

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

RODNEY D. PIERCE; *et al.*,

Plaintiffs,

v.

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

Defendants.

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

NATURE OF THE CASE

The only thing “egregious” about this case, Memorandum in Support of Motion for Preliminary Injunction, D.E. 17, (“Mem.”) 1, is the racial gerrymandering that would result if the Court accepts Plaintiffs’ erroneous position. North Carolina redistricting plans have experienced virtually constant litigation for the past decade, and the one “clear-cut” proposition, *id.*, that has emerged is that voting in the State is not racially polarized at legally significant levels. On that basis, a three-judge federal court invalidated all 28 of the State’s majority-minority legislative districts last decade, *Covington v. North Carolina*, 316 F.R.D. 117, 169 (M.D.N.C. 2016), and evidence and findings in recent state-court litigation have consistently confirmed that no majority-minority district is necessary or justified under present electoral conditions. Plaintiffs make a familiar error in presenting evidence of “statistically significant” bloc voting, not *legally* significant bloc voting, and their demand to dismantle the State’s formulaic county groupings for

predominantly racial reasons has no basis in law or fact. Simply stated, §2 of the Voting Rights Act does not compel the race-based remedy Plaintiffs seek.

In all events, no emergency injunction can issue because the candidate-filing period has come and gone, absentee voting begins on January 19, and federal intrusion into the election process is unwarranted. There is no time to effectuate the relief Plaintiffs demand, which is certainly not “limited and straightforward.” Mem. 7. Plaintiffs promise that their proposed remedy will leave “all other districts in the 2023 enacted map wholly untouched,” *id.*, and that only a handful of districts would need reconfiguring. But their majority-minority illustrative district resets the State’s county groupings, which would send shock waves across the plan and potentially mandate that many Senate districts be redrawn. An injunction now would risk an election meltdown. The Court should deny the motion without argument.

BACKGROUND

After each decennial census, “States must redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In North Carolina, the State Constitution commits that task solely to the General Assembly. N.C. Const. art. II, §§3, 5. “Redistricting is never easy.” *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). The General Assembly is subject to “complex and delicately balanced requirements regarding the consideration of race” under federal law, as well as “special state-law districting rules.” *Id.* This case does not occur against a blank slate and must be understood against the backdrop of those principles and North Carolina’s history in attempting to implement them.

Federal Requirements. “The Equal Protection Clause of the Fourteenth Amendment...prevents a State, in the absence of ‘sufficient justification,’ from ‘separating its citizens into different voting districts on the basis of race.’” *Cooper v. Harris*, 581 U.S. 285, 291

(2017) (citation omitted). Under the governing framework, a state’s predominant use of race in redistricting is unconstitutional unless it is narrowly tailored to a compelling interest. *Id.* at 1464-65.

At the same time, the VRA “pulls in the opposite direction: It often insists that districts be created precisely because of race.” *Abbott*, 138 S. Ct. at 2314. VRA §2 requires majority-minority districts upon proof that “members of a [protected] class...have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. §10301(b). Plaintiffs alleging vote dilution under §2 must prove “three threshold conditions”: that the minority relevant group is “‘sufficiently large and geographically compact to constitute a majority’ in some reasonably configured legislative district”; that the group is “politically cohesive”; and that a white majority votes “‘sufficiently as a bloc’ to usually ‘defeat the minority’s preferred candidate.’” *Cooper*, 581 U.S. at 301-02 (citation omitted). “If a plaintiff makes that showing, it must then go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group.” *Abbott*, 138 S. Ct. at 2331. The Supreme Court has long assumed that a state that creates a majority-minority district for predominantly racial reasons can only justify that choice under strict scrutiny by establishing (at the time of redistricting) the three *Gingles* preconditions. *Id.* at 2309-10. But if the state lacks a strong basis in evidence to believe that each is met, the majority-minority district will be an unconstitutional racial gerrymander. *See Cooper*, 581 U.S. at 301-02.

State Requirements. The North Carolina Constitution’s Whole County Provisions (“WCP”) dictate that “[no] county shall be divided in the formation of a Senate district.” N.C. Const. art. II, §3; *see id.* art. II, §5 (same for House districts). Although the federal one-person, one-vote rule and (in some instances) the VRA render strict compliance with the WCP impossible,

the North Carolina Supreme Court resolved this tension by interpreting the WCP to forbid county lines from being transgressed “for reasons unrelated to compliance with federal law.” *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 389 (2002) (*Stephenson I*).

The court therefore directed that “legislative districts required by the VRA” be “formed prior to creation of non-VRA districts,” that total-population deviations “be at or within plus or minus five percent for purposes of compliance with federal ‘one-person, one-vote’ requirements,” and that county groupings be identified consistent with those federal rules to ensure that county lines are followed except where federal law otherwise requires. *See id.* at 383, 562 S.E.2d at 396-97. As Plaintiffs acknowledge (Mem. 9), the WCP county groupings and traversal formula is objectively ascertainable. *Id.*; *see also Stephenson v. Bartlett*, 357 N.C. 301, 302, 582 S.E.2d 247, 248 (2003) (*Stephenson II*); *Dickson v. Rucho*, 367 N.C. 542, 571-72, 766 S.E.2d 238, 258 (2014), *vacated on other grounds*, 575 U.S. 959 (2015).

North Carolina Litigation History. In the 1990 redistricting cycle, the Supreme Court first recognized the racial-gerrymandering claim adjudicating a challenge to North Carolina’s CD1 and CD12, *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), ultimately determining that CD12 was a racial gerrymander because the district did not satisfy the *Gingles* compactness requirement, *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*). In *Cooper*, the Court again encountered CD1 and CD12 and invalidated both. 581 U.S. at 322-23 As relevant here, it concluded that race predominated in CD1 because the General Assembly “purposefully” made it a majority-minority district and moved a significant number of voters to achieve that end. *Id.* at 300. The Court then determined that CD1 failed strict scrutiny because the third *Gingles* precondition was not met: evidence before the General Assembly demonstrated that a district below a 50% Black voting-age population (“BVAP”) majority (known as a “crossover” district) would provide equal minority opportunity

to elect and that there was no reason to believe “a plaintiff could establish...effective white bloc voting.” *Id.* at 304. CD1 occupied various counties, including Northampton, Hertford, Halifax, Warren, Bertie, Gates, Chowan, and Washington, *see id.* at 325, the same counties at issue here, *see* Mem. 1, 6, 10-11.

