 counties were wholly nested within single districts. In the case of the remaining counties involving more than one congressional district, no county straddled more than two districts. Legislative districts, by comparison, encompass 120 State House districts and 50 State Senate districts, many of which will likely subdivide counties in any plan. Additional subdivisions require additional time. Without additional time, the risk becomes higher of mistakes in geocoding at the county level that could negatively affect voting in any Third Primary.

### ***Ballot Preparation and Election Coding***

24. Information compiled by SEIMS is used to generate ballots and to code voting systems in a manner necessary to ensure the integrity of elections processes.

Jurisdictional data, for instance, is used to pair every voter with a specific “ballot style” that displays all races for which that voter is eligible to participate. In a primary, ballot styles are used to ensure affiliated voters cannot participate in a different party’s primary. Elections officials proof ballot styles prior to printing and data from SEIMS is used to code voting equipment so each machine tabulator accurately reads results from the distinct ballot styles within a particular county.

25. Once jurisdictions are properly assigned, the time required for ballot preparation and election coding depends on the type of election. Staff informs me that the below estimates represent the bare minimum amount of time necessary:

- a. Ballot preparation and coding for the November General Election could be completed in as little as three (3) weeks, leaving no margins for error. Staff, however, informs me that ballot preparation and election coding during the March Primary occurred over five (5) weeks, including several weekends.
- b. A Special Election is estimated to require at least two (2) weeks.

***Burning Media and Preparing Touch-Screen Ballots***

26. Once ballots are prepared and voting systems are coded, county boards of elections must load data onto physical media cards that are placed in tabulation machines, a process called “burning media.” The media cards ensure that the tabulator anticipates the layout of ballots, properly reads ballot markings, and records votes cast.

27. Counties that use touch-screen voting machines—including the populous Mecklenburg County—must prepare digital ballots that will display properly and interact with the machine’s software.

28. Staff inform me that burning media and preparing touch-screen ballots ordinarily takes the same amount of time as ballot coding: two (2) weeks for a Third Primary.

29. These processes are often completed after the start of mail-in absentee voting.

***L&A Testing, and Mock Election***

30. Before live ballots are tabulated, county boards of election must conduct logic and accuracy (L&A) testing to ensure tabulation machines accurately read ballots. This process involves running a test deck of ballots through tabulation machines within the county and auditing results. L&A testing allows counties to assess whether tabulators recognize and properly record results for the ballot styles in that county.

31. The State Board hosts mock elections during which all 100 counties upload results into SEIMS, mimicking Election Night. These mock elections test county systems and ensure SEIMS is accurately processing and aggregating results. The State Board also relies on mock elections to test the accuracy of its web-based elections results page.

32. If L&A testing has not occurred by the beginning of absentee voting, past protocol requires that those mail-in absentee ballots are marked and counted by hand in order to avoid an improper reading if changes are made to the machine logic as a result of L&A testing.

33. Staff informs me that the time required to complete these tasks varies across counties, but that neither L&A testing nor mock elections should be held less than two (2) weeks from the start of one-stop early voting. In the past, that two (2) week period has provided a needed opportunity to correct errors.

*Effect of November General Election on Third Primary Date*

34. Identifying the last possible date for a Third Primary requires that the State Board plan backwards from critical dates governing the November General Election, especially deadlines associated with absentee voting.

35. The beginning of the absentee voting period for the November General Election under state law (60 days) requires that ballots be available beginning September 9. The federal minimum under UOCAVA (45 days) requires that ballots be available beginning September 23.

36. Absentee ballot preparation and election coding for any one jurisdiction can begin only after results from any Third Primary are final.

37. The finalization process for a Third Primary would include a canvass by the county boards of election—a certification process occurring one (1) week after Election Day—and a final canvass by the State Board to aggregate totals in multicounty jurisdictions and to certify the accuracy of the election as a whole. State law does not designate a deadline for the State Board’s canvass of a primary election. Post-election proceedings may affect the State Board’s ability to canvass, including recounts, the filing and adjudication of elections protests, and a sample audit of election returns.

