

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

NORTH CAROLINA STATE CONFERENCE OF)
NAACP, COMMON CAUSE, MARILYN)
HARRIS, GARY GRANT, JOYAH BULLUCK,)
and THOMASINA WILLIAMS,)

Plaintiffs,)

v.)

Wake County
21-CVS-14476

PHILLIP E. BERGER, in his official)
capacity as President Pro Tempore)
of the North Carolina Senate;)
TIMOTHY K. MOORE, in his official)
capacity as Speaker of the North)
Carolina House of Representatives;)
RALPH E. HISE, JR., WARREN DANIEL,)
PAUL NEWTON, in their official)
capacities as Co-Chairmen of the)
Senate Committee on Redistricting)
and Elections; DESTIN HALL, in his)
official capacity as Chairman of)
the House Standing Committee on)
Redistricting; THE STATE OF NORTH)
CAROLINA; THE NORTH CAROLINA STATE)
BOARD OF ELECTIONS; DAMON CIRCOSTA,)
in his official capacity as Chair)
of the State Board of Elections;)
STELLA ANDERSON, in her official)
capacity as Secretary of the State)
Board of Elections; STACY EGGERS)
IV, in his official capacity as)
Member of the State Board of)
Elections; JEFF CARMON III, in his)
official capacity as Member of the)
State Board of Elections; TOMMY)
TUCKER, in his official capacity as)
Member of the State Board of)
Elections; KAREN BRINSON BELL, in)
her official capacity as Executive)
Director of the State Board of)
Elections,)

Defendants.)

TRANSCRIPT, Volume 1 of 1

Pages 1 - 62

Tuesday, November 30, 2021

November 30, 2021, Civil Session

The Honorable A. Graham Shirley, II, Judge Presiding

Plaintiffs' Motion for Preliminary Injunction

Legislative Defendants' Motion to Dismiss

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1 (Superior Court of Wake County convened civil
2 court session November 30, 2021, before the
3 Honorable A. Graham Shirley, II. The case of
4 NC State Conference of NAACP, et al. v.
5 Berger, et al., was called for hearing at
6 10:31 a.m.)

7 THE COURT: Good morning, everyone. All right.
8 We are here in North Carolina State Conference of the NAACP,
9 et al., v. Phillip E. Berger, et al., in 21-CVS-14476. If
10:31AM 10 counsel for the parties, starting with the plaintiff, would
11 introduce themselves for the record.

12 MS. KLEIN: Thank you, Your Honor, and good
13 morning. My name is Hilary Harris Klein of the Southern
14 Coalition For Social Justice on behalf of Plaintiffs. I'm
10:31AM 15 joined by my co-counsel, Allison Riggs, also of the Southern
16 Coalition For Social Justice, as well as Mitchell Brown and
17 Katelin Kaiser.

18 I'm also joined by co-counsel from the firm Hogan
19 Lovells -- they're sitting behind me -- Tom Boer and Olivia
10:31AM 20 Molodanof.

21 THE COURT: Thank you.

22 MS. KLEIN: I would also introduce the Court to
23 our client, Bob Phillips of Common Cause, who is the
24 executive director, who is also here today, Your Honor.

10:31AM 25 THE COURT: All right. Thank you.

1 MR. STRACH: Good morning, Your Honor.
2 Phil Strach with Nelson Mullins here for the Legislative
3 Defendants.

4 MS. MCKNIGHT: Good morning, Your Honor.
10:32AM 5 Kate McKnight here on behalf of the Legislative Defendants.

6 THE COURT: All right.

7 MR. STEED: Good morning, Your Honor.
8 Terence Steed on behalf of the State Defendants.

9 MR. BRANCH: Good morning, Your Honor.
10:32AM 10 John Branch here on behalf of Legislative Defendants.

11 THE COURT: All right. As a housekeeping matter,
12 I have one motion for pro hac vice that has been submitted
13 to me. That is for Ms. McKnight.

14 Is there any objection from the plaintiffs to her
10:32AM 15 admission?

16 MS. KLEIN: Plaintiffs do not object, Your Honor.

17 THE COURT: All right. I noticed that there were
18 a number of individuals on the complaint that said -- that
19 stated pro hac vice motions to be filed. Have those been
10:33AM 20 filed, and do they need to be acted upon?

21 MS. KLEIN: No, Your Honor, they have not yet
22 been filed, but they will be imminently. Thank you.

23 THE COURT: All right. So, what -- I see you
24 have the "backslash S backslash." What is that?

10:33AM 25 MS. KLEIN: Your Honor, that is to indicate the

1 signature of attorneys that have appeared in this case, but
2 we're happy to not do that going forward, if necessary.

3 THE COURT: Well, only -- under North Carolina
4 General Statute Rule 84.4, or Section 84.4, only attorneys
10:33AM 5 licensed to practice law in the state, or otherwise admitted
6 to practice, may sign pleadings; otherwise, it constitutes
7 the unauthorized practice of law. So, in the future, no one
8 is to sign a pleading unless they have been admitted pro hac
9 vice or been admitted to the State Bar of North Carolina,
10:33AM 10 just as a point of clarification.

11 That breach is observed -- that rule is observed more
12 in its breach than its rule, but it's something that the
13 Court places emphasis on, because, of course, when you put a
14 signature on, you're certifying certain things pursuant to
10:34AM 15 Rule 11 of the North Carolina Rules of Civil Procedure.

16 All right. Any other administrative matters before we
17 proceed?

18 MS. KLEIN: No, Your Honor.

19 THE COURT: All right. When counsel is actively
10:34AM 20 speaking, they will be permitted to take their mask off.
21 Otherwise, I request that you keep your mask on. Since this
22 is Plaintiffs' -- we'll proceed with Plaintiffs' motion
23 first.

24 MS. KLEIN: Thank you, Your Honor, and may it
10:34AM 25 please the Court. Your Honor, if it's amenable to the

1 Court, because of the overlapping issues and the many
2 motions, I plan to address our motion, as well as just a few
3 of the points raised by Legislative Defendants in theirs.

4 THE COURT: That's fine.

10:34AM

5 MS. KLEIN: Your Honor, Plaintiffs are here
6 before you today with a fairly straightforward request, and
7 that is to declare their rights and the Legislative
8 Defendants' duties to adhere to the North Carolina
9 Constitution when undertaking their mandate to redistrict
10 state legislative maps.

10:35AM

11 Plaintiffs have further requested injunctive relief,
12 including a preliminary injunction, that would enjoin and
13 delay the March 2022 primaries and their related deadlines
14 to protect Plaintiffs from irreparable harm.

10:35AM

15 THE COURT: All right. Just a minute. So you're
16 not seeking to have the maps invalidated in this action; is
17 that correct?

18 MS. KLEIN: That's correct, Your Honor.

10:35AM

19 THE COURT: So what we're going to end up with is
20 a set of maps that have been approved by the legislature,
21 and as a matter of operation by law, until a court
22 determines otherwise, they are presumed to be
23 constitutional, and at the same time telling -- asking me to
24 say you can't proceed on the maps that are presumed to be
25 constitutional, because we don't want you to invalidate

10:35AM

1 them, and we're going to delay the election; is that
2 essentially what you're asking this Court to do?

3 MS. KLEIN: Not exactly, Your Honor.

4 THE COURT: Well, would you agree with me that
10:36AM 5 until those maps are declared invalid they are presumed to
6 be constitutional? Until a court declares those maps
7 invalid, that they are presumed as a matter of law to be
8 constitutional?

9 MS. KLEIN: I would agree with that. And the key
10:36AM 10 language is until a court declares them invalid. And here,
11 Plaintiffs' action is under the Declaratory Judgment Act
12 specifically, which was designed to give the type of
13 anticipatory relief we have asked for here.

14 THE COURT: But you are not asking me to declare
10:36AM 15 the maps invalid, are you?

16 MS. KLEIN: We have not yet requested that.

17 THE COURT: Okay. In fact, had you done that,
18 you would have been required to serve a copy of your
19 complaint on the senior resident judge of Wake County, who
10:36AM 20 would then be required to send it to the Chief Justice of
21 the North Carolina Supreme Court to appoint a three-judge
22 panel; is that correct?

23 MS. KLEIN: That's my understanding.

24 THE COURT: All right. So, sitting here today, I
10:36AM 25 cannot, I have no -- absolutely no authority under the

1 general statutes to declare these maps unconstitutional or
2 invalid, because that power is solely vested in the
3 three-judge panel constituted under North Carolina General
4 Statute 1-267; is that correct?