Legislative redistricting has proven equally contentious in North Carolina. *Bartlett v. Strickland*, 556 U.S. 1 (2009), arose out of Pender County, where the General Assembly departed from the WCP formula to create a district with “an African-American voting-age population of 39.36 percent.” *Id.* at 7 (plurality opinion). Both the United States and North Carolina Supreme Courts held that this departure from state constitutional requirements was not justified by §2, because it does not require districts “in which minority voters make up less than a majority of the voting-age population” (i.e., crossover districts). *Id.* at 13; *see also id.* at 11, 14. Accordingly, the WCP—not §2—controlled the district configuration.

After that experience, during 2011 redistricting, the General Assembly hired an expert to conduct a polarized voting study to ascertain the State’s §2 obligations. *Covington*, 316 F.R.D. at 169. Based on the expert’s conclusion that voting was racially polarized—and recognizing that crossover districts are not mandated by §2—the General Assembly included 28 majority-minority districts in the 2011 House and Senate plans, seeking to achieve proportionality, *see id.* at 132–33.

A subsequent suit challenged each of these districts as racial gerrymanders, and it succeeded. First, the *Covington* three-judge district court found race predominated in each challenged district because of the way the General Assembly sought VRA compliance and its goal of drawing majority-minority districts under the VRA “first, before any other ‘non-VRA’ districts were drawn” and because that goal required departure from the WCP formula. *Id.* at 130-31; 138-39. Second, it found that the use of race was not narrowly tailored, even though the General

Assembly relied on expert polarization analysis, because neither that nor any other analysis “made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy.”¹ *Id.* at 168. In other words, even if voting is polarized, polarization is not “legally significant” unless white bloc voting is sufficient to defeat Black-preferred candidates in districts below 50% BVAP. *Id.* at 168-69. The *Covington* court enjoined the 2011 plans. But it made “no finding that the General Assembly acted in bad faith or with discriminatory intent.” *Id.* at 124 n.1. That is, the *Covington* court determined that the General Assembly made only a legal mistake in considering race in reliance on a statistical analysis that failed to establish the third *Gingles* precondition. The Supreme Court summarily affirmed that decision. *North Carolina v. Covington*, 581 U.S. 1015 (2017).

The Race-Neutral Approach. After being afforded the opportunity to remedy the federal-law violation, the General Assembly in 2017 adopted a different approach by adopting a criterion of race-neutrality. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 418 (M.D.N.C. 2018) (quoting the criterion). The General Assembly implemented that criterion in the remedial redistricting. To be sure, the *Covington* court itself considered racial data, *see id.* at 421, and ultimately again made alterations in small portions of the General Assembly’s plans. *Id.* at 449. The *Covington* court, however, did not find that §2 required any majority-minority districts, and it affirmed most of the 2017 districts. *Id.* at 458.

In 2018, different plaintiffs—represented by the legal team that brings this suit—filed a suit in state court, challenging large swaths of the 2017 legislative plans under a novel state constitutional doctrine purportedly prohibiting “partisan” gerrymandering. *Common Cause v.*

¹ The court “express[ed] no view as to whether the *Stephenson* cases require that VRA districts be drawn first both in priority and in time.” *Covington*, 316 F.R.D. at 132 n.12.

Lewis, No. 18-cvs-014001, 2019 WL 4569584, at *1-2, 38 (N.C. Super. Sep. 03, 2019). In September 2019, a three-judge panel invalidated the plans. *Id.* at *135. During the subsequent redistricting, the General Assembly adopted the strategy it utilized after the *Covington* ruling, and race was not used. The *Lewis* court had—at the prompting of the lawyers who bring this suit—imposed severe restrictions on racial considerations by, *inter alia*, (1) forbidding the General Assembly from asserting that consideration of race was necessary in certain county groupings where expert evidence had shown it was not necessary and (2) requiring the General Assembly to “provide evidentiary support” for any asserted need to consider race. *Id.* at *133.

The *Common Cause* plaintiffs presented a brief and a comprehensive expert study addressing various county groupings in North Carolina and opining that legally significant white bloc voting did not exist anywhere a majority-Black district could be drawn, because “the average minimum BVAP necessary for African Americans to elect candidates of their choice” was below 50%. Ex. 1, at 6, 7-32. On that basis, the state court entered an order finding that the *Gingles* preconditions were not satisfied in any of the areas addressed. Ex. 2, Order. Although the brief, expert report, and order did not explicitly address elections in the counties at issue here, the expert’s merits-phase supporting data and tables did and showed victories for Black candidates of choice in districts below 50% BVAP. Ex. 3, Handley Backup Data Senate Tables (SD3, SD4, and SD5). No portion of the 2019 plans were challenged under §2.

The 2020 Redistricting Cycle. The 2021 plans, adopted on November 4, 2021, were likewise drawn without racial data. *See NCLCV v. Hall*, Nos 21 CVS 015426, 21 CVS 500085, 2022 WL 124616 at *9, FOF ¶54 (Wake Sup. Ct. Jan. 11, 2022). The General Assembly determined there were two permissible *Stephenson* county groupings for the Senate Plan in the

northeastern part of the State.² Plaintiffs, including some represented by the same counsel as Plaintiffs in this matter, challenged the 2021 legislative and congressional plans (the “2021 Plans”) under theories of partisan gerrymandering, but not under the VRA. In February 2022, the North Carolina Supreme Court invalidated the 2021 Plans under this theory. *See Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) (*Harper I*). During the remedial redistricting phase, the General Assembly selected the alternative Senate county grouping configuration for the northeastern part of the state in an effort to remedy the alleged “partisan gerrymandering.”³

In evaluating the remedial redistricting plans, both the state trial court and North Carolina Supreme Court considered whether §2 liability might arise under the General Assembly’s remedial plans, and both concluded that a polarized voting analysis of Dr. Jeffrey Lewis, who advised the General Assembly, demonstrated that §2 liability would not arise. *Harper v. Hall*, 383 N.C. 89, 123, 881 S.E.2d 156, 180 (2022) (*Harper II*). The North Carolina Supreme Court observed that, while crossover districts might improve minority opportunity, federal law “do[es] not require the General Assembly to create functioning crossover districts.” *Id.* at 124, 881 S.E.2d at 180.

