

Exhibit 15

**May 27, 2011 Letter From
Michael Crowell and Bob Joyce**



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May 27, 2011

Senator Bob Rucho
NC Senate
300 N. Salisbury Street, Room 300-A
Raleigh, NC 27603-5925

Representative David R. Lewis
NC House of Representatives
300 N. Salisbury Street, Room 534
Raleigh, NC 27603-5925

Dear Senator Rucho and Representative Lewis:

We appreciate the opportunity of addressing the set of questions related to legislative redistricting that you sent to us on May 17. You will find our answers in the attached document.

If we can be of further assistance, please call on us.

Sincerely,

Michael Crowell

Michael Crowell

Robert P. Joyce

Robert P. Joyce

RESPONSES TO REDISTRICTING QUESTIONS FROM SENATOR RUCHO AND REPRESENTATIVE LEWIS

Michael Crowell and Bob Joyce, UNC School of Government
May 27, 2011

1. What counties were the subject of a finding of liability under Section 2 of the Voting Rights Act in the case of *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*")?

In *Gingles* the United States Supreme Court upheld the finding of Section 2 violations in North Carolina's 1982 legislative redistricting plans. The areas where violations were found included: (1) a four-member Senate district consisting of Mecklenburg and Cabarrus counties; (2) an eight-member House district comprising Mecklenburg County; (3) a five-member House district consisting of part of Forsyth County; (4) a six-member House district comprising Wake County; and (5) a four-member House district consisting of Edgecombe, Nash and Wilson counties. In addition, a Section 2 violation was found in eastern North Carolina in the area where a single-member Senate district had been created consisting of all of Bertie, Chowan, Gates, Hertford and Northampton counties and parts of Edgecombe, Halifax, Martin and Washington counties. Although African Americans were 55.1 percent of the total population of that district, they were only 46.2 percent of the registered voters, and the court determined that it was possible to create a district with an effective black voting majority in the same general area. Finally, a Section 2 challenge to a three-member House district comprising Durham County was rejected.

Thus the Supreme Court found the three *Gingles* elements — a cohesive minority group, lack of minority success because of racially polarized voting, and the ability to create a reasonably compact minority district — to exist in Mecklenburg and Wake counties; in the combined area of Cabarrus and Mecklenburg counties; in the combined area of Edgecombe, Nash and Wilson counties; in an area comprising most of Forsyth County; and in an area of eastern North Carolina that included Bertie, Chowan, Edgecombe, Gates, Halifax, Hertford, Martin, Northampton and Washington counties. As noted in the response to Question 3 below, when new majority-black legislative districts were drawn in response to the trial court decision in *Gingles* one of those districts included parts of Vance and Warren counties.

2. Following *Gingles*, and in all subsequent legislative redistricting plans, has the General Assembly created legislative districts in those counties with a total black population of at least 40 percent or higher?

We believe the answer is yes but do not have ready access to the documents necessary to confirm our response. The legislative staff can provide a definite answer.

3. Has there ever been a judicial ruling modifying, overturning, or vacating the judgment entered in *Gingles*?

Although there have been numerous court decisions in the quarter century since *Gingles* that elaborate upon its meaning, *Gingles* has not been overturned and remains the principal case defining the elements of a Section 2 violation.

It may be useful to note how the *Gingles* case concluded. Upon finding a Section 2 violation in January 1984, the trial court gave the General Assembly an opportunity to develop a remedial redistricting plan. The legislature did so in extra session in March 1984 and the trial court approved the remedial plan in April 1984. The redistricting legislation approved by the court provided that the districts would revert to their previous configuration if the Supreme Court reversed the original trial court decision finding violations of Section 2 in the 1982 plans. The Supreme Court reversed only the ruling on Durham County. Thus pursuant to the 1984 legislation all the new districts remained in effect until the next round of decennial redistricting except for the division of Durham County into three single-member House districts; Durham reverted to a three-member district as provided in the 1982 plan.

The April 1984 trial court order in *Gingles* approved the General Assembly's March 1984 redistricting plan as a remedy for the Section 2 violation but did not specify how long the remedy should remain in effect nor address future redistricting. Nevertheless it appears to be commonly accepted that the legislature remains obligated to maintain districts with effective African American voting majorities in the same areas as decided in *Gingles*, if possible.