10:37AM

5 MS. KLEIN: Yes. And Plaintiffs have not asked
6 for that relief.

7 THE COURT: Okay.

10:37AM

8 MS. KLEIN: Plaintiffs have asked for relief
9 under the Declaratory Judgment Act to resolve an ongoing
10 controversy as to what the state constitution requires of
11 Legislative Defendants. And Plaintiffs have separately
12 alleged harm arising out of that.

10:37AM

13 THE COURT: Well, you're asking me to give an
14 advisory opinion, aren't you, before an actual act is
15 passed?

10:37AM

16 MS. KLEIN: We are asking for relief that is
17 specifically afforded under the Declaratory Judgment Act.
18 So, the Declaratory Judgment Act was passed in 1931,
19 Your Honor. And it was -- it was passed, and I can refer
20 the Court to a Law Review article written by the dean of UNC
21 at the time talking about that act soon after it had been
22 passed.

10:38AM

23 And it was passed to give parties the opportunity, when
24 there is uncertainty and an imminent breach arising out of
25 that uncertainty, when there is an uncertainty as to duties,

1 as to legal status, as to rights, as there is here, the
2 parties can ask for judicial review earlier to prevent that
3 harm. And what that judicial review allows for here,
4 Your Honor, is for the Court to provide certainty.

10:38AM

5 The parties can go back and do with that what they
6 wanted, but the argument that we have to also act to enjoin
7 the maps, which, by the way, were not passed when we filed
8 this suit, so the argument that we have to enjoin the
9 maps --

10:38AM

10 THE COURT: But you could have waited. You could
11 have waited.

12 MS. KLEIN: Your Honor, we could have waited.
13 And at that time, we had no idea how long the process for
14 enacting maps was going to extend. It could have gone until
15 Thanksgiving.

10:38AM

16 THE COURT: So --

17 MS. KLEIN: And the declaratory judgment allows
18 the Court to provide that anticipatory review now, and the
19 parties get to do what they want. Their position and what
20 the Court has mentioned about needing to enjoin the final
21 maps, that's like asking -- in the classic contract
22 situation, that's like asking for parties to not only bring
23 a Declaratory Judgment Act, but also bring breach of
24 contract before that has even happened.

10:38AM

10:39AM

25 And the declaratory judgment does not require that,

1 Your Honor. Everything is possible until the primaries
2 happen, until voters vote --

3 THE COURT: And just --

4 MS. KLEIN: -- under these new maps.

10:39AM 5 THE COURT: -- as anything was possible until the
6 maps were enacted, wasn't it?

7 MS. KLEIN: It remains possible, and, in fact --

8 THE COURT: No, everything was possible in terms
9 of compliance with Stephenson or compliance with the
10:39AM 10 VHA (sic) up until the time the maps were enacted?

11 MS. KLEIN: And it remains possible, Your Honor.

12 THE COURT: Okay.

13 MS. KLEIN: Legislative Defendants have provided
14 no reason other than their own unwillingness to comply with
10:39AM 15 the law.

16 THE COURT: But you could have waited until the
17 maps were enacted to determine whether there was a violation
18 of the Whole County Provision or violation of the VRA.

19 MS. KLEIN: We didn't have to, Your Honor,
10:39AM 20 because at the time --

21 THE COURT: Wait a minute.

22 MS. KLEIN: -- that we filed this suit -- -

23 THE COURT: I didn't ask whether you had to. I
24 said you could have.

10:40AM 25 MS. KLEIN: We could have, Your Honor.

1 THE COURT: Let me ask you this. Let's say our
2 legislature -- let's imagine a legislature that is -- either
3 has a governor who will sign this legislation or they have a
4 veto-proof majority. And this fictitious legislature in
10:40AM 5 North Carolina is going to -- is poised to pass legislation
6 that states no citizen of North Carolina or anyone within
7 the geographical boundaries of North Carolina can use the
8 word "north" in the spoken or written word. Now, I hope we
9 could all agree that that proposed legislation is a
10:40AM 10 violation of the First Amendment.

11 Could you -- could a court enjoin the legislature from
12 voting on such an act, or does the act have to pass before
13 we declare it unconstitutional?

14 MS. KLEIN: To answer your question, Your Honor,
10:40AM 15 the judicial branch could not enjoin the General Assembly
16 from voting on that. And that's not what Plaintiffs have
17 asked for here.

18 But it is the sole responsibility of the judicial
19 branch, Your Honor, to state what the state constitution
10:41AM 20 requires and how it's applied in certain situations. And
21 courts have done this time and time again, to state this is
22 what the constitution requires --

23 THE COURT: Well --

24 MS. KLEIN: -- and it has to be followed.

10:41AM 25 THE COURT: -- hasn't the Stephenson court

1 already said what the constitution requires?

2 MS. KLEIN: Yes, Your Honor.

3 THE COURT: I mean, this is not -- this is --
4 what Stephenson says is a well settled matter of law. Why
10:41AM 5 do you need to come to me to say what the law is? Why
6 didn't you wait, once they enacted it, and say, you violated
7 Stephenson and you violated the VRA?

8 MS. KLEIN: We came here because it was very
9 clear they skipped the first step of Stephenson. They
10:41AM 10 decided to skip entirely the first step of Stephenson, and
11 that was apparent when the criteria were passed and
12 Plaintiffs and Plaintiffs' counsel --

13 THE COURT: When were the criteria passed?

14 MS. KLEIN: The criteria were passed on August --
10:41AM 15 on August 5th. No, on August 12th, Your Honor. They were
16 first proposed, I think, around the 5th. They were passed,
17 and Plaintiffs pointed this out. Plaintiffs wrote a
18 letter --

19 THE COURT: Why did you wait until October 29th
10:42AM 20 to file the motion for preliminary -- or motion for
21 declaratory relief and preliminary injunction?

22 MS. KLEIN: To understand whether this would
23 actually cause harm, Your Honor --

24 THE COURT: Okay.

10:42AM 25 MS. KLEIN: -- and --

1 THE COURT: So, when did the harm occur? Does
2 the harm occur when the maps are passed? Or what harm
3 occurs before the maps are passed?

10:42AM

4 MS. KLEIN: The irreparable harm, Your Honor,
5 occurs when voters are going to vote under these maps. It
6 was very clear --

7 THE COURT: Okay. So, when voters -- voters can
8 only vote under those maps once they're enacted. So, the
9 harm doesn't occur until the maps are enacted.

10:42AM

10 MS. KLEIN: Your Honor, hypothetically, right
11 now, this legislature, as it has done in the past, could
12 still comply with Stephenson. There is still time. The
13 primaries have not taken place, and --

10:42AM

14 THE COURT: Does Stephenson -- does compliance
15 with Stephenson necessarily mean compliance with the VRA?

16 MS. KLEIN: Yes, Your Honor.

17 THE COURT: It does. So, you can comply with
18 Stephenson, and if you comply with Stephenson, there will
19 never be a violation of the VRA?

10:43AM

20 MS. KLEIN: As Stephenson is written.

21 THE COURT: No, it says all you do is create VRA
22 districts first. But sometimes people create VRA districts
23 that pack more African-Americans into the district than is
24 necessary, don't they? And that's not in compliance with
10:43AM 25 the VRA.

1 MS. KLEIN: So, Legislative Defendants attempted
2 to do what you're saying last cycle in the Covington matter,
3 and the court explicitly found not only is this first step
4 of Stephenson crucial, but it has to be followed properly.
10:43AM 5 And the court found specifically they had not followed the
6 requirements of the VRA, specifically.

7 By skipping this step, they're saying, okay, we got
8 called afoul, we got called afoul in the game last cycle,
9 but --

10:43AM 10 THE COURT: So, what you're saying is that the
11 process is wrong, because not only did they create VRA
12 districts, they failed to create VRA districts that complied
13 with the constitution and the VRA?

14 MS. KLEIN: The court in the last cycle --

10:44AM 15 THE COURT: No, I'm talking about in this case.

16 MS. KLEIN: In this case?

17 THE COURT: In this case.

18 MS. KLEIN: In this case, Your Honor, they never
19 made any meaningful attempt --

10:44AM 20 THE COURT: Okay. So --

21 MS. KLEIN: -- to determine what the VRA requires
22 at all. They never made any meaningful attempt --

23 THE COURT: So, if they --

24 MS. KLEIN: -- no analysis.

10:44AM 25 THE COURT: -- if they made an analysis, but it

1 was wrong, does that violate Stephenson?