The North Carolina Supreme Court subsequently re-heard the case and reversed its prior ruling on the partisan-gerrymandering question and permitted the General Assembly to redraw the State’s legislative and congressional districts without encumbrance of that novel (and erroneous) doctrine. *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) (*Harper III*). The General

² These findings were confirmed by Dr. Jonathan Mattingly, an expert who was hired in prior litigation by Plaintiffs’ counsel in this matter. *See NCLV*, 2022 WL 124616 at *11, FOF ¶¶59-60. A copy of the 2021 Senate Plan with the county groupings can be found here: https://www.ncleg.gov/Files/GIS/Plans_Main/Senate_2021/SL%202021-173%20Senate%20-%2011%20x%2017%20Map.pdf

³ A copy of the 2022 Senate Plan with County Grouping configurations can be found here: https://www.ncleg.gov/Files/GIS/Plans_Main/Senate_2022/SL%202022-2%20Senate%20-%2011%20x%2017%20Map.pdf (While currently numbered as SD 2, this district was previously numbered as SD 3)

Assembly enacted the challenged Senate plan on October 25, 2023 (the “Senate Plan”). Before doing so, it conducted public hearings across the state, including one in Elizabeth City, and accepted comments from an online public portal. Ex. 4, 9.27 Public Hearing Tr. 4:6-15. This was in addition to the 13 hearings held after the 2020 census data was released. *See NCLCV*, 2022 WL 124616 at *10 FOF ¶55-56. The Senate Redistricting and Elections Committee, consistent with past practice, adopted criteria, including equal population, traditional redistricting principles, compactness, contiguity, respect for existing political subdivisions, political considerations and incumbent residence, along with the WCP rules for legislative maps. Ex. 5, 10.19.23 Senate Redistricting and Elections Committee Meeting Tr. 4:2-12. The Committee’s co-chair, Senator Hise, testified that no racial data was used to draw maps *Id.* 4:13-16, given that the predominant use of race violates the federal constitution under the “Cooper and Covington cases.” *Id.* 4:17-25.

Senator Hise also addressed the VRA, noting that there “must be a strong basis in evidence of [the] three *Gingles* Criteria” to justify the use of race under the “totality of the circumstances.” *Id.* 5:1-8. Senator Hise noted that “[p]ast decisions and court records demonstrate that to this point nowhere in North Carolina can anyone provide evidence of the three *Gingles* conditions” *Id.* 5:9-12, that “in the absence of any evidence of the three *Gingles* preconditions” the chairs elected not to use race to “protect the state from lawsuits alleging illegal racial gerrymandering” *Id.* 5:12-17, that racial data would not have been helpful in reaching any political or legislative redistricting goal, and that any political considerations were informed by political, not racial, data. *Id.* 5:18-23.

Upon the public filing of the proposed maps, Senator Hise directed the non-partisan Central Staff to load racial data into Maptitude for the first time, to create statpacks with racial data for the committee members and the public. *Id.* 5:24-6:15. Senator Hise stated that the Chairs would “consider any evidence that a member of this Committee or a third party advocating altering plans

for racial reasons brings forth that provides a strong basis in evidence that the Gingles preconditions are present in a particular area of the state.” *Id.* 6:22-7:6. And that “[o]nly then will the chairs consider using race in amending the districts.” *Id.* Neither Plaintiffs, nor their Counsel submitted evidence to the Committee.⁴ When questioned about potential VRA liability, Senator Hise referred committee members to studies “regarding racial polarization [that] were done as part of the lawsuit a year and half ago” and since the census data was released. *Id.* 13:4-7.

Plaintiffs seek to create their demonstrative districts out of portions of SD1, SD2, and SD11. Each of these districts represent single district *Stephenson* groupings which are identical to the Senate 2021 Plan, which was never challenged under the VRA. Senator Daniel testified about the formation of these districts:⁵

- SD1 was “created by the county grouping choice”⁶ in the northeastern part of the state containing the whole counties of Northampton, Bertie, Hertford, Gates, Perquimans, Pasquotank, Camden, Currituck, Tyrell, and Dare.” *Id.* 46:12-18. Senator Daniel noted that this configuration kept intact four of the five finger counties in northeastern North Carolina. *Id.* 46:18-21. Senator Daniel also noted that many of the district’s residents work or travel frequently to Virginia’s tidewater, and that 7/10 of the counties and 81% of the population were in the Norfolk media market. *Id.* 46:22-47:2.
- SD2 “follows the Roanoke River from Warren county to the Albemarle Sound in Washington County” and noted that Chowan county, directly across from the Albemarle Sound was also included in this district. Senator Daniel testified that the Pamlico Sound and River were also included in the district, as was Carteret county, which spans the inner and outer banks. *Id.* 47:12-22. Senator Daniel noted that 5/8 counties and 2/3 of the population lived in the Greenville media market. *Id.* 47:23-48:4.

⁴ The only additional evidence received was from the Southern Coalition for Social Justice, who asked that the county grouping for SD 1 and 2 be changed to the alternate county grouping used in 2022. They did not request any majority-minority districts.

⁵ A Map of the Senate Plan with the county groupings can be found at https://www.ncleg.gov/Files/GIS/Plans_Main/Senate_2023/SL%202023-146%20Senate%20-%2011%20x%2017%20Map.pdf

⁶ In 2023, the General Assembly returned to the county grouping configuration from the 2021 Plan.

- SD11 was created by the base county grouping map of Vance, Franklin, and Nash counties. *Id.* 50:12-16.

The Instant Lawsuit. Plaintiffs filed this suit 26 days after the Senate Plan was enacted and moved for provisional relief on the 28th day. D.E. 1, 16. In tension with their prior advocacy, Plaintiffs’ counsel insist that the General Assembly’s failure to create a majority-minority Senate district in Vance, Warren, Halifax, Northampton, Hertford, Bertie, Martin, and Washington Counties amounts to an “egregious and clear-cut violation of Section 2.” Mem. 1. Plaintiffs propose two alternatives, both of which would destroy the State’s county groupings. *Id.* at 10-11. One configuration (Demonstration B-1 and B-2) creates a crossover district of 48% BVAP. Mem. 11; D.E. 17-1 (“Esselstyn Rep.”) 13. The other (Demonstration A) includes a majority-BVAP district that so thoroughly breaks up the State’s county groupings that implementing it would likely require reconfiguring many Senate districts. *See* Mem. 10. Plaintiffs demand emergency relief in time for the 2024 primary. Absentee voting begins January 19. *See* Part II, *infra*.

THE LEGAL STANDARD

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “[P]reliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances.” *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotation marks omitted).

Because “[t]he rationale behind a grant of a preliminary injunction has been explained as preserving the status quo,” *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 788 (4th Cir. 1991) (citation omitted), “[m]andatory preliminary injunctive relief”—i.e., relief that

“goes well beyond simply maintaining the status quo *pendente lite*”— “in any circumstance is disfavored.” *Taylor v. Freeman*, 34 F.3d 266, 270 n.2 (4th Cir. 1994) (citation omitted). Plaintiffs seek to alter the status quo by compelling the State to adopt redistricting configurations substantially dissimilar from those the State has currently or recently employed. *See* Mem. 1, 6, 9–11; Esselstyn Rep. 7-10, 12-15. Their request is presumptively “disfavored” and can be justified only by “the most extraordinary circumstances.” *Taylor*, 34 F.3d at 270 n.2.