38. To date, nearly two months after the March Primary, election protest proceedings arising from that election remain ongoing. No active proceeding involves a contest for the General Assembly. The State Board has not canvassed and staff continues to ensure that counties uniformly and properly count provisional ballots.

39. The deadlines to initiate certain post-election proceedings fall after the date of county canvass. Accordingly, canvass by the county or by the State Board would not stand-in for finalization required to code ballots. Assuming every effort is made to audit results and compact the timeframe of post-elections proceedings below the three (3) weeks set out by statute for a general election—where an incumbent’s holding over in office does not pose the same problem as uncertainty as to the nomination—it may be possible to conduct county and state canvass within two (2) weeks after Election Day. It is not certain that any recount or protest would occur, though it is difficult to overstate the effect of any lingering post-election proceeding on the effort to begin ballot preparation and election coding ahead of the November General Election.

40. The deadline for filing an election protest is no later than 5 p.m. on the second business day after county canvass. Under ordinary circumstances, county boards of election hold a preliminary consideration meeting, followed by a properly noticed and transcribed hearing that results in a written order, which may be appealed to the State Board with subsequent recourse in Superior Court. Taking into consideration notice to parties, the production of transcripts, and windows of appeal, this process can take many weeks. A truncated, two-week canvass period would materially affect the recourse ordinarily available to aggrieved candidates and members of the public.

41. Working backward from the state absentee deadline for the November General Election (September 9), the latest Tuesday on which a Third Primary could occur is August 2, as reflected below:

Third Primary (August 2)	Canvass/Finalize (2 weeks)	Ballot Preparation & Election Coding (3 weeks)	November Absentee (September 9)
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42. Critical dates for a Third Primary on August 2 include the following:
- a. June 13: Absentee by mail begins (state absentee deadline)
  - b. July 21: Early voting begins
  - c. August 2: Election Day
  - d. August 9: County canvass
  - e. August 16: State canvass

43. Working backward from the federal UOCAVA deadline for absentee ballots during the November General Election (September 23), the latest Tuesday on which a Third Primary could occur is August 16, as reflected below:

Third Primary (August 16)	Canvass/Finalize (2 weeks)	Ballot Preparation & Election Coding (3 weeks)	November Absentee (September 24)
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44. Critical dates for a Third Primary on August 16 include the following:
- a. June 27: Absentee by mail begins (state absentee deadline)
  - b. August 4: Early voting begins
  - c. August 16: Election Day



- d. August 23: County canvass
- e. August 30: State canvass

*Preparations for the Third Primary Date*

45. Although the state or federal absentee deadlines for the November General Election may establish the latest possible date for a Third Primary, it is necessary to identify concomitant statutory and logistical deadlines to ensure adequate time for needed preparations.

46. After receiving shapefiles that contain jurisdictional data containing new district boundaries, county officials will have to manually process those changes through their county's geocoding database. There are several days within an election cycle where processing such changes would be highly inadvisable, including any time voting is occurring: one-stop and Election Day.

47. Early voting for the June Primary runs from May 26 to June 4. During that period, county administrators use a SEIMS tool called the Statewide One-stop System Administrator ("SOSA"), which functions as a digital poll book at all early voting locations. SOSA derives its data from SEIMS; if, however, the application determined that jurisdictional information has changed within SEIMS, security protocols within the system will lock and prevent voting from occurring. If a county intentionally or unintentionally allows SOSA to communicate with SEIMS while geocoding is in progress, voters would be prevented from participating. The same type of problem arises on Election Day.

48. Beyond the risk of halting voting activity, my experience suggests that county boards of elections are not sufficiently staffed to carry out duties associated with an ongoing election while making geocode changes accurately. The same constraints would recommend against any timetable that would require that counties conduct geocode changes during the day prior to Election Day, and during the county’s canvassing period. Candidate filing, ballot preparation and election coding could, however, occur during early voting and the canvassing period, since most of these activities occur at the State Board of Elections or through vendors—not the county. It should be noted that geocode changes must precede ballot coding, since ballot coding relies on accurate jurisdictional information to create the different ballot styles.