2 MS. KLEIN: That would -- that is not this case.
3 That's not what happened.

10:44AM

4 THE COURT: That's not what I'm asking you. You
5 need to please answer the questions I ask.

6 MS. KLEIN: Yes, Your Honor.

7 THE COURT: If they misconstrued the VRA or if
8 they misconstrued Stephenson but make an honest attempt to
9 comply with the VRA, is Stephenson satisfied?

10:44AM

10 MS. KLEIN: Unless -- no, unless they have
11 properly -- unless they have properly determined what the
12 VRA requires.

10:44AM

13 THE COURT: Okay. So, under that analysis, you
14 would be able to bring a declaratory judgment before any map
15 is passed anytime you believe they've made a mistake in the
16 application of the VRA and the Whole County Provision?

10:45AM

17 MS. KLEIN: I'm not sure that's correct,
18 Your Honor, and this is because in that hypothetical case,
19 which is very different from this one, that would be a
20 disagreement between the parties as to whose analysis is
21 correct. That is not what happened here. In their brief,
22 Legislative Defendants admit they are not aware of any such
23 analysis.

10:45AM

24 THE COURT: Why are we sitting here 30 days after
25 the complaint was filed on a preliminary injunction motion

1 when the harm of the process, you claim, was irreparable?

2 MS. KLEIN: Plaintiffs filed -- I don't know the
3 answer to that question. Plaintiffs filed a motion for
4 preliminary injunction the same day the complaint was filed,
10:45AM 5 Your Honor, and we have acted --

6 THE COURT: Why didn't you request a TRO?
7 Because a TRO gets you into court quick. TROs have a
8 tendency to bring the defendants to the table much more
9 quickly, and TROs are typically brought when there is
10:46AM 10 irreparable harm, when the parties are screaming that there
11 is irreparable harm. But here we sit 30 days later.

12 MS. KLEIN: Well, first of all, Your Honor, the
13 triggering -- the first deadline for the upcoming primaries
14 is December 6th, and we filed this on October 29th. So, as
10:46AM 15 far as the TRO, you know, crying imminent harm at that
16 point, within days, we did not -- we thought that -- we made
17 the reasoned judgment, Your Honor, that a preliminary
18 injunction was the more appropriate standard, because --

19 THE COURT: But I thought it was the process that
10:46AM 20 was causing the harm. And you -- your complaint had not
21 only originally asked for the Court to enjoin the elections,
22 you asked this Court to enjoin the process the legislature
23 was using. So, if -- because that process was causing
24 imminent harm to the plaintiffs.

10:46AM 25 If that is the case, why was a TRO not requested to

1 stop the process and stop the imminent harm that you claim
2 here?

3 MS. KLEIN: The ship has not sailed -- because
4 the ship has not sailed until the primaries take place. And
10:47AM 5 the first -- and the first deadline related to that,
6 Your Honor, is December 6th. Plaintiffs seek for the
7 orderly administration of elections. Unlike last cycle
8 where several elections were undertaken under unlawful
9 maps --

10:47AM 10 THE COURT: If you're seeking --

11 MS. KLEIN: -- here --

12 THE COURT: -- for the orderly process of
13 elections, I still don't understand why the TRO was -- why a
14 TRO was not sought prior to a preliminary injunction and why
10:47AM 15 you waited until October 29th, when, in August, you knew the
16 criteria -- did you doubt that they were going to use the
17 criteria that they said would be used to create the maps?

18 MS. KLEIN: We did not doubt that, but at that --
19 perhaps could I go briefly through the --

10:47AM 20 THE COURT: Sure.

21 MS. KLEIN: -- procedural history and how things
22 played out in this case, Your Honor? Thank you.

23 So, in this matter, that first step, Your Honor, as
24 we've talked about, happened in August when they proposed
10:48AM 25 race blind -- what are called race-blind criteria. And at

1 that point, Plaintiffs' counsel provided public comment,
2 indicating the first step of Stephenson, this is not
3 required under law, and, in fact, the law requires the
4 consideration of racial data in order to comply with
10:48AM 5 Stephenson's requirement that the VRA be -- the requirements
6 under the VRA be ascertained.

7 After that point, it was not clear. There was plenty
8 of opportunity for Legislative Defendants to still comply
9 with Stephenson. They could have performed an analysis.
10:48AM 10 They could have done several different things at that time.
11 And, Your Honor, Plaintiffs do not seek judicial
12 intervention lightly. This is not the first -- this is not
13 the first option for Plaintiffs. This is a last resort, to
14 be before Your Honor.

10:49AM 15 So, when --

16 THE COURT: Can you -- can you use a process
17 other than that set out by Stephenson and come up with a map
18 that satisfies the VRA and the Whole County Provision of the
19 constitution?

10:49AM 20 MS. KLEIN: Absolutely.

21 THE COURT: Okay.

22 MS. KLEIN: And court processes -- court
23 processes have outlined in past cases, in Covington and
24 Common Cause. The courts ordered briefing, extensive --
10:49AM 25 there's extensive briefing on what the VRA requires, and

1 that after, the courts ordered remedial processes that
2 followed -- that followed the other Stephenson requirements.

3 THE COURT: In fact, the VRA doesn't command the
4 state to adopt any particular map, does it?

10:49AM

5 MS. KLEIN: That's correct, Your Honor. And
6 Plaintiffs --

7 THE COURT: Rather, it prevents the enforcement
8 of plans, the enforcement of plans, the purpose or effect of
9 which is to dilute the voting strength of legally protected
10 minorities. The plan.

10:49AM

11 MS. KLEIN: But the state constitution
12 requires -- as interpreted by the court in Stephenson, the
13 state constitution requires a process that requires
14 consideration of federal law first. Federal law is an
15 express, not an implied requirement of the state's
16 constitution. And the court in Stephenson issued a process
17 requirement. The language in Stephenson, which I'm happy to
18 walk the Court through --

10:50AM

19 THE COURT: I've read Stephenson numerous times.

10:50AM

20 MS. KLEIN: -- does that. Wonderful, Your Honor.

21 And Dickson v. Rucho, a recent 2015 decision, when they
22 talk about Stephenson, they even said, again, this is a
23 process requirement. And it imparts a process --

24 THE COURT: If you don't follow the process, if
25 you don't follow the process, but the end results are plans

10:50AM

1 that are compliant with the VHA and the Whole County
2 Provision of the constitution, what is the harm?

3 MS. KLEIN: So, first of all, the harm there
4 would be the maps. But that is not this case.

10:50AM

5 THE COURT: No, we're assuming that they didn't
6 follow Stephenson, but we're assuming that the maps comply
7 with the VHA -- pardon me, the VRA and the Whole County
8 Provision, and throw in the one-person-one-vote requirement.

10:51AM

9 Because you can create a map that complies with those
10 three requirements without following Stephenson. It may
11 take you longer to do it, and it's not what the Supreme
12 Court has said you should do, but you can create a map that
13 satisfies all three of those legislative and constitutional
14 requirements. So, if you do create that map without
15 following Stephenson, what is the harm?

10:51AM

16 MS. KLEIN: So, the harm there, Your Honor --
17 first of all, I would say that -- I would start by saying,
18 Your Honor, that that is a hypothetical that is not this
19 case here. Plaintiffs have alleged --

10:51AM

20 THE COURT: I know it's a hypothetical.

21 MS. KLEIN: Okay.

22 THE COURT: But we're talking about when you
23 filed the suit, what was hypothetically going to happen with
24 these maps. It was hypothetical that the maps would be
25 enacted. I don't even think it's hypothetical that they

10:52AM

1 violate the VRA or the whole county requirement. All you've
2 alleged is they violate the procedural requirements of
3 Stephenson.

10:52AM

4 MS. KLEIN: So, in that case, Your Honor, the
5 declaratory judgment, I believe, would still allow, still
6 allow for judicial intervention, and here's why. It's
7 because the declaratory judgment squarely provides that
8 plaintiffs and parties can come to the court for
9 anticipatory relief, whether or not further -- they have --
10 whether or not further relief could be claimed.

10:52AM

11 THE COURT: So, what do I do -- what do I do if I
12 grant your preliminary injunction, what do I do with this
13 plan that is -- these plans that have been passed that are
14 presumed to be constitutional under our law because no court
15 has struck them down? What do I do with those plans?