ARGUMENT

I. Plaintiffs Will Not Succeed on the Merits

A. Plaintiffs Lack a Right of Action

As the Eighth Circuit recently held, there is no private right of action to enforce §2. *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1206-07 (8th Cir. 2023). That view is likely to prevail, and Plaintiffs in all events cannot make a clear showing given this uncertainty. “[P]rivate rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). “The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.” *Id.* As will be shown in more detail in Legislative Defendants’ forthcoming motion to dismiss, the VRA contains neither a private right nor a private remedy.

Plaintiffs also have no recourse to a right of action under 42 U.S.C. § 1983. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002). Under §1983, “the initial inquiry—determining whether a statute confers any right at all—is no different from the initial inquiry in an implied right of action case,” *id.* at 285, so the absence of a private right ends that inquiry. And the VRA’s remedial scheme supplants any presumptive §1983 remedy, as the forthcoming motion to dismiss will show.

B. Plaintiffs' §2 Claim Fails Numerous *Gingles* Elements

Even assuming a cause of action, Plaintiffs are unlikely to succeed under §2. As explained, Plaintiffs alleging vote dilution under §2 must prove the *Gingles* preconditions and that vote dilution is occurring under the totality of the circumstances. *Cooper*, 581 U.S. at 301-02 (citation omitted); *Abbott*, 138 S. Ct. at 2331. Plaintiffs are unlikely to make the necessary showings.

1. The First Precondition

Plaintiffs' illustrative plans do not establish the first precondition, which is “focused on geographical compactness and numerosity.” *Allen v. Milligan*, 599 U.S. 1, 18 (2023).

a. Demonstration B

Demonstration District B-1 does not satisfy the numerosity requirement. Plaintiffs barely defend it because (as they have to admit) its BVAP of 48.4% is “shy of 50%.” Mem. 11; Esselstyn Rep. 14; Ex. 6 Expert Report of Dr. Sean Trende (“Trende Rep.”) 8. The numerosity element is not met where “the minority group makes up less than 50 percent of the voting-age population in the potential election district.” *Bartlett*, 556 U.S. at 12 (plurality opinion); *see also Hall v. Virginia*, 385 F.3d 421, 428–29 (4th Cir. 2004). As in *Bartlett*, which found §2 does not require the State to sacrifice the WCP formula for a district below 50% BVAP, 556 U.S. at 7, Plaintiffs admit that Demonstration Districts B-1 and B-2 contravene the WCP, Mem. 11, and they cannot show §2 liability.

Plaintiffs observe that the Black citizen voting-age population (“CVAP”) of Demonstration District B-1 is 50.19%. Mem. 11; Esselstyn Rep. 14. “However, CVAP has been applied only where there is a significant noncitizen population.” *Pope v. Cnty. of Albany*, No. 1:11-CV-0736, 2014 WL 316703, at *12 (N.D.N.Y. Jan. 28, 2014). Otherwise, the first precondition looks to “the voting-age population in the potential election district.” *Bartlett*, 556 U.S. at 12 (emphasis added); *accord Hall*, 385 F.3d at 430. The purpose of utilizing CVAP is for “refinement” of VAP figures

to account for “a significant difference in the citizenship rates of the majority and minority populations,” as often occurs in cases involving Hispanic populations. *Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1568 (11th Cir. 1997). CVAP is “is less reliable” than VAP, *Pope*, 2014 WL 316703, at *13, which is reported in the decennial census, an enumeration of the population in each U.S. jurisdiction, *Dep’t of Com. v. U.S. House of Representatives*, 525 U.S. 316, 342–43 (1999). By contrast, CVAP estimates are drawn from the American Community Survey (“ACS”) as “a rolling statistical estimate with accompanying margins of error.” Brief for the United States as Amicus Curiae, *Evenwel v. Abbott*, No. 14-940, 2015 WL 5675829, at *22 (filed Sep. 2015). The ACS “is less reliable than Census data and not intended to be used in redistricting.” *Pope*, 2014 WL 316703, at *13 n.22 (citation omitted). It is the wrong metric here.

b. Demonstration District A

Demonstration District A fails the first precondition on multiple grounds.⁷

First, it is not “reasonably configured.” *Allen*, 599 U.S. at 20. This inquiry looks to “traditional districting criteria,” including maintaining “county lines.” *Id.* at 20; *Abrams v. Johnson*, 521 U.S. 74, 92 (1997). As explained, county lines occupy a preeminent place among North Carolina’s legislative redistricting criteria. *Stephenson I*, 355 N.C. at 366, 562 S.E.2d at 386 (citing “the long-standing tradition of respecting county lines during the redistricting process in this State”); N.C. Const. art. II, §3; *see id.* art. II, §5 (same for House districts). Demonstration District A contravenes the WCP by drawing a district that breaks the single-district county

⁷ Many of these failings likewise plague Demonstration Districts B-1 and B-2, including numerous violations of the WCP. While Demonstration Districts B-1 and B-2 break the county groupings, this configuration also illegally divides Pasquotank county to pick up 14% of the B-1’s Black population and form a crossover district — the same scenario deemed unconstitutional by the North Carolina Supreme Court in *Pender County*, 649 S.E.2d 364, 361 N.C. 491 (2007), *affirmed Bartlett*, 556 U.S. 1. *Trende Rep.* 8. However, the Court need not reach these issues because they clearly fail the numerosity requirement.

groupings of SD1, SD2, and SD11 by combining three counties from SD1 (Northampton, Hertford, Bertie), four counties from SD2 (Warren, Halifax, Martin, Washington), and one from SD11 (Vance). Mem. 6, 9-11, Adopting Demonstration District A would inflict such havoc that numerous Senate districts would likely need to be redrawn. Districts that dismantle the WCP are not “reasonably configured.” *Allen*, 599 U.S. at 20. The Supreme Court recently held that §2 “never requires adoption of districts that violate traditional redistricting principles.” *Id.* at 30 (citation and alteration marks omitted); *see also id.* at 43 (Kavanaugh, J., concurring) (recognizing that §2 does not require districts that flout “county, city, and town lines”).