49. Assuming the (1) state absentee deadline remains for the November General Election, and (2) state absentee deadline (June 13, *see* Paragraph 42, *supra*) remains for a Third Primary held August 2, the State Board would have needed new jurisdiction files by May 4, as reflected below:

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30 Ballot Preparation and Election Coding Begins	31	1	2	3	4 One-Stop Ends

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13 State Absentee Deadline	14 County Canvass	15	16	17	18

- Geocode changes (15 Business Days; 3 weeks)
- Geocode changes should not occur during this time period

50. Assuming (1) absentee deadlines are reduced to the federal minimum for the November General Election, and (2) state absentee deadlines (June 27, *see* Paragraph 44, *supra*) remain for a Third Primary held August 16, the State Board would have needed new jurisdiction files by May 4, as reflected below:

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13 Ballot Preparation and Election Coding Begins	14 County Canvass	15	16	17	18
	19	20	21	22	23	24	25

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
	26	27 State Absentee Deadline	28	29	30		

- Geocode changes (15 Business Days; 3 weeks)
- Geocode changes should not occur during this time period

51. Based on my experience and the estimates provided by staff, it is my view that a Third Primary cannot be held on either August 2 or August 16 without reducing the absentee voting period for the Third Primary.

52. The need for jurisdiction files on May 4 is not altered by picking between absentee requirements for the November General Election, because there are windows in which it is inadvisable for county boards to perform geocoding processes, including during the early voting period.

***Third Primary preparations omitting an Absentee Deadline***



53. In the absence of an absentee deadline for a Third Primary, it is helpful to plan backwards from the start of one-stop early voting.

54. A Third Primary held August 2 would have required that the State Board receive new jurisdiction files on or before May 4. According to the timelines referenced above, *see* Paragraph 24, *supra*, ballot preparation and election coding can begin no later than June 9.

Ballot Preparation can begin (June 9)	Ballot Preparation & Election Coding (2 weeks)	Burning Media and Touch Screen Ballots (2 weeks)	L&A and Mock Election buffer (2 weeks)	Early Voting (Jul 21)
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As illustrated in the calendar below, geocode changes must therefore begin by May 5 in order to avoid days where no geocode changes can occur. See Paragraph 46 through 48, *supra*.

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
May 2016	1	2	3	4 Deadline to receive shapefiles	5 Geocode changes begin	6	7
	8	9	10	11	12	13	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9 Ballot Preparation and Election Coding Begins	10	11
	12	13	14 County Canvass	15	16	17	18



-  Geocode changes (15 Business Days; 3 weeks)
-  Geocode changes should not occur during this time period

55. A Third Primary held August 16 would have required that the State Board receive new jurisdiction files on or before May 12. According to the timelines referenced above, *see* Paragraph 24, *supra*, ballot preparation and election coding can begin no later than June 23.

Ballot Preparation can begin (June 23)	Ballot Preparation & Election Coding (2 weeks)	Burning Media and Touch Screen Ballots (2 weeks)	L&A and Mock Election buffer (2 weeks)	Early Voting (Aug 4)
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As illustrated in the calendar below, geocode changes must therefore begin by May 13 in order to avoid days where no geocode changes can occur. See paragraphs 46 through 48.

Month	Sun	Mon	Tue	Wed	Thu	Fri	Sat
	8	9	10	11	12 Deadline to receive shapefiles	13 Geocode changes begin	14
	15	16	17	18	19	20	21
	22	23	24	25	26 One-Stop Begins	27	28
	29	30	31	1	2	3	4 One-Stop Ends
Jun 2016	5	6	7 Congressional Primary Election	8	9	10	11
	12	13	14 County Canvass	15 Geocode changes resume	16	17	18
	19	20	21	22	23 Ballot Preparation and Election Coding Begins	24	25

-  Geocode changes (15 Business Days; 3 weeks)
-  Geocode changes should not occur during this time period

56. The need for jurisdiction files early in the process is not significantly affected by the presence or absence of absentee voting because the beginning of one-stop early voting requires the completion of all tasks relating to tabulation and systems testing—administrative tasks that would have been occurring concurrently with the absentee voting period.