10:52AM

16 MS. KLEIN: Plaintiffs have not asked for the
17 Court to do anything with them.

10:53AM

18 THE COURT: No, but I've got to deal with them,
19 because they're plans passed by the legislature that are
20 presumed to be constitutional. And since they're presumed
21 to be constitutional, I mean, do I just let them -- it's
22 almost a pocket veto, is what you're asking me to do with
23 the plans. Just let them remain there, don't -- we're not
24 going to attack the constitutionality or the legality of the
25 plans, don't do anything, but at the same time make them go

10:53AM

1 back and do new plans.

2 MS. KLEIN: Respectfully, Your Honor, I think it
3 would be helpful to draw an analogy to this case to a
4 classic contract dispute where the Declaratory Judgment Act
10:53AM 5 also would apply. So, what we're saying in that dispute,
6 where parties have a disagreement as to what is required on
7 an instrument, they come to the court to resolve that
8 disagreement. After that declaratory judgment ruling, the
9 parties can go and act accordingly, and one would hope the
10:54AM 10 parties go and act accordingly to follow what the judge has
11 declared. And that transforms into this case precisely.

12 Legislative Defendants can take a declaration from this
13 Court, and they can decide to act accordingly. They have
14 not pointed to any reason they couldn't do that. And until
10:54AM 15 the primaries have been elected, that's possible. What
16 they're saying, by presuming we have to also challenge the
17 map, that's like saying you have to bring declaratory
18 judgment and breach of contract at the same time.

19 And the Declaratory Judgment Act was specifically
10:54AM 20 designed so that parties didn't have to wait for that step.
21 You don't have to bring declaratory judgment and breach of
22 contract at the same time. You can ask for the declaratory
23 judgment, and the parties go back and they act accordingly.

24 Now, Plaintiffs can also, as other parties have already
10:54AM 25 done, they can also seek further, you know, intervention

1 from a three-judge panel on the maps. I think we know these
2 maps are problematic, but that's not what Plaintiffs are
3 doing here. They are asking for this Court to provide badly
4 and urgently needed certainty as to what the court required
10:55AM 5 in Stephenson, as to what the state constitution requires.

6 THE COURT: Again, when we start talking about
7 badly and urgently and we're sitting here almost four months
8 since the criteria was announced, when I hear badly and
9 urgently and see that four-month lapse in time, it makes me
10:55AM 10 wonder how urgent it's needed, if we're going to address in
11 a three-judge panel whether the maps actually comply with
12 the -- or whether that there's proof that they comply or
13 don't comply with the VHA or whether there's permissible or
14 impermissible political gerrymandering.

10:55AM 15 MS. KLEIN: So here, Your Honor, I think
16 principles of equity really come in, because Plaintiffs
17 relied upon specific statements by the Legislative
18 Defendants that they would consider evidence. They said in
19 committee -- several times, the committee chair said, hey,
10:56AM 20 if anybody has evidence of, you know, VRA requirements,
21 racially polarized voting, if anybody has evidence, you
22 know, we will consider that. And Plaintiffs did that.

23 Plaintiffs' counsel wrote two letters, one on
24 October 8th, one again on the 25th when proposed maps were
10:56AM 25 coming out, saying, this is going to harm votes of color.

1 There are serious VRA issues with these maps. You have to
2 take a look. And after -- and they repeatedly disregarded
3 those.

10:56AM

4 And it was only until it became absolutely clear, after
5 Plaintiff Common Cause had provided racially polarized
6 voting analyses, saying this is what's going to happen in
7 these districts that you proposed, when they ignored that,
8 it was, I believe, days after that that we filed the
9 complaint and sought judicial intervention.

10:56AM

10 THE COURT: So, they've come out with --

11 MS. KLEIN: It was a last resort.

10:57AM

12 THE COURT: They've come out with proposed maps,
13 they had come out with the proposed maps, and letters were
14 written saying you've got problems with these maps. Well,
15 wasn't there a violation of Stephenson before they even sent
16 the letters?

17 MS. KLEIN: Stephenson requires them before
18 setting districts that they do federally -- it says,
19 districts required by the VRA shall be drawn before.

10:57AM

20 THE COURT: And what --

21 MS. KLEIN: And during the criteria, during the
22 process, no districts had been drawn yet. And when I say
23 they had proposed maps, this was on the website. They were
24 posting what are called member-proposed maps to a specific
25 place on the website. And those maps were the first

10:57AM

1 indication that they had failed to take the step. They had
2 drawn all of the other districts --

3 THE COURT: When's the district actually set?

4 MS. KLEIN: -- before --

10:57AM 5 A district would actually be set when the map is
6 enacted.

7 THE COURT: Okay.

8 MS. KLEIN: And it became very clear when they
9 started proposing these maps that they had skipped and they
10:57AM 10 were not going to do the first step of Stephenson. They
11 actually stated affirmatively in committee during this
12 process, this was after -- after, you know, the criteria --
13 this was in October. They stated affirmatively that they
14 had no intention, the committees had no intention of
10:58AM 15 commissioning any needed, you know, racial analysis that
16 would be needed to comply with the VRA.

17 And it was after that process and it was after it was
18 clear that they had skipped the first step of Stephenson
19 that -- and after many efforts to ask them to undertake that
10:58AM 20 step.

21 THE COURT: How soon after you filed your lawsuit
22 did they enact the maps?

23 MS. KLEIN: It was four days after. But prior to
24 that, Your Honor, there was no announced schedule, there was
10:58AM 25 no indication of when those maps would be passed. It could

1 have extended through Thanksgiving. There was no indication
2 to anyone of how long these maps would take to make their
3 way through. Or, you know, the House map, for example,
4 Your Honor, that was filed on the 28th, was a placeholder.
10:58AM 5 You know, we have that in the binder of exhibits we provided
6 to the Court.

7 THE COURT: Let me ask you --

8 MS. KLEIN: It didn't even have specific lines,
9 it was just a blank placeholder. So, it was not clear how
10:59AM 10 long these maps would take to make their way through the
11 process. If we had to wait until Thanksgiving, Your Honor,
12 it would have been -- you know, if that's when this whole
13 thing had happened and then we had sought to get in front of
14 a court -- you know, it took five weeks for us to get in
10:59AM 15 front of the court. There are natural administrative things
16 that have to happen before getting --

17 THE COURT: You could have gotten in front of the
18 court within a week on a temporary restraining order.

19 MS. KLEIN: And there, Your Honor, we would have
10:59AM 20 faced an argument like this one, the other side of this
21 coin. They would have said there's no deadline until
22 December 6th. The primary -- you know, the
23 primaries candidate -- the candidate deadline for the
24 2020 (sic) election isn't until December 6th, and Plaintiffs
10:59AM 25 have filed this too early, and the legislature can still

1 decide to do this analysis. If we had -- that's what would
2 have happened if we had filed.

3 Instead, Your Honor, Plaintiffs came here as a last
4 resort, after many efforts, after many efforts to convince
10:59AM 5 the Legislative Defendants to follow the law. And we asked
6 here to seek minimal -- the minimum relief here that we have
7 requested is just a declaration of what the state
8 constitution requires and time. And the schedule that we've
9 requested, an injunction until May, is the schedule that was
11:00AM 10 followed in the last cycle when the, you know, primaries
11 were classically scheduled in May.

12 So, Plaintiffs have really made extreme efforts, first
13 of all, to resolve this without the need for court
14 intervention and also to only seek court intervention,
11:00AM 15 again, with time before those deadlines start happening.

16 But it should be clear that anything is possible until
17 the primary elections happen. Legislative Defendants can --
18 upon a declaration of this Court that they violated their
19 duties, Legislative Defendants can decide to comply. They
11:00AM 20 have forecasted unwillingness to do so, but that doesn't
21 change the fact that Plaintiffs are entitled to relief.

22 THE COURT: All right. And you've submitted a
23 number of affidavits in support of your motion; is that
24 correct?

11:00AM 25 MS. KLEIN: That's correct, Your Honor.

1 THE COURT: All right. Your motion was filed and
2 served on October 29th, the day the complaint was filed?

3 MS. KLEIN: That's correct.

11:01AM

4 THE COURT: And the affidavits were served on
5 November 5th; is that correct?

6 MS. KLEIN: Shortly after. And they were served
7 with a copy of the motion. They were served with a copy of
8 the motion.