Plaintiffs appear to believe that county boundaries are optional because *Stephenson I* and its progeny authorize departures from county lines for “legislative districts required by the VRA.” *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97. But that is circular logic. Districts that do not comply with a state’s neutral criteria are not reasonably configured and §2 does not require them. *Allen*, 599 U.S. at 20. The North Carolina Supreme Court’s recognition that federal law overrides state law did not alter the scope of federal law, authorize federal courts to override county boundaries more than necessary to implement federal dictates, or declare that districts dismantling county groupings are “reasonably configured.” Rather, *Stephenson I* referenced federal dictates that do not have a “reasonable configuration” requirement, including the one-person, one-vote principle and the non-retrogression command of VRA §5. *See Stephenson I*, 355 N.C. at 382-83, 562 S.E.2d at 396-97.⁸

Second, Demonstration District A is a racial gerrymander. Section 2 does not require majority-minority districts drawn with “a ‘quintessentially race-conscious calculus,’” *Allen*, 599

⁸ Plaintiffs criticize enacted SD2, Mem. 10-11, but elsewhere acknowledge (as they must) that SD2 simply occupies a county grouping created by the WCP formula, Esselstyn Rep. 212. This illustrates the paramount supremacy of the county-line criterion in North Carolina.

U.S. at 31 (plurality opinion) (citation omitted), which occurs where the map-maker “subordinate[s] traditional race-neutral districting principles...to racial considerations,” *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 187 (2017) (citation omitted). For North Carolina legislative plans, application of that test has proven straightforward because departures from the WCP formula to hit racial targets present clean cases of predominance. *See Covington*, 316 F.R.D. at 131-32, 138-39. Plaintiffs ignore the lesson learned in *Covington*. Plaintiffs’ expert deemed hitting 50% targets (measured by both BVAP and CVAP) more important than North Carolina redistricting principles, opting to destroy State constitutionally-mandated districts to achieve a singular goal. Esselstyn Rep. 16. This is further demonstrated by the counties chosen for inclusion in Demonstration District A. Each county present in the district is required to achieve a majority Black District. Trende Rep. 5. And even if the counties were split, which would violate *Stephenson*, only 2 or 3 precincts could be removed before the district would lose majority-Black status. *Id.* To be clear, Mr. Esselstyn drew with such surgical precision that nearly every Black resident is needed to create Demonstrative District A as a majority-Black district. *Id.* “While the line between racial predominance and racial consciousness can be difficult to discern,” *Allen*, 599 U.S. at 31, it is not here.

Third, Plaintiffs have not proven that Demonstration District A can be part of a reasonably configured Senate plan governing North Carolina. Plaintiffs seeking §2 relief customarily present entire plans with additional majority-minority districts, not isolated districts. *See Allen*, 599 U.S. at 19-21; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 435 (2006). That type of showing is necessary because there would be no value in a showing that a majority-minority district is reasonably configured if that accomplishment will turn neighboring districts, or the plan, into “a monstrosity.” *Allen*, 599 U.S. at 28 (quoting *Miller v. Johnson*, 515 U.S. 900, 909 (1995)).

Here, Plaintiffs present only isolated districts, not entire plans. That failing is not a technicality. As explained *supra* pp. 13-16 Demonstration District A destroys the State’s county groupings. *See* Mem. 10-11; Trende Rep. 4-5. As also explained, assuming the VRA requires certain districts, State precedent requires that the General Assembly configure them “prior to...non-VRA districts,” *Stephenson I*, 562 S.E.2d at 396-97, because the county-grouping formula governs the entire State and builds upon the placement of VRA districts, *see Dickson*, 367 N.C. at 571-72, 766 S.E.2d at 258 (explaining the order of operations). By breaking up the county groupings in northeastern North Carolina, Plaintiffs’ Demonstration District A would reset the county-grouping formula. Trende Rep. 5. Any order adopting Demonstration A will send shockwaves that will likely result in a significant re-draw. *Id.* Without a statewide illustrative map, it is impossible to know how many *Stephenson* groupings will be destroyed by Demonstrative A. Because Plaintiffs have not proven that this re-draw will result in reasonably configured districts elsewhere, they fail the first precondition.

Fourth, there is particular reason for concern of impact on neighboring districts, given that enacted SD1 and SD2 border SD5, which has a BVAP of 40.35%, Esselstyn Rep. 10, and likely qualifies as a “crossover” district, i.e., a district “in which minority voters make up less than a majority of the voting-age population” but where “the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority.” *Bartlett*, 556 U.S. at 13 (plurality opinion). Plaintiffs concede SD5 is a current minority opportunity district. Mem. 10. Neighboring SD11, at 36.65% BVAP, may also qualify as a crossover district. Esselstyn Rep. 10. Although §2 does not mandate crossover districts, states may create them “as a matter of legislative choice or discretion,” *id.* at 23, and §2 can “be *satisfied* by crossover districts,” *Cooper*, 581 U.S. at 305. Demonstration District A dismantles SD 1, 2, and

11, reconfiguring the county groupings and district lines, which in turn, may dismantle districts like SD 5 that currently provide equal minority opportunity.

But “a § 2 violation is proved for a particular area,” *Shaw II*, 517 U.S. at 917, so dismantling one district for some minority voters (in SD5) to create another district for other minority voters (Demonstrative A) is improper, *see id.* at 917 (rejecting the notion that a majority-Black district may be drawn “anywhere” as “a misconception of the vote-dilution claim”); *Johnson v. DeGrandy*, 512 U.S. 997, 1019 (1994) (rejecting the notion that “the rights of some minority voters under §2 may be traded off against the rights of other members of the same minority class”). Without establishing the impact of Demonstration District A on minority opportunity elsewhere, Plaintiffs show “that lines could have been drawn elsewhere, nothing more.” *DeGrandy*, 512 U.S. at 1015.

2. The Third Precondition

a. Majority-Minority Districts Are Unnecessary and Unjustified

Plaintiffs are also unlikely to establish the third precondition, which requires proof of an “amount of white bloc voting that can generally ‘minimize or cancel’ black voters’ ability to elect representatives of their choice.” *Gingles*, 478 U.S. at 56 (citations omitted). The best available evidence shows that a majority-Black district is unnecessary to ensure equal minority opportunity to elect in the districts that are destroyed to create Demonstrative A (SD1, SD2, SD5, SD11) and white bloc voting lacks legal significance.

While “the general term ‘racially polarized voting’ is defined much more broadly and simply refers to when different racial groups ‘vote in blocs for different candidates,’” the “third *Gingles* inquiry is concerned only with ‘legally significant racially polarized voting.’” *Covington*, 316 F.R.D. at 170 (citations omitted). “[A] general finding regarding the existence of any racially polarized voting, no matter the level, is not enough” to satisfy the third precondition. *Id.* “The key

inquiry...is whether racial bloc voting is operating at such a level that it would actually minimize or cancel minority voters' ability to elect representatives of their choice, *if no remedial district were drawn.*" *Id.* at 168 (emphasis added) (quotation and edit marks omitted). Because a remedial district is a 50% plus one BVAP district, *Bartlett*, 556 U.S. at 19, there is no legally significant racially polarized voting if minority-preferred candidates have an equal opportunity to win districts at below 50% BVAP. *Id.* at 18; *Covington*, 316 F.R.D at 168-69.