The 1984 redistricting plan enacted by the General Assembly, as it existed with the restoration of the Durham multi-member district following the Supreme Court's 1986 decision in *Gingles*, created seven majority-black single-member House districts and one majority-black single-member Senate district that had not previously existed, and it increased the black total population percentage from 55.1 percent to 60.7 percent in the challenged single-member Senate district. Of the six new black-majority House districts, one was comprised of parts of Edgecombe, Nash and Wilson counties; one was in Wake County; and two each were in Forsyth and Mecklenburg counties. One new black-majority Senate district was created in Mecklenburg County. The redrawn Senate district in which the percentage of black population was increased to 60.7 percent was comprised of Hertford and Northampton counties and parts of Bertie, Edgecombe, Gates, Halifax, Martin, Vance and Warren counties.

4. During public hearings held by the House and Senate Redistricting Committee in 2011, several witnesses asked that the General Assembly create redistricting plans that avoid "cracking," "stacking," and "packing." Has the United States Supreme Court defined those terms and if so, in what cases have those terms been defined and how have they been defined?

The Supreme Court has used each of those terms and explained their meaning in a general sense but has not attempted to set specific objective measures for when cracking, stacking and packing occur. The terms refer to different ways of diluting the voting strength of a group. As the court explained in *Gingles*, though it did not use the terms "cracking" and "packing": "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." Other cases have used the words "cracking" and "packing" to label the concepts identified in *Gingles*. As stated in *Vieth v. Jubalier*, 541 U.S. 267 (2004): "'Packing' refers to the practice of filling a district with a supermajority of a given group or party. 'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." The same kind of explanation appears in a variety of Supreme Court opinions such as *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *Volnovich v. Quilter*, 507 U.S. 146 (1993), and *Show v. Reno*, 509 U.S. 630 (1993).

The term "stacking" has been used less often and was described in *Shaw v. Reno*, 509 U.S. 630 (1993) as joining "a large minority population concentration . . . with a larger white population." Other sources have used "stacking" to refer to a plan that creates the illusion of a majority black district by concentrating low income blacks with little education (and who are less likely to vote) in the same district with whites who have high incomes and considerable education (and are more likely to vote).

5. Please explain the elements needed to prove a violation of section 2 of the Voting Rights Act as explained in *Gingles* and as clarified in *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009).

While a Section 2 claim involves an analysis of the "totality of the circumstances" which requires consideration of a number of factors, including the history of discrimination in the jurisdiction, the *Gingles* court said the three "necessary preconditions" to a Section 2 challenge to an at-large or multi-member election method are: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

Bartlett v. Strickland further defined what *Gingles* meant by the first element, the minority group being "sufficiently large and geographically compact to constitute a majority in a single-member district." The court said a majority means at least 50 percent of the voting age population, rejecting the argument that the element could be satisfied by showing that a smaller percentage of African Americans might form an effective voting majority when combined with enough white crossover voters.

Justice Kennedy's plurality opinion in *Bartlett v. Strickland* speaks only of "voting age population" or "voting population," and does not specify "citizen voting age population," but Justice Souter's dissent describes the plurality as requiring 50 percent of the citizen voting age population.

6. Please explain your opinion of the holding by the North Carolina Supreme Court in *Strickland v. Bartlett*, 361 N.C. 491 (2007), with emphasis on the Court's holding that the General Assembly must consider citizen voting age population when deciding whether and where to create majority minority districts.

The North Carolina Supreme Court's decision in *Pender County v. Bartlett* is the lower court decision that was upheld by the United States Supreme Court in *Bartlett v. Strickland*. The division of Pender County in drawing House legislative districts had been challenged as a violation of the whole-county provision as interpreted in *Stephenson*. The State's defense to dividing Pender was that it was necessary to comply with Section 2 of the Voting Rights Act. The plaintiffs contended, however, that there was no potential Section 2 violation because the first element of *Gingles* could not be met, as it was not possible to create a reasonably compact district in that part of the state with an African American majority. Blacks were only 42.9 percent of the total population of the district and only 39.4 percent of the voting age population. Consequently the North Carolina Supreme Court had to determine what was meant by a "majority" in the first element of *Gingles*.

The North Carolina Supreme Court held, and the United States Supreme Court affirmed (as discussed in the response to Question 5) that a potential Section 2 violation exists only when the minority group would constitute at least 50 percent of the relevant population in the district. The North Carolina

Supreme Court specifically referred to the relevant population as "citizens of voting age," but did not discuss why it used that measure rather than census voting age population (which includes both citizens and non-citizens). As noted above in the response to Question 5, the United States Supreme Court plurality did not use the term "citizen voting age population" in affirming the North Carolina Supreme Court decision, instead referring to "voting age population" or "voting population." Nevertheless, in the absence of a clear rejection of the citizen voting age population standard by the United States Supreme Court, we believe the General Assembly should follow the North Carolina Supreme Court's directive to use citizen voting age population in determining whether Section 2 requires the creation of a legislative district that will consist of something other than a whole county — if the legislature can overcome the difficulties in identifying citizen voting age population as discussed in our answer to Question 7.