11:01AM

9 THE COURT: All right. But the initial motion
10 was served on October 29th?

11 MS. KLEIN: That's correct.

12 THE COURT: Is that in compliance with Rule 6(d)?

11:01AM

13 MS. KLEIN: So, I understand it to be, and this
14 is why, Your Honor. So, that rule provides -- the North
15 Carolina rules provide that Legislative Defendants have to
16 have notice of a motion five days -- more than five days
17 before that hearing. And here, there was much more. There
18 was many, many weeks of notice.

11:01AM

19 And that rule, Your Honor, I believe, only requires
20 that the affidavits be served with a copy of the motion.
21 And I'm not aware that Legislative Defendants have objected
22 to that.

11:02AM

23 THE COURT: And Mr. Bartlett's affidavit, even
24 though he signed it on November 3 of 2021, it appears that
25 he swore to it on January 20th of 2021. I'm not sure how

1 that happens. Is that a typo?

2 MS. KLEIN: Oh, Your Honor, that is a typo. I'm
3 sorry.

4 THE COURT: So, when was he sworn to that?

11:02AM 5 MS. KLEIN: He swore to that on the 3rd or the
6 4th. I'm happy to have us submit --

7 THE COURT: That's all right.

8 MS. KLEIN: Very, very promptly we can submit a
9 corrected --

11:02AM 10 THE COURT: I will consider the affidavit,
11 understanding that it's a typo. And on your --

12 MS. KLEIN: Oh, Your Honor, I'm sorry. It says
13 executed November 3rd at the top of that page. So that
14 is -- that is just the notary public. And the notary
11:02AM 15 public -- that's just for the notary public's affirmation.

16 THE COURT: Well, you can't swear someone to
17 something in January of 2021 when I don't think the census
18 data was out then.

19 MS. KLEIN: Yeah. I'm sorry for that --

11:03AM 20 THE COURT: So that would be November 3rd?

21 MS. KLEIN: -- but it is November 3rd, and it
22 says that. I apologize, Your Honor.

23 THE COURT: All right. Go ahead.

24 MS. KLEIN: So, would it be helpful for the Court
11:03AM 25 if I walked through more of the exhibits here, including the

1 affidavits? I'd like to actually direct the Court's
2 attention to the letters --

3 THE COURT: Okay.

11:03AM

4 MS. KLEIN: -- that I had. That's in the index
5 of exhibits, Your Honor, starting with Exhibit M, Tab M.
6 These are the letters that were written by Plaintiffs'
7 counsel first. And N and then O is the racially polarized
8 voting study that was submitted to Legislative Defendants.
9 That was submitted to Legislative Defendants as a final plea
10 to get them to comply with Stephenson.

11:03AM

11 And as we've discussed, Your Honor, Stephenson
12 requires -- it requires that legislators follow a particular
13 process. And it does this in language that said that
14 districts required by the VRA shall be formed prior to all
15 others. That temporal language, Your Honor, mandates a
16 specific process. As we've described, the Legislative
17 Defendants not only failed to do this, but the criteria that
18 they imposed prevented other members from complying with
19 this.

11:04AM

20 In addition to the race-blind criteria that we've
21 discussed, Your Honor, the Legislative Defendants also
22 required other legislators to use specific templates for
23 their maps. These templates are called county clusters or
24 county groupings, and they were devised by a set of Duke
25 professors doing a -- following a mathematical algorithm,

11:04AM

1 and that was reflected in a paper that Legislative
2 Defendants referred to.

3 But, importantly, Your Honor, that paper -- those
4 professors admitted, clearly on the first page of that
11:04AM 5 paper, this paper does not consider the first step of
6 Stephenson. This paper does not. So, by requiring all
7 members to use these template maps, Your Honor, the
8 Legislative Defendants effectively prevented anyone from
9 drawing districts required by the VRA first. They required
11:05AM 10 everyone to skip that first step of Stephenson.

11 Each of these steps was done intentionally and
12 knowingly by the Legislative Defendants. They were warned
13 several times not just by Plaintiffs and Plaintiffs'
14 counsel, they were also warned by their fellow legislators
11:05AM 15 who, in committee, time after time, asked them, how are we
16 going to comply with Stephenson if we are prohibited from
17 using racial data?

18 And what did they do after all of this, Your Honor? As
19 we have seen and as we've discussed, they didn't take heed
11:05AM 20 of any of those warnings, and after the filing of this
21 complaint, they rushed to enact the final maps. And all of
22 the harm -- importantly, all of the harm that Plaintiffs
23 forecast are included in those final maps. In other words,
24 this case is not mooted by the final maps, because the harm
11:06AM 25 that Plaintiffs have alleged still remains.

1 THE COURT: Well, there was no harm until the
2 final maps were enacted.

3 MS. KLEIN: The harm that Plaintiffs have
4 forecasted, Your Honor, that will occur when the elections
11:06AM 5 occur is still -- is still possible with the -- they have
6 not resolved that issue. They have not mooted this case by
7 resolving the issues and making the controversy go away.

8 In other words, a declaration of this Court would have
9 a very practical effect. A declaration of this Court would
11:06AM 10 provide the certainty to the parties as to what Stephenson
11 requires, there's an act of controversy of that, and the
12 additional relief, which the declaratory judgment
13 specifically provides for. It says, any additional relief
14 as necessary and proper. And Plaintiffs have asked here for
11:06AM 15 time. They have asked for a two-month delay in the
16 primaries set to a schedule they have historically taken,
17 set to a schedule that the state board actually requested
18 back in February, a two-month delay in primaries to allow
19 the parties to act upon that declaration of the Court.

11:07AM 20 That means Legislative Defendants can decide what
21 they're going to do, and it means that, if needed,
22 Plaintiffs can further pursue their rights. Plaintiffs --
23 in addition to the Declaratory Judgment Act, Your Honor,
24 Plaintiffs have also brought claims that Legislative
11:07AM 25 Defendants have violated their rights under equal protection

11:07AM 1 and freedom of assembly, and that Legislative Defendants
2 have done this by intentionally acting. They made this
3 intentional decision to act and skip the first step of
4 Stephenson in a way that will dilute the votes of individual
5 plaintiffs.

11:07AM 6 THE COURT: But to the extent that there is the
7 violation of those rights, that violation does not occur
8 until the maps are actually enacted. We can talk all we
9 want about what we're going to do, we can tell everybody
10 what our plan is going to do, but nothing really matters
11 until the plan is executed.

12 MS. KLEIN: When the -- yes, when the --

13 THE COURT: Okay.

11:08AM 14 MS. KLEIN: -- people have to vote under these
15 maps, there will be irreparable harm. There's no take-back
16 of votes, can't do over.

11:08AM 17 But the harm I would say to the -- the declaratory
18 judgment is here to provide certainty. That act of
19 controversy remains. Legislative Defendants haven't said
20 they agree with Plaintiffs, and they haven't otherwise acted
21 in a way that would resolve that uncertainty at all. In
22 fact, that certainty risks to haunt not just this cycle,
23 but, you know, it risks to haunt future cycles if it's not
24 clear that mandates from the state supreme court need be
11:08AM 25 followed.

1 THE COURT: The purpose of Stephenson was what,
2 to harmonize the provisions of the North Carolina
3 Constitution regarding the whole county requirement and the
4 VHA?

11:08AM

5 MS. KLEIN: That's correct, Your Honor.

6 THE COURT: VRA. The plaintiffs in that case
7 contended -- one party contended you could do it, and one
8 party said that the Whole County Provisions of the
9 constitution were violated. It basically violated the
10 constitution because the constitution incorporates the U.S.
11 Constitution and federal law, and Chief Justice Lake said
12 the constitution cannot violate the constitution. And so
13 they harmonized.

11:09AM

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MS. KLEIN: That's correct, Your Honor.

11:09AM

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THE COURT: And the whole purpose was to
determine how you can -- I mean, the focus of Stephenson was
not necessarily the VRA, the focus of Stephenson was how do
you implement the Whole County Provision requirements of the
constitution in light of the mandate of the VRA.

11:09AM

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11:10AM

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MS. KLEIN: That's correct, Your Honor. And
that's why it's important that the Court specify that the
first step is federal law. And that's when counties are to
be drawn. First, you must draw districts. Sorry, when
districts are to be drawn, Your Honor, you must first take
steps to ascertain what is required by the VRA. It did not

1 say, you know, districts that legislators assume were or
2 want to draw because of the VRA, it said required by the
3 VRA, which requires them to ascertain --

11:10AM

4 THE COURT: But federal law doesn't require you
5 to draft them first. All federal law requires is that you
6 comply with the VRA. You could draw your maps, and after
7 the maps are initially drawn, you can go back and do a VRA
8 analysis to ensure that the maps comply with the VRA, and
9 then massage them to comply with the VRA, so long as you
10 still -- or comply with the whole county requirement, but
11 making sure they comply with the VRA.