The Supreme Court made this clear in *Bartlett*. In holding that §2 does not require "crossover" districts, the Court reasoned that "the majority-bloc voting requirement" will not "be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." 556 U.S. at 16. The Court further explained that, where crossover voting is sufficient to create performing crossover districts, "majority-minority districts would not be required in the first place." *Id.* at 24.

The Supreme Court's summary affirmance in *Covington* confirmed this principle. The *Covington* court took issue with the General Assembly's decision to create majority-Black districts in North Carolina's legislative plans based on the advice of experts who found "statistically significant racially polarized voting in 50 of the 51 counties studied." *Covington*, 316 F.R.D. at 169 (quotation marks omitted). The Court criticized these experts for addressing "racially polarized voting" which "simply refers to when different racial groups 'vote in blocs for different candidates.'" *Covington*, 316 F.R.D. at 170. But they missed, the Court wrote, the "crucial difference between legally significant and statistically significant racially polarized voting." *Id.* (underlining in original). Whereas polarized voting can occur "when 51% of a minority group's voters prefer a candidate and 49% of the majority group's voters prefer that same candidate," *id.* at 170, "the third *Gingles* inquiry is concerned only with 'legally significant racially polarized

voting,” *id.* (quoting *Gingles*, 478 U.S. at 51, 55-56). Non-actionable polarized voting becomes legally significant only when “racial bloc voting is operating at such a level that it would actually minimize or cancel minority voters’ ability to elect representatives of their choice, if no remedial district were drawn.” *Id.* at 168 (quotation and alteration marks omitted; emphasis added). The question is whether “the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*.” *Id.* (emphasis added). Because the third precondition was not shown, the court struck down the plan as a racial gerrymander, and the Supreme Court affirmed.

Plaintiffs’ claim is likely to fail on this same basis. Their expert—like the experts in *Covington*—found “statistically significant racially polarized voting,” D.E. 17-2, (“Barreto Rep.”) 10; *see also id.* at 11, but not legally significant racially polarized voting. That doomed the General Assembly last decade and should doom the Plaintiffs here. *Covington*, 316 F.R.D. at 170. Dr. Barreto did not determine whether “a VRA remedy” in the form of a majority-BVAP district is necessary for equal minority opportunity. *Id.* at 168. As *Covington* explained, the way to determine whether majority-BVAP districts are necessary is a “district effectiveness analysis,” which “determines the minority voting-age population level at which a district ‘becomes effective in providing a realistic opportunity for voters of that minority group to elect candidates of their choice.’” *Id.* at 169 & n.46 (quotation and alteration marks omitted). But Dr. Barreto did not perform a district effectiveness analysis and offers no opinion that only with districts at or above 50% BVAP will minority voters be able to elect their candidates of choice in the relevant area. Moreover, Plaintiffs admit as much by drawing a 48.47% district (Demonstrative B-1) and stating it will perform. Mem. 13, 23, Esselstyn Rep. 13

This is unlikely to be shown. Legislative Defendants’ expert, Dr. Alford, opines that it is unlikely any of these districts need a 50% BVAP for a Black candidate of choice to prevail. Ex. 7,

Report of Dr. John Alford (“Alford Rep.”) 2. Moreover, the evidence *before the General Assembly at the time of drawing* clearly shows that SD1 and SD2 have high levels of white crossover support of 24% and 26%, respectively, in general elections, which is sufficient for Black candidates of choice to win without majority-minority districts. Ex. 8 December 28, 2021, Report of Dr. Jeffrey B Lewis in *NCLCV v. Hall*, (“Lewis Rep.”) Table 1 p. 10. White crossover voting is also high in SD11, which contains Vance County, and an average BVAP of only 31% would enable the minority candidate of choice to be elected in general elections. *Id.* Analyzing Democratic primaries, Dr. Lewis showed white crossover support ranging from 45-49% in these districts, and an average BVAP percentage of 7-12% needed to win. *Id.* Table 2, p. 23. Voting is not polarized at legally significant levels.

Additional points of context demonstrate that the third precondition cannot be shown. One is that *Covington* involved some of the counties at issue here. *See* 316 F.R.D. at 151-52, 158-59. This includes then-SD4 (containing Vance, Warren, and Halifax counties) which the court invalidated because the third precondition was not established. *Id.* Moreover, the Supreme Court in *Cooper* found no legally significant racially polarized voting in last decade’s rendition of CD1, 581 U.S. at 301-06, which occupied the same counties at issue here, *see id.* at 325. There is no reason to believe the third precondition can be satisfied in this case when it was not in *Cooper* or *Covington*. Further, evidence and court findings in both the *Common Cause* and *Harper* litigation established that legally significant polarized voting does not exist in North Carolina, and Plaintiffs’ counsel sponsored evidence supporting those findings and showing they apply equally in the areas at issue in this case. *See supra* pp. 6-9

b. Polarization Is Political, Not Racial

North Carolina voting patterns lack legal significance for the additional reason that they reflect a partisan, not a racial, divide. The VRA “is a balm for racial minorities, not political ones—even though the two often coincide.” *Baird v. Consol. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (citation omitted). If “partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens,” then there is no “legally significant” racially polarized voting under the third *Gingles* precondition. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc). This is so because “[t]he Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if Black voters are likely to favor that party’s candidates.” *Id.* at 854 (quotation omitted). VRA § 2 “is implicated only where Democrats lose because they are Black, not where Blacks lose because they are Democrats.” *Id.* As the Fifth Circuit explained in *LULAC, Council No. 4434*, a majority of Justices in *Gingles* held §2 liability does not lie where different candidate preferences reflect “interest-group politics.” *See id.* at 855-59.

Here, Plaintiffs’ expert did not analyze whether voting patterns are polarized for partisan or racial reasons, and Dr. Alford’s study shows that voting is divided along partisan lines and that “the race of the candidates does not appear to have a polarizing impact on vote choice.” Alford Rep. 10. In all elections Dr. Alford studied, he found that partisan affiliation better predicted the choice of a voter than race. *Id.* at 12-13. For example, when comparing the 2020 US Senate election (which had two white candidates), with the 2022 US Senate Election (which had one white and one Black candidate), Dr. Alford’s analysis revealed a higher level of white support for the Black Democratic candidate statewide, and in all areas of interest studied, than for the white Democratic candidate in 2020. *Id.* at 6-7. This pattern is again evident, with one exception, across all five Court

of Appeals races in 2020. *Id.* at 8-9. The 2020 Court of Appeals elections are highly probative for another reason: Dr. Alford’s EI estimates (at table 3) clearly showed that Black Democrats, statewide and in all areas of interest studied, displayed a significant preference for a White Democratic candidate over a Black Republican candidate. *Id.* In fact, Black support behind all democratic candidates was nearly identical regardless of the race of the candidate.⁹ *Id.* Plaintiffs are unlikely to succeed for this additional reason.