7. Does the U.S. Census Bureau report citizen voting age population? If not, can the General Assembly reasonably estimate citizen voting age population and, if so, how should that calculation be made?

The 2010 census forms did not include questions about citizenship and the Census Bureau did not include citizenship information in population data it reported for redistricting purpose in March of this year (the P.L. 94-171 block-by-block data).

We are not demographers and our knowledge of census data is limited, but we understand that the Census Bureau does include a question about citizenship on its annual American Community Survey which goes to about 2.5 percent of the households in the country. Based on that sampling the Census Bureau can estimate citizen and non-citizen population, but the estimates are not available at the census block level to match with the P.L. 94-171 data used for redistricting. We also understand that the estimates based on the American Community Survey are for boundaries as defined by the 2000 census and that 2010 census geography may be different in some places.

We are not qualified to respond further as to how the calculation of citizen voting age population should be made, as a demographer is needed for that purpose, but here is the conclusion reached by one scholar who has examined the question: "For purposes of one-person, one-vote or even one-citizen, one-vote, therefore, the only relevant citizenship data available from the census gives ballpark figures, at best, and misleading and confusing estimates at worst." Nathaniel Persly, "The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them," 32 *Cardozo L. Rev.* 755, 776 (2010-11).

8. Do African Americans constitute a larger percentage of the citizen voting age population than the voting age population, and if so, why?

We think that the answer is yes for North Carolina, but the General Assembly should consult a demographer for a more reliable response. Our answer is based on the assumption that the largest non-citizen population in North Carolina is Latino (the American Community Survey estimates for North Carolina appear to support that assumption). The Census Bureau reports (see "2010 Census Briefs, Overview of Race and Hispanic Origin: 2010," March 2011) that nationally 53 percent of people who identified themselves as being of Hispanic origin chose "White" as their race while only 2.5 percent chose "Black or African American." If, as seems likely, most of the non-citizen population in North Carolina are people who identified themselves for the census as being of Hispanic origin, and if the ratio between those in the Hispanic-origin population who chose white and those who chose black for their

race is similar to what is reported in the Census Bureau report, it would follow that the exclusion from the voting age population of non-citizens would exclude more whites than blacks and thus would increase African Americans' percentage of the voting age population. We assume, however, that the numbers might vary from one part of the state to another. We repeat that a demographer could provide a more reliable response.

9. What is the likelihood that African Americans would constitute a majority of the citizen voting age population if a legislative district in North Carolina was constructed to have a majority African American voting age population?

As explained in the response to Question 8, it would appear to us likely that a district with a majority of African Americans in the total voting age population would have the same or a somewhat higher percentage of African Americans in the citizen voting age population. This answer is subject to the recommendation stated earlier that you consult a demographer.

10. Has the United States Supreme Court provided any guidance on the number of majority African American districts that can or should insulate the state from any potential lawsuits claiming that legislative plans violate Section 2 of the Voting Rights Act? If so, please cite the case as well as any opinions you may have based upon such cases regarding the number of majority African American State House or State Senate districts that could or should be created by the General Assembly.

We are not aware of any Section 2 litigation involving North Carolina legislative districts other than the *Gingles* case. As things now stand, the only parts of the state where Section 2 clearly has required the drawing of majority African American districts are those areas involved in the *Gingles* lawsuit. In other areas of the state successful Section 2 lawsuits were brought against local governments, establishing that the *Gingles* elements of black political cohesion, racially polarized voting and lack of minority success existed there in the late 1980s and early 1990s, but not necessarily establishing that it ever was or currently is possible to create majority African American legislative districts (which would be considerably larger than districts for county commissioners or city councils) in those areas.

In considering whether Section 2 requires the drawing of majority African American legislative districts today it should be kept in mind that the *Gingles* decision was based on demographics as they existed in 1982 and an election history primarily from the 1960s and 1970s; likewise, the Section 2 litigation involving local governments mostly was concluded by the early 1990s. North Carolina has changed significantly since then, especially in the piedmont urban areas, so that more recent analysis of voting patterns and the other Section 2 elements would be necessary to assert with any confidence that a Section 2 violation might be found in a particular part of the state today.

11. The North Carolina Supreme Court has clarified constitutional requirements under the North Carolina Constitution for drawing legislative districts. See *Stephenson v. Bartlett*, 355 N.C. 354 (2002) ("*Stephenson I*"); *Stephenson v. Bartlett*, 357 N.C. 301 (2003) ("*Stephenson II*"). Please explain your understanding of how the General Assembly applied the county grouping rules stated in *Stephenson I* and *II* in its creation of the 2003 House and Senate plans.