11:10AM

12 MS. KLEIN: That might be true under federal law,
13 but state legislative redistricting is commanded by our
14 state's constitution. It incorporates federal laws and
15 express provisions, but the mandate that they had is under
16 this state's constitution, and the issue before the Court is
17 a matter of state constitutional law.

11:10AM

18 THE COURT: Well, what Chief Justice Lake was
19 doing was giving a procedure whereby that the courts -- it
20 basically provided a safe harbor. Here's how you make sure
21 you comply with the Whole County Provision. If you follow
22 this procedure, you're going to be fine. I don't know, I
23 guess they didn't do it, and that's why we have
24 Stephenson II.

11:11AM

11:11AM

25 MS. KLEIN: That's correct, Your Honor. And the

11:11AM 1 court further confirmed this reading of Stephenson as
2 requiring -- saying the state constitution requires certain
3 procedures in Dickson v. Rucho, where it said, you know,
4 specifically, this is the procedure that we outlined. This
5 is the procedure that must be followed.

6 And the record reflects, the evidence shows that not
7 only did Legislative Defendants fail to do that, but they
8 effectively prevented any member from -- any member from
9 doing this, and they -- as a result, they completely were
10 derelict in their duty to follow the first step of
11 Stephenson.

12 THE COURT: Let's say I grant your relief. When
13 do you plan on attacking the validity of the maps that have
14 been passed?

11:12AM 15 MS. KLEIN: I don't know that that has been
16 determined yet.

17 THE COURT: Well, you've had -- you've had 30
18 days to figure that out. I mean, because that's -- that's a
19 key issue, because those maps are presumed constitutional at
20 this point.

11:12AM 21 MS. KLEIN: Honestly, Your Honor, that's going to
22 depend on whether the Legislative Defendants indicate
23 they're going to follow a declaration of this Court. They
24 went so far in their brief as to call a declaration of this
25 Court an advisory, a lobbyist 's opinion. And we strongly

1 disagree with that. The judiciary has the sole
2 responsibility of declaring what the state constitution
3 requires and how it should be applied. And we would hope,
4 Your Honor, that a declaration of this Court, a declaration
11:12AM 5 of this Court would cause Legislative Defendants to change
6 their course of action.

7 Now, as other -- as others have observed, there may and
8 probably are additional issues with these maps. And I don't
9 want to come here before you to say that Plaintiffs aren't
11:13AM 10 also concerned with those issues, but as it pertains to the
11 case as it's been filed, Your Honor, as it's been filed
12 here, Plaintiffs would hope that Legislative Defendants
13 would follow a declaration of this Court.

14 THE COURT: In the case of Parker v. Raleigh
11:13AM 15 Savings Bank, that was a case where the parties came before
16 the Supreme Court asking the court to determine whether said
17 bonds -- whether certain bonds and coupons were subject to
18 taxation when they constituted part of the surplus at the
19 bank. And the Supreme Court noted that decision ultimately
11:14AM 20 rests with the state Corporation Commission. And only until
21 the body authorized by statute, the sole body authorized by
22 statute, makes that decision can the court actually give a
23 declaratory judgment of whether -- whether the bonds can be,
24 because the decision is first up to that legislatively
11:14AM 25 created body to make a decision.

1 So, our constitution gives first crack at redistricting
2 maps to the legislature. And the undisputed juris prudence,
3 not only in this state, in this country, is that after that,
4 they are going to be subject to judicial review.

11:14AM

5 Are you aware of any case in the United States where
6 something like we're in the procedural posture -- that was
7 in the procedural posture where we are here, where the
8 process was attacked and not the maps and the court entered
9 an injunction?

11:15AM

10 MS. KLEIN: So, Your Honor, first, I would say
11 I'm not specifically aware of a specific case, but I am
12 aware of several instances in which this -- the Supreme
13 Court of this state has explicitly required certain
14 procedures of the legislature in order to follow
15 requirements of the state constitutional law. That is very
16 well established, and we cite to several of those cases,
17 such as Hoke. And, actually, Legislative Defendants cite to
18 two other cases in which the courts did that.

11:15AM

19 THE COURT: Here's the Court's concern. Anytime
20 anyone wants to raise an issue that the legislature is not
21 following proper procedure, which is -- this Court will see
22 an onslaught of suits asking us to determine what is the
23 proper procedure for the legislature to follow in order to
24 carry out their constitutional and statutory mandate.

11:15AM

11:16AM

25 MS. KLEIN: Thank you, Your Honor. Thanks for

11:16AM 1 that clarification. I understand the Court's concern. I
2 think that's -- that concern is not -- would -- that concern
3 would not be implicated here for a couple reasons. First of
4 all, the procedural requirement in Stephenson is very clear
5 as to what's required. So, this isn't --

6 THE COURT: Then why do you need a declaration
7 from this Court if it's so clear?

8 MS. KLEIN: Because they have failed to follow
9 it. They've taken a contrary view of that.

11:16AM 10 THE COURT: Then what you do -- I mean, the law
11 is clear as to what they're supposed to follow under
12 Stephenson. When they enact the maps, you file a lawsuit
13 and say they didn't comply with what this Court has already
14 declared is the proper procedure.

11:16AM 15 MS. KLEIN: And the declaratory judgment -- and
16 if we had done that, if this had taken until Thanksgiving,
17 they would have been here in court arguing that it's too
18 late, that the candidate filing's on December 6th and that
19 there's no chance. If Plaintiffs had waited -- and this
11:17AM 20 creates -- that would create a loophole, an incredible
21 loophole to the -- and narrowing of the state's --

22 THE COURT: I couldn't --

23 MS. KLEIN: -- important role --

24 THE COURT: -- guarantee you a court sitting in
11:17AM 25 equity is not going to consider a loophole like that. I

1 mean, these are extremely important questions that affect
2 all members of this state. And the fact -- I mean, we're
3 having a hearing on Friday in a three-judge panel, and we
4 have to make a decision before Monday.

11:17AM

5 I mean, this Court -- courts are asked all the time to
6 make decisions in a very quick manner. Sometimes it doesn't
7 look like we do, but we are faced with that very task. A
8 three-judge panel is on Friday, and we will not shirk our
9 duties. And we won't -- you know, the fact that -- I mean,
10 there are so many factors that have led this to be where we

11:18AM

11 are now, as opposed to other years that, you know, it's --
12 it can't be -- once the maps were passed, Plaintiffs have to
13 examine those maps to determine whether they meet Gingles
14 first, at least the three -- you know, whether they meet
15 Stephenson, whether they meet the first three criteria of
16 Gingles, and that takes time, and the courts understand
17 that.

11:18AM

18 And so, the fact that we are here today less than a
19 week before the primary, or the filing period, and the fact
20 that on Friday we will be less than a business day away from
21 the filing period, I do not believe is determinative of the
22 legal issue. The legal issue is whether the plaintiffs in
23 that case can prove or can prove a substantial likelihood of
24 success on the merits, and then whether, at that point,

11:18AM

11:19AM

25 injunctive relief is required to protect the status quo.

1 And I don't think the Court's going to say, well, since this
2 is going Monday, we're just going to automatically go and
3 let it go. That's not the analysis the Court goes through
4 or will go through, I can assure you of that.

11:19AM

5 MS. KLEIN: And I feel very assured and thankful
6 for that fact and very thankful for the Court's time today
7 as well.

11:19AM

8 And I would say two things. If the Court -- as the
9 Court rightly observed, it takes time to consider those
10 enacted maps. And, here, if the Court were to take the
11 position that the process -- and this would be contrary to
12 Stephenson v. Bartlett's express language, but if the Court
13 were to take the position that in redistricting, it cannot
14 look to process, then that would be an unprecedented
15 narrowing of the Court's important role in redistricting to
16 protect voters' rights.

11:20AM

17 In other words, this whole -- this whole issue that
18 you've just raised, Your Honor, begs the question of why
19 Legislative Defendants didn't do as the state board
20 requested in February, knowing about the census delay and
21 moving the primaries back to where they have been in prior
22 years. That was a specific request by the executive
23 director that was not followed, and, instead, they drew out
24 the process and only rushed to enact the maps, quite
25 frankly, after this case was filed.