3. The Totality of the Circumstances

In all events, Plaintiffs are unlikely to make the “ultimate” showing of vote dilution under “the totality of the circumstances.” *Gingles*, 478 U.S. at 78. “The ultimate determination of vote dilution under the Voting Rights Act...must be made on the basis of the ‘totality of the circumstances.’” *Lewis v. Alamance County*, 99 F.3d 600, 604 (4th Cir. 1996) (quotation marks omitted). The factors germane to that inquiry, *see Gingles*, 478 U.S. at 36-37, cut against Plaintiffs.

First, “the policy underlying the state[’s] use of” the challenged districts is not “tenuous,” but compelling. *Id.* at 37 (citation omitted). As demonstrated, North Carolina’s WCP principles represent a sovereign policy recognized at least as of 1776 and are implemented through objective, neutral, and non-arbitrary means. The State’s interest in districts that adhere to county lines to the maximum extent possible “lies at the heart of representative government and thus must be treated with great respect.” *Fusilier v. Landry*, 963 F.3d 447, 460 (5th Cir. 2020).

Second, the “extent to which voting in the elections of the state...is racially polarized” is limited at most. *Gingles*, 478 U.S. at 37. As shown, majority-minority districts are unnecessary in

⁹ The one exception is the statewide estimate for the democratic candidate for Court of Appeals Seat #4 who received 98% instead of 99% of the Black vote.

North Carolina and in the areas relevant to this case, which indicates “substantial crossover voting,” *Bartlett*, 556 U.S. at 24.

Third, there are no “other voting practices or procedures that may enhance the opportunity for discrimination against the minority group,” such as “unusually large election districts, majority vote requirements, [or] anti-single shot provisions.” *Gingles*, 478 U.S. at 37 (citation omitted). Plaintiffs point to past practices they believe were discriminatory, but the question here is whether the challenged scheme interacts with other mechanisms in the *present* to enhance the discriminatory impact of the challenged system. *See, e.g., Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1296 (11th Cir. 2020) (finding majority-vote requirement enhanced impact of system lacking in majority-minority districts). Plaintiffs show nothing like that here.

Fourth, Black representatives have been elected to the North Carolina General Assembly in large numbers. *Gingles*, 478 U.S. at 37. Plaintiffs acknowledge that 21.6% of House members and 18% of Senate members are Black. Mem. 20; D.E. 17-3, “Burch Rep.” 21-22. Plaintiffs claim Black voters are “underrepresented.” Mem. 20. But the legal question is not whether Black voters are “underrepresented” under a standard of proportional representation, but whether “no members,” or just a “few,” “of a minority group have been elected to office over an extended period of time.” S. Rep. 97-417 at 29, n.115 (1982). “Forcing proportional representation is unlawful and inconsistent with [the Supreme] Court’s approach to implementing § 2.” *Allen*, 599 U.S. at 28.

Fifth, Plaintiffs present no evidence of “a significant lack of responsiveness” in the General Assembly to minority needs. *Gingles*, 478 U.S. at 37 (citation omitted). Plaintiffs assert that a supposed “failure to remedy...socioeconomic disparities between Black and white North

Carolinians” proves a lack of responsiveness. Mem. 20. But responsiveness does not guarantee outcomes, and representative democracy is not magic, whereby an elected body can cure all manner of social ills by mere force of will. *See N.A.A.C.P., Inc. v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1023 & n.24 (2d Cir. 1995).

Sixth, the evidence does not support Plaintiffs’ assertion that North Carolina elections frequently see racial appeals to voters. *Gingles*, 478 U.S. at 37. Plaintiffs’ expert, Dr. Burch, cites attack ads against Black candidates as evidence of racial appeals, even if they are not racial. Burch Rep. 20. For example, she cites a New York Times article regarding an advertisement about three opinions then-Justice Beasley joined involving child sex offenders, but the advertisements did not mention the race of the offenders. *Id.* at 20 n.47. This type of evidence proves only that Black candidates run for office in contested races and face harsh opposition, like all other candidates.

Finally, the Supreme Court has explained, one “may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.” *DeGrandy*, 512 U.S. at 1017. Accordingly, vote dilution will ordinarily not be found where minority voters “would enjoy substantial proportionality” of equal-opportunity districts. *Id.* at 1014. The North Carolina Supreme Court recently found this to be satisfied without a majority-Black district in the region at issue. *Harper II*, 383 N.C. at 124, 881 S.E.2d at 180. Plaintiffs do not address this element and are unlikely to succeed at trial.

II. Plaintiffs Have Not Established That the Equitable Factors Favor an Exceptional Mandatory Injunction

Plaintiffs are not entitled to a preliminary injunction for the independent reason that the equities do not support one. *See Winter*, 555 U.S. at 25-26. The equities analysis in an election case is governed by the *Purcell* principle, “which establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that

federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle.” *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). This principle, in fact, antedates the *Purcell* decision by two generations, having its genesis in *Reynolds v. Sims*, 377 U.S. 533 (1964), which ruled that the lower court “acted wisely in declining to stay the impending primary election in Alabama,” *id.* at 586, even though the challenged redistricting plan was plainly unconstitutional, *id.* at 545. “*Sims* has been the guidon to a number of courts that have refrained from enjoining impending elections,” *Chisom v. Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988), “even in the face of an undisputed constitutional violation,” *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003); see *Wise v. Circosta*, 978 F.3d 93, 98–99 (4th Cir. 2020).

The *Purcell* principle applies here because the “State’s election machinery is already in progress.” *Reynolds*, 377 U.S. at 585. Plaintiffs acknowledge that the candidate filing period has come and gone (running from December 4 to December 15). Mem. 22. But Plaintiffs’ discussion of the primary election is misleading: it is not “many months away.” *Id.* Ballots will be sent to voters in North Carolina’s no-excuse absentee system beginning January 19, 2024, and printing must begin before then. North Carolina State Board of Elections, *Upcoming Election, Overview of 2024 Elections*.¹⁰ In-person early voting runs from February 15 to March 2, with election day for the primary on March 5. *Id.* Thus, the election is already beginning.