***Unanticipated Costs to Counties***

57. Early voting during an unanticipated election poses significant difficulties for the county boards of elections, which are funded by their county commissioners.

In 2013, the General Assembly enacted the Voter Information Verification Act, 2013 Session Laws 381, which introduced new requirements for early voting. S.L. 2013-381, § 25.2. At a minimum, counties are now required to offer one-stop early voting consistent with the following formula, unless hours reductions are approved unanimously by the county board of elections and by the State Board: One-stop early voting hours for a primary without a presidential contest must meet or exceed cumulative early voting hours for the 2010 primary (19,901 hours statewide).

58. While the scope of redistricting is not known, statewide budget data collected by the State Board following the 2014 general election suggests that the county-level costs associated with matching hours one-stop hours could exceed \$2 million, with total costs to the counties perhaps exceeding \$9 million. The State Board temporarily suspended the hours-matching requirement for the June Primary pursuant to special authorization contained in S.L. 2016-2. Given the unanticipated and unbudgeted nature of a Third Primary, it is likely that the hours-matching requirement would prove highly burdensome for county elections officials, who must scout locations, hire poll workers, and secure funding from their county commissioners.

59. The 2016 Election Cycle has been characterized by a number of changes affecting the voters' experience in our state. Designating a Third Primary to be held between the June Primary and the November General Election may contribute to voter confusion and result in depressed turnout.

60. A stand-alone congressional primary in September 1998 drew roughly 3.6% of registered voters. Comparable turnout in a Special Primary would reduce participation to roughly 1/10th of that in the March Primary.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of May, 2016.

A handwritten signature in cursive script that reads "Kim Westbrook Strach". The signature is written in black ink and is positioned above a horizontal line.

Kim Westbrook Strach  
Executive Director  
North Carolina State Board of Elections

24744300.1



# **EXHIBIT B**

**N.C. Election Board's Response to Petitions  
for Writ of Supersedeas or Prohibition in  
*Cooper v. Berger*, No. 367P18 (N.C. Aug. 29,  
2018)**

SUPREME COURT OF NORTH CAROLINA

\*\*\*\*\*

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. (“ANDY”) PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT.

From Wake County  
No. 18 CVS 9805

\*\*\*\*\*

ELECTIONS BOARD’S RESPONSE TO PETITIONS FOR WRIT OF SUPERSEDEAS OR PROHIBITION, TO MOTION FOR TEMPORARY STAY, AND TO MOTION TO SUSPEND THE APPELLATE RULES

\*\*\*\*\*

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Under Rules 2, 21(d), 22(c), 23(d), and 37(a) of the North Carolina Rules of Appellate Procedure, defendants-crossclaimants, the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony Penry, in his official capacity as Chair of the Board (collectively, the Board), respectfully respond to the petitions and motions that the Governor of this State filed yesterday.

The Board urges the Court to review the merits of the Governor's petitions. The importance of the issues here, as well as the timing demands of this case, call out for this Court's direct review.

All parties agree that the essential issue before the Court—the fairness of ballot questions that the voters will see when they decide whether to amend their State Constitution—has surpassing importance. By reviewing those ballot questions, this Court can interpret and enforce the standards that protect North Carolinians' right to consider potential constitutional amendments on an informed basis. See, e.g., N.C. Const. art. I, §§ 2, 3; id. art. XIII, §§ 2, 4.

The timing of this case is equally extraordinary. Eight days ago, a three-judge trial court, after extensive briefing and a full day of argument,

granted a preliminary injunction that bars the use of two misleading ballot questions. Although the General Assembly initially appealed from that injunction, it soon changed tack, relied on the injunction, and enacted revised versions of the ballot questions at issue. Those events came to rest just two days ago.