11:20AM

1 Stephenson specifically addresses what Your Honor
2 raised in your initial question, saying that although the
3 respective state legislators maintain primary responsibility
4 for redistricting and reapportionment of legislative
11:20AM 5 districts, such procedures must comport with federal law.
6 Stephenson said such procedures must comport with federal
7 law, and then it provided the procedure that must be
8 followed.

9 And in that procedure, going back this case, back to
11:21AM 10 that language, it said VRA -- districts required by the VRA
11 must be formed prior to it. It used temporal language. And
12 the "required by the VRA" is important, Your Honor, because
13 that requires them to ascertain what the VRA requires.
14 That's exactly what they failed and adamantly refused to do
11:21AM 15 in this case. They skipped that entire step entirely.

16 THE COURT: Process is important. The ultimate
17 result is more important, because that's ultimately what the
18 process is designed, and here you're not attacking the
19 ultimate result, at least yet.

11:21AM 20 Anything further?

21 MS. KLEIN: If Your Honor will give me indulgence
22 of just one minute.

23 (Pause in proceedings.)

24 MS. KLEIN: Your Honor, I have nothing further at
11:22AM 25 this moment. Thank you so much.

1 THE COURT: We're going to take -- we're going to
2 be in recess until 11:30.

3 THE BAILIFF: Court's in recess until 11:30.

11:33AM

4 (A recess was taken from 11:22 a.m. to
5 11:33 a.m.)

6 THE COURT: All right. I'll hear from the
7 plaintiffs. Pardon me, defendants. I'll hear from the
8 Legislative Defendants first.

11:33AM

9 MR. STRACH: Thank you, Your Honor. Phil Strach
10 for the Legislative Defendants. I just want to make a few
11 points, Your Honor.

11:33AM

12 I think when we're talking about what Stephenson did or
13 didn't do, the Plaintiffs, I think, are conflating two
14 issues. Stephenson set up a set of rules, the Court
15 referenced them as a safe harbor, which I think is correct,
16 for complying with the Whole County Provision. Those rules
17 go to how you actually construct districts, how do you
18 actually go in and construct the districts. Those are
19 not -- those are different, distinguishable from the
20 legislative process itself.

11:34AM

21 The constitution doesn't speak to that, except by
22 saying bills have to be read in each house three times
23 before they can be enacted. But constructing districts,
24 having rules and following rules for constructing districts
25 is one thing; the legislative process is another. I think

11:34AM

1 the Plaintiffs were conflating those two issues and thinking
2 that Stephenson said that there's some part of the
3 legislative process that's impacted by Stephenson.

11:34AM

4 And I think particularly when it comes to the VRA,
5 Stephenson itself says, "Interpretation of the federal
6 limitations upon the redistricting process is unnecessary to
7 the resolution of the instant case." So the court made it
8 pretty clear, we're not speaking to that. They also
9 acknowledge that the VRA does not command a state to adopt
10 any particular legislative reapportionment.

11:34AM

11 THE COURT: But does it command a legislature
12 that's redistricting to assess whether the new districts it
13 contemplates are in compliance with the VRA?

14 MR. STRACH: Section 2 of the VRA does not.

11:35AM

15 THE COURT: But Cooper v. Harris, the United
16 States Supreme Court case, does, doesn't it?

17 MR. STRACH: No.

11:35AM

18 THE COURT: "True enough, a legislature
19 undertaking a redistricting case must assess whether the new
20 districts it contemplates, not the old one it sheds, conform
21 to the VRA requirements." That's coming right out of
22 Cooper v. Harris. So, tell me why -- why -- well, let me
23 ask this.

11:35AM

24 The VRA is not a safe harbor for using -- it was not
25 enacted as a safe harbor for using racial criteria in

1 redistricting, was it?

2 MR. STRACH: No. Because if you use it in the
3 wrong way, and that line is not clear, you might violate the
4 equal protection clause of the U.S. Constitution.

11:35AM 5 THE COURT: And, in fact, it was enacted to
6 protect the dilution of the minority vote.

7 MR. STRACH: Correct.

8 THE COURT: And is there not a duty on the
9 legislative body to comply with the VRA?

11:35AM 10 MR. STRACH: They have to comply with it because
11 it's federal law. They don't have to undertake some sort of
12 analysis to assess whether they're complying with it.
13 That's not an affirmative command. The court is simply
14 saying, look, if you don't want your map struck down because
11:36AM 15 of VRA issues, then you might want to look at this. And it
16 does not say you have to undertake any particular kind of
17 analysis to do that.

18 Now, under Section 5 of the VRA, which was in effect
19 when -- in the 2011 round of redistricting, the burden was
11:36AM 20 on the legislature to demonstrate that the plan did not
21 cause any retrogression of minority rights. So, in that
22 case, the legislature certainly did have to examine racial
23 issues on the front end to be able to meet their burden of
24 proof, but that's not the case under VRA Section 2.

11:36AM 25 THE COURT: So, there's an obligation on the

1 legislature to comply with Section 2?

2 MR. STRACH: There is.

3 THE COURT: All right.

4 MR. STRACH: And we believe they have.

11:36AM 5 THE COURT: And, so, how do you do that without
6 looking at race?

7 MR. STRACH: Well, Your Honor, once the districts
8 are drawn, then the legislators can look at those districts
9 and racial data, obviously, becomes known. People post it
11:37AM 10 out there. And one can look at that and say, huh, do we
11 have any issues here? No, don't think we do.

12 THE COURT: Does the census data not inform you
13 of race in districts?

14 MR. STRACH: So, the legislature, in drawing the
11:37AM 15 districts, did not use the racial demographic data provided
16 by the census.

17 THE COURT: I understand that. But you don't
18 have to wait for people to post it, do you? Can't you get
19 racial data after you draw your districts from the census?

11:37AM 20 MR. STRACH: How the legislature chooses to do
21 any sort of back-end analysis is not dictated by anything.
22 You could certainly get the census data if you wanted to.
23 You could wait for it to get posted on Dave's Redistricting
24 App. There's lots of ways you could do it.

11:37AM 25 THE COURT: Well, why is it doing a back-end

1 analysis when Stephenson seems to state that you need to
2 create -- I don't know how you create a VRA district first
3 without considering racial data.

11:37AM

4 MR. STRACH: Right. We don't believe that that's
5 what Stephenson requires. Even the Covington court dropped
6 a footnote acknowledging that it was unclear whether what
7 Stephenson required was to draw VRA districts first in time,
8 like literally chronologically, or just first in priority in
9 the sense that federal law supersedes the state law.

11:38AM

10 And, so, we believe that the map that was enacted by
11 the legislature does comply with Section 2 of the VRA, and I
12 think it's notable that no one -- of all the lawsuits that
13 have been filed, no one has said that the map violates the
14 Voting Rights Act. So, no one's come forward with any
15 evidence whatsoever that says we're wrong that our maps
16 comply with the Voting Rights Act.

11:38AM

17 So, we did comply with Stephenson. What the
18 legislature did conclude was there were no, quote, required
19 VRA districts. Even if you -- even if you say that
20 Stephenson requires VRA districts to be drawn first
21 chronologically, it only speaks to districts that are
22 required by the VRA. And we've taken the position in this
23 litigation and in the legislative process that VRA districts
24 were not required because of the long litigation history
25 that preceded this redistricting.

11:39AM

1 THE COURT: And that long litigation history
2 dealt with data from the 2010 census, not the 2020 census,
3 correct?

11:39AM

4 MR. STRACH: It did. But there's an order as
5 recent as 2020 that examined districts drawn in 2019, using
6 the 2010 data, of course.

7 THE COURT: Okay. But there's been -- the 2020
8 census takes into account immigration and migration to and
9 from North Carolina, correct?

11:39AM

10 MR. STRACH: Correct.

11 THE COURT: And logic would tell me that because
12 we had -- we have one new congressional district, we have
13 more people coming to this state than leaving the state.

14 MR. STRACH: Correct.

11:39AM

15 THE COURT: And, so, shouldn't we know where
16 those people are going and what their racial makeup is in
17 order to be VHA compliant?

11:39AM

18 MR. STRACH: There's no requirement that we
19 inform ourselves of that data to comply with the VRA. And
20 we believe the maps do comply with the VRA, and no one has
21 said otherwise to date.

11:40AM

22 THE COURT: So, what you're telling me is you
23 all threw -- someone threw a dart and it hit the intended
24 target even though they had a blindfold on, and it just --
25 and because of that, it complies?