Our knowledge of the process followed in 2003 is limited by the fact that neither of us was involved in the redistricting efforts of the General Assembly following *Stephenson I* and *Stephenson II*. In preparing our answers to these questions, however, we have spoken with members of the legislative staff who

were involved and we have reviewed the January 2004 Section 5 preclearance documents relating to the 2003 House and Senate plans.

We are aware of two considerations that arose in the application of the county grouping rules. The first concerns the drawing of Voting Rights Act ("VRA") districts and the effect that the drawing of those districts has on the remainder of the plan. The second concerns the method of clustering the non-VRA counties.

Formation of VRA districts. Every decision in the drawing of a particular district affects at least one other district, and in many cases may affect several districts. *Stephenson I* directs that "legislative districts required by the VRA shall be formed prior to the creation of non-VRA districts." The choice of how to draw districts that comply with the VRA will have an effect on the drawing of non-VRA districts.

It appears that the General Assembly applied literally the directive that VRA districts be "formed prior" to non-VRA districts. In the 2004 House preclearance documents, this explanation is given:

"Prior to the [November 2003 redistricting] special session, the co-chairs [of the redistricting committee] consulted with individual Representatives about their districts. All black Representatives were consulted about the effect of the *Stephenson* requirements and the redrawing of their districts. Each black Representative met separately with either Speaker [Jim] Black or Representative Martha Alexander, the co-chair of the House Redistricting Committee, plus the technical staff to discuss that Representative's district and negotiate the boundaries of the district. Black Representatives typically met numerous times with House leadership in a back-and-forth process until the Representative expressed satisfaction with the district as revised."

The 2004 Senate preclearance documents say that "the plan was crafted under the guidance of the Senate's black members, both with regard to the design of their own districts and also with regard to the design of the plan as a whole." In his explanation of the map-creation process to a meeting of the Senate Redistricting Committee on November 24, 2003, co-chair Senator Daniel Clodfeiter said, "in preparing the map, we first drew those districts that were required to comply with the Voting Rights Act."

Clustering of counties. *Stephenson I* directed that once the legislature had drawn VRA districts and had drawn districts in single counties that were the right size for districts, then clusters were to be created by "grouping the minimum number of whole, contiguous counties" necessary to meet the one-person-one-vote population deviation standard, so that "only the smallest number of counties necessary to comply with the [the one-person-one-vote population deviation standard] shall be combined."

A question of interpretation arose with respect to this requirement. By one interpretation, the requirement meant that, once clustering began, the General Assembly must first create the maximum number of two-county clusters possible, then the maximum number of three-county clusters, and so on, until all counties were grouped into clusters. By another interpretation, however, the requirement meant that, once clustering began, the General Assembly must draw clusters in a way to maximize the number of clusters, in an effort to keep as many counties as possible whole. The concern was that under the first interpretation the end result would be a large, multi-county cluster consisting of counties which could not be worked into two-county or three-county or other smaller clusters.

In *Stephenson II*, the Supreme Court cited with apparent approval the trial court's finding that the 2002 legislative redistricting, undertaken in response to *Stephenson I*, contained a "failure to create the maximum number of two-county groupings."

When asked, in effect, at a meeting of the Senate Redistricting Committee on November 4, 2003, which interpretation is correct, staff attorney Bill Gilkeson, since retired, after citing the language in *Stephenson I* and the trial court finding noted above, said, "I'm not sure the court has completely specified what it means there." He said, further, "[T]he two-county combinations would have to be put into a statewide plan. And it may be that it's impossible to put every two-county grouping into a statewide plan. That's about the best I can do."

Senator Clodfelter, at the November 24, 2003, redistricting committee meeting cited above, said:

"[W]e proceeded to comply with the *Stephenson* requirement by drawing districts that minimized the number of counties that were divided and the number of traverses of county boundaries in creating those districts. . . [W]e also followed the mandate of *Stephenson I* and *II* to maximize the number of clusters that were two counties or three counties and to minimize the number of clusters that were larger than two counties or three counties."

As stated earlier, the two of us were not involved in the legislature's interpretation of *Stephenson I* and *Stephenson II* or in the development of the redistricting plans. Our understanding of how the General Assembly applied the county grouping rules is limited to what we have described here.

12. Following the decisions in *Stephenson I* and *II*, in the 2003 legislative plans, how did the General Assembly treat "VRA districts" (as defined in *Stephenson I* and *II*) relative to county groups? Were VRA districts nested with single counties or county groups or were they separated from county groups and treated as being a group of their own?