The late-breaking events in this case create a need for swift, decisive judicial review. Federal law requires the Board to make absentee ballots available to voters at least forty-five days before a general election. See, e.g., 52 U.S.C. § 20302(a)(8)(A). This year, that deadline is September 22. Before the Board can make absentee ballots available, it must prepare, print, and test those ballots. Those steps require the Board to begin ballot-related work at least twenty-one days before the deadline for the release of absentee ballots—that is, by Saturday, September 1.

As these timelines show, the Board, the parties, and the voters urgently need a prompt and decisive resolution of this case. The lateness of the hour allows only one court to review the constitutionality of the new ballot questions.

The importance of that judicial review identifies the proper Court to conduct it: this Court, the ultimate authority on North Carolina

constitutional law. Only this Court can resolve this case in a way that will command the respect of all parties and, most importantly, the people of our State.

CONCLUSION

The Board respectfully requests that the Court take all steps needed to review the Governor's petitions promptly and on the merits.

To allow that review to occur under stable conditions, the Board requests that the Court enter a temporary stay in this case, mirroring the one that the Court entered this morning in NAACP, No. 261P18.

Respectfully submitted, this 29th day of August, 2018.

JOSHUA H. STEIN  
Attorney General

/s/Matthew W. Sawchak  
Matthew W. Sawchak  
Solicitor General  
N.C. State Bar No. 17059  
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Rule 33(b) certification: I certify that all of the lawyers listed below have authorized me to list their names on this document as if they had personally signed it.

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Attorneys for the North Carolina  
Bipartisan State Board of Elections and  
Ethics Enforcement and J. Anthony  
(Andy) Penry, in his official capacity as  
Chair of the Board

CERTIFICATE OF SERVICE

I certify that today, I caused the attached document to be served on all counsel of record by email, addressed to:

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This 29th day of August, 2018.

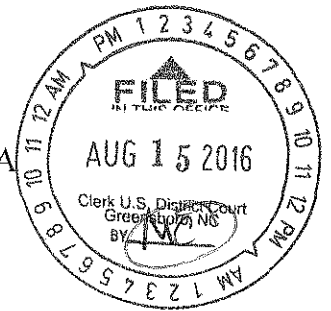
/s/ Matthew W. Sawchak  
Matthew W. Sawchak

# **EXHIBIT C**

**Judgment in *Covington v. North Carolina***



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA



SANDRA LITTLE COVINGTON, et )  
al., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
THE STATE OF NORTH )  
CAROLINA, et al., )  
Defendants. )

1:15-CV-399

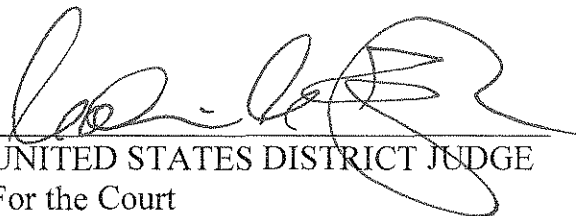
**ORDER and JUDGMENT**

For the reasons given in the memorandum opinion entered August 11, 2016, (Doc. 123), it is ORDERED and ADJUDGED that:

1. North Carolina House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107 and Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40 as drawn in 2011 are unconstitutional.
2. The plaintiffs' request to enjoin the November 2016 election is DENIED, but the plaintiffs' request for injunctive relief is GRANTED as follows:
  - a. The State of North Carolina is ordered to redraw new House and Senate district plans;
  - b. The State of North Carolina is enjoined from conducting any elections for State House and State Senate offices after November 8, 2016, until a new redistricting plan is in place.
3. This judgment is final.

4. The Court retains jurisdiction to enter such orders as may be necessary to enforce this Judgment and to timely remedy the constitutional violation.

This the 15<sup>th</sup> day of August, 2016.



UNITED STATES DISTRICT JUDGE  
For the Court