An injunction therefore cannot issue. In *Milligan*, the Supreme Court intervened to stay a three-judge panel’s redistricting injunction, which was issued “seven weeks” before delivery of ballots for absentee voting in “the primary elections.” 142 S. Ct. at 879 (Kavanaugh, J., concurring). According to the two Justices whose votes were decisive, the strength of the *Purcell*

¹⁰ <https://www.ncsbe.gov/voting/upcoming-election>

principle, standing alone, compelled that result. *Id.* at 879-82. In this case, the earliest an injunction could issue would be three weeks before the beginning of absentee voting, making it a far more compelling *Purcell* case than *Milligan*. Notably, a stay was required in *Milligan*, even though the Supreme Court ultimately affirmed on the merits, concluding that the court “faithfully applied our precedents.” *Allen*, 599 U.S. at 23. Around the same time, the Fifth Circuit declined to stay a June district-court injunction under §2 in Louisiana, despite that ballot-mailing would begin in September, calling *Milligan* “an outlier.” *Robinson v. Ardoin*, 37 F.4th 208, 228-29 (5th Cir. 2022). That was erroneous. The Supreme Court promptly entered the stay the Fifth Circuit refused to enter. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Other courts have bought similar arguments; their injunctions were short lived. *See, e.g., Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers); *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v. Johnson*, 512 U.S. 1283 (1994); *Chabot v. Ohio A. Philip Randolph Inst.*, 139 S. Ct. 2635 (2019).

Plaintiffs’ arguments to coax this Court down that tried and untrue path fail.

First, they analogize this case to litigation in 2022 in North Carolina state court. Mem. 22-23. But the Fourth Circuit has expressly rejected that analogy, holding that “*Purcell* is about *federal court* intervention” and does not cover “action by state courts.” *Wise*, 978 F.3d at 99. Whatever might be said of the North Carolina courts’ actions in 2022, it says nothing of this

Court's role here.¹¹ As *Milligan* shows, rescheduling the primaries and intervening in candidate qualification and ballot-mailing is not an option available to this Court.

Second, Plaintiffs say an injunction would not “cause any voter confusion” because it would “impact[]” just “candidate filing for two districts.” Mem. 22. That is not true. As shown, it would throw ballot *mailing* and *printing* into disarray—which would obviously confuse voters—and Plaintiffs’ only proposed majority-BVAP district (Demonstration District A) could (if implemented) require redrawing a significant number of the State’s Senate districts. Moreover, the Court would not be entitled to implement a plan on its own prerogative; it must afford the General Assembly the first opportunity to cure any violation, *Reynolds*, 377 U.S. at 585–86. If the injunction stayed in *Milligan* was “a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters,” *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring), the injunction demanded here is a prescription for a total meltdown.

Third, Plaintiffs erroneously suggest an injunction would have been appropriate on the unreasonable briefing schedule they demanded. Mem. 2. *Purcell* is not an excuse for plaintiffs to make redistricting “a game of ambush.” *In re Landry*, 83 F.4th 300, 303 (5th Cir. 2023). Plaintiffs’ “meritless” motion for emergency briefing, after they waited 28 days to file the instant motion, demanding that opposition briefs be filed in one business day, Order, D.E. 23 at 4, only proves that it was too late for an injunction when they first filed this motion.

Finally, Plaintiffs criticize the timing of the 2023 redistricting, but ignore that *Purcell* protects the “status quo” a State establishes, regardless of when it does so. *Wise*, 978 F.3d at 98.

¹¹ The 2022 North Carolina Supreme Court’s actions blithely ignored binding precedent. In *Pender County*, the Court entered a final judgment declaring a crossover district drawn by the General Assembly illegal for violating the WCP in August of 2007 but stayed the remedy until after the 2008 election cycle to avoid disruption. 649 S.E.2d at 376.

The timing is materially akin to that in *Wise*, where the North Carolina executive and judicial branches altered state election law in late September 2020 based on pandemic-related concerns known long before, and the Fourth Circuit held that *Purcell* protected that choice, *id.* at 96-99, over the dissent’s objection that the state action came too late, *id.* at 116-17 (Wilkinson, J., dissenting). Likewise, in *Milligan*, the Alabama legislature enacted the challenged congressional plan on November 3, 2021, suit was filed the same day, *Caster*, 2022 WL 264819, at *6, 15, and *Purcell* barred the injunction. Here, the General Assembly acted well within its discretion to establish the status quo through the challenged plan, enacted on October 25, 2023, with ample time for election administration. Moreover, Plaintiffs waited 28 days to bring the instant motion and—given that delay—stand in no position to blame the State for *Purcell*’s impact on their belated suit. And the General Assembly had good reasons to enact the plans when it did, as it faced a prolonged budget process, in addition to its other legislative action, that occupied its time and resources from the beginning of session until the budget became law. *See* H.B. 259 (enacted at N.C. Sess. Law 2023-134). As soon as a compromise was reached, the General Assembly turned to its redistricting obligation. As in *Wise* and *Milligan*, *Purcell* applies in full force.

CONCLUSION

The Court should deny Plaintiffs’ motion for preliminary injunction.

Respectfully submitted, this the 22nd day of December, 2023.

BAKERHOSTETLER LLP

Richard B. Raile*
DC Bar No. 1015689
Katherine L. McKnight**
Trevor Stanley**

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Phillip J. Strach
Phillip J. Strach
North Carolina State Bar no. 29456
Thomas A. Farr

1050 Connecticut Ave. NW
Suite 1100
Washington DC 20036
Ph: (202) 861-1500
rraile@bakerlaw.com
kmcknight@bakerlaw.com
tstanley@bakerlaw.com

Rachel Hooper*
Texas State Bar no. 24039102
Tyler G. Doyle*
Texas State Bar no. 24072075
811 Main Street, Suite 1100
Houston, Texas 77002
Ph: (713) 751-1600
rhooper@bakerlaw.com
tgdoyle@bakerlaw.com

Patrick T. Lewis*
Ohio State Bar no. 0078314
Key Tower
127 Public Square, Suite 2000
Cleveland, Ohio 44114
Ph: (216) 621-0200
plewis@bakerlaw.com

* *Appeared via Special Notice*
** *Special Notice of Appearance*
Forthcoming

North Carolina State Bar no. 10871
Alyssa M. Riggins
North Carolina State Bar no. 52366
Cassie A. Holt
North Carolina State Bar no. 56505
Alexandra M. Bradley
North Carolina State Bar no. 54872
301 Hillsborough Street, Suite 1400
Raleigh, North Carolina 27603
Ph: (919) 329-3800
phil.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
cassie.holt@nelsonmullins.com
alex.bradley@nelsonmullins.com

CERTIFICATE OF SERVICE

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

This the 22nd day of December, 2023.

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

/s/ Phillip J. Strach

Phillip J. Strach

N.C. State Bar No. 29456