The *Stephenson I* decision directed that "[t]o the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the [whole-counties provision], as herein established for all redistricting plans and districts throughout the State." In the November 24, 2003, redistricting committee meeting, Senator Clodfelter said:

"[W]hat our Supreme Court told us in *Stephenson* was that in drawing Voting Rights Act districts we could not simply willy-nilly draw the map in any way we wished, but even in drawing those districts, we needed to be mindful of and to try to respect the criteria in the state Constitution and the map that we have before you does so. Even in drawing the Voting Rights Act districts, we tried to observe the principles of keeping counties whole, of minimizing the size of county clusters, and of providing compact districts. And I think we have done that."

We do not know the processes used by the House or Senate map drawers to effectuate maximum compliance with the *Stephenson* criteria in the drawing of the VRA districts. We have not undertaken an independent analysis of the maps to determine whether VRA districts were nested with single counties or county groups or were separated from county groups and treated as being a group of their own.

13. Did the county grouping principles followed by the General Assembly in the 2003 plans comply with *Stephenson I* and *II*? If not, please explain where and how the plans violated the *Stephenson* grouping principles.

The answer to this question turns on two factors.

The first factor is the adoption of one or the other of the two possible interpretations of the *Stephenson I* and *Stephenson II* grouping requirement. Do those decisions require the creation of the maximum number of two-county clusters, then the maximum number of three-county clusters, etc? Or do those decisions require the splitting of the fewest counties?

The second factor arises once that interpretation question is answered. Has the plan as drawn best meet the requirements of the interpretation?

We were not involved in advising the General Assembly as to the proper interpretation of the *Stephenson* decisions nor in the development of the plans adopted by the General Assembly for the House and Senate in 2003. We express no opinion on the proper interpretation, except to say that we believe that it is within the province of the General Assembly, in the first instance, to determine the proper interpretation. We have not attempted to assess the maps as adopted to evaluate whether they best meet the requirements of either interpretation and believe that this question is best addressed to the litigants in *Stephenson*.

14. Please explain your understanding of any criteria in *Stephenson I* and *II* that the General Assembly draws "compact" districts within single counties or county groups. Did the 2003 House and Senate plans comply with this criteria, and if not, please explain the location of any such violation and why you think that a particular district or districts violated this criteria.

In *Stephenson I*, the Supreme Court said that in the dividing of a single county into multiple districts of the appropriate population, the resulting districts "shall be compact." It also said that in the drawing of districts within county clusters, "compact districts shall be formed." The *Stephenson I* decision gave no guidance on how compactness of districts is to be determined. Although various mathematical models exist for measuring compactness, none were mentioned by the court.

In *Stephenson II*, the Supreme Court cited with apparent approval the trial court's finding that the 2002 legislative redistricting, undertaken in response to *Stephenson I*, contained "violations of the *Stephenson* mandate that districts shall be compact." The trial court found those violations on the basis of a visual review of the shapes of the offending districts (for example, "District 11 . . . is not compact. Its eastern boundary has been drawn in such a manner that it runs southward, then swings to the northwest, then . . . curves around a portion of Nash County"). The Supreme Court apparently embraced this method for determining compactness, i.e., a visual review of the shapes.

15. Please explain your understanding of any criteria established in *Stephenson I* and *II* that the General Assembly consider "communities of interest" in drawing districts within a single county or county group. Did the 2003 House and Senate plans comply with this criteria, and if not, please explain the location of any such violation and why you think a particular district or districts violated this criteria.

The Supreme Court in *Stephenson I* said that in the drawing of districts within county clusters, "communities of interest should be considered in the formation of compact and contiguous electoral

districts." The way the court expresses this requirement contrasts noticeably with the way it expressed the compactness requirement. While the court said that "districts shall be compact" and that "compact districts shall be formed," it said only that communities of interest "should be considered."

The *Stephenson I* decision gave no further guidance on how communities of interest were to be taken into account. In *Stephenson II*, the Supreme Court cited with apparent approval the trial court's finding that the 2002 legislative redistricting, undertaken in response to *Stephenson I*, contained violations of "the requirements of the equal protection clause in that the requirements of keeping local government subdivisions or geographically based communities of interest [together] were not consistently applied." The trial court modified, for instance, the legislature's drawing of two districts "to eliminate the splits of these boundaries in keeping with the preservation of local governments as communities of interest" and in another instance it modified a district to include the county seat within a district "anchored" by the county, "to better preserve 'communities of interest.'" The Supreme Court apparently embraced this application of the "communities of interest" requirement to the splitting of political jurisdictions, but beyond that it has given no further guidance.