1 MR. STRACH: Well, Your Honor, in 2019, we drew
2 legislative maps, in part, using a lottery machine. So,
3 yeah, I mean, that happens. And what I --

11:40AM

4 THE COURT: You know, a blind squirrel finds a
5 nut every now and then.

6 MR. STRACH: Exactly. Exactly. So, yes, we
7 believe that the maps are VRA compliant. And if the Court
8 tells us otherwise, we'll modify them.

11:40AM

9 THE COURT: And what analysis has been done to
10 determine whether they're VRA compliant?

11 MR. STRACH: There's been no formal -- there's
12 been no -- the legislature hasn't had a hearing or done
13 anything like that. They're not required to.

11:40AM

14 THE COURT: Explain to me the relationship
15 between Section 2 and Section 5 of the VRA.

11:41AM

16 MR. STRACH: So, they're really two sides of the
17 same coin, because VRA Section 5 put the burden of proof on
18 the legislature to show that their redistricting plan did
19 not retrogress the voting rights of minority voters. So, in
20 order to comply with that, the legislature had to go to DOJ
21 and say, hey, we've looked at the racial data, here's why we
22 did not retrogress, engage in retrogression.

11:41AM

23 Under VRA Section 2, the burden of proof is on any
24 plaintiff who believes that the map dilutes the votes of
25 minority voters or intentionally violates the VRA to go to

1 court, and the burden of proof is on them to examine the
2 racial data themselves and make a claim and prove a claim
3 that the maps violate the VRA. And that's where the Gingles
4 preconditions come into play and all that.

11:41AM

5 So, they're actually very different. And, of course,
6 Section 5 is not operative right now. And, so, the burden
7 of proof would be on any group of plaintiffs that say the
8 current maps violate the VRA, dilute the votes of minority
9 voters. They would need to get the census demographic data,
10 they would have to prove the three Gingles preconditions and
11 make their case in court.

11:42AM

12 THE COURT: So, there's no burden or duty of any
13 kind of the state legislature to comply with the VRA?

11:42AM

14 MR. STRACH: Well, the map has to be compliant,
15 otherwise it could be enjoined. There's no affirmative duty
16 on the legislature to engage in any particular process to
17 get to a compliant VRA map.

18 THE COURT: But is there an affirmative duty to
19 have a VRA compliant map?

11:42AM

20 MR. STRACH: I don't know if I would describe it
21 that way. The map has to comply with the VRA or it could be
22 enjoined, is the way I would describe it.

11:43AM

23 Your Honor, I have another topic to go to, but I'll
24 wait if the Court has any other questions on this particular
25 topic.

1 THE COURT: All right. Under Stephenson v.
2 Bartlett, the court stated, "Section 2 of the VRA generally
3 provides that states or their political subdivisions may not
4 impose any voting qualification or prerequisite that impairs
11:43AM 5 or dilutes, on account of race or color, a citizen's
6 opportunity to participate in the political process and to
7 elect representatives of his or her choice"; is that
8 correct?

9 MR. STRACH: That's what the VRA says, correct.

11:43AM 10 THE COURT: So, it places the prohibition on the
11 state. It prohibits the state from doing certain things
12 that cause certain harms to -- well, on account of someone's
13 race or color.

14 MR. STRACH: On pain of being enjoined. It
11:44AM 15 doesn't require an affirmative process, but it's correct
16 that if the map -- if it dilutes the votes of minority
17 voters, then it could be enjoined under the VRA.

18 THE COURT: All right. Go on to your next topic.

19 MR. STRACH: All right, Your Honor. I just
11:44AM 20 wanted to briefly address the Declaratory Judgment Act that
21 points -- that counsel was raising an analogy about a breach
22 of contract case. And I just wanted to point out that if
23 you thought the contract was going to be breached and you
24 file a dec action to have the court address that, if the
11:44AM 25 contract was then breached, obviously, what you would do is

1 amend the complaint and allege a breach of the contract and
2 have the court address the breach of contract.

3 Effectively, that's the posture of this case. The maps
4 have been passed. They've been enacted. And, frankly,
11:45AM 5 surprisingly to me, the Plaintiffs have made no move to
6 amend their complaint and actually attack the maps, which
7 would then flesh out all these issues, these VRA issues,
8 because there would actually be evidence and data to look
9 at.

10 So, without an amended complaint -- and it's -- to me,
11 it's just seems to be a strange procedure to say a single
12 judge should make a declaration, but then nothing could be
13 done with the map unless it's actually enjoined, and that
14 would have to be done later by a three-judge panel. So, it
11:45AM 15 would seem to -- it would seem to just further delay things
16 and create a very unusual posture for a case like this.

17 So, to the extent that the theory is it's an
18 anticipatory breach, then there's already been an alleged
19 breach, and so, a request should have been made of the Court
11:46AM 20 to amend the complaint actually seeking injunction.

21 THE COURT: All right. Anything else?

22 MR. STRACH: No, Your Honor. We are -- we think
23 for the reasons we've briefed and the reasons that have been
24 discussed here today, the motion should be denied.

11:46AM 25 THE COURT: Go ahead.

1 MS. KLEIN: Your Honor, I didn't know if the
2 Court wanted to hear from the State Defendants first --

3 THE COURT: Sure.

4 MS. KLEIN: -- or Plaintiffs. If I may, just a
11:46AM 5 few points in rebuttal, Your Honor. And the first is that
6 the interpretation that my colleague has put forward is
7 contravened by the Supreme Court of North Carolina itself.

8 In Dickson v. Rucho -- I have that decision, I can hand
9 it to the parties and to the Court -- the court specifically
11:47AM 10 said the process established by this court in Stephenson and
11 its progeny requires that, in establishing legislative
12 districts, the General Assembly first must create all
13 necessary VRA districts.

14 There's nothing in there about safe harbor, doing the
11:47AM 15 analysis later. There's nothing. And I don't think -- they
16 have not cited any case, from the Supreme Court or
17 otherwise, that adopts that interpretation. Adopting their
18 view of Stephenson, Your Honor, would render Stephenson
19 advisory and dicta. That's not what was intended, and that
11:47AM 20 would have disastrous results. It would be a narrowing of
21 this -- the court's, the judiciary's role in stating what
22 the state constitution requires.

23 And I'm happy to hand that opinion up to the Court and
24 the other parties with the highlighted section if that would
11:48AM 25 be helpful --

1 THE COURT: That would be fine.

2 MS. KLEIN: -- for the Court. May I approach?

3 THE COURT: Yes.

4 MS. KLEIN: Thank you, Your Honor.

11:48AM

5 Second, Your Honor, I'd like to -- my colleague,
6 Ms. Riggs, rightly reminded me that the Court asked about
7 the unique procedural posture of this and a concern that
8 this would create ripple effects of allowing people to
9 inject themselves in the legislative process, and I was
10 rightly reminded that in all prior redistricting cycles,
11 there was preclearance. And, in fact, in preclearance,
12 while parties were seeking preclearance, before the maps
13 could be finalized, while they were seeking preclearance,
14 litigants did, courts did consider VRA requirements.

11:48AM

11:49AM

15 In other words, just like this case, courts did peer
16 into what the VRA would require. And I can give a specific
17 citation. For example, in the Perez v. Perry case, this is
18 out of the Western District of Texas, that's 891 F.Supp. 2d,
19 2012, in that matter -- in that matter -- thank you. In
20 that matter, Your Honor, the court did, while also
21 considering issues of preclearance, took evidence on
22 Section 2 compliance. Now, we no longer have preclearance,
23 but the courts weighing in at this stage is not
24 unprecedented, and I wanted to make sure the Court
25 understood that.

11:49AM

11:49AM

1 THE COURT: But you're asking -- your lawsuit was
2 essentially asking for preclearance or seeking
3 pre-non-clearance. Instead of the defendant seeking
4 preclearance, you're seeking pre-denial of something that --

11:50AM

5 MS. KLEIN: No, Your Honor.

6 THE COURT: -- has not been enacted. In
7 preclearance, do they enact the maps and then go get
8 clearance?

9 MS. KLEIN: That was how it worked.

11:50AM

10 THE COURT: Okay. So, even preclearance required
11 maps to be enacted before the Department of Justice would
12 look at it. And then if no one -- if someone was displeased
13 with how the Department of Justice saw it, it would go to
14 court?

11:50AM

15 MS. KLEIN: Your Honor, it would -- the
16 preclearance required them to get an affirmative approval,
17 either from a district court or a declaratory -- from the
18 district court or from the DOJ. And further issues could
19 still be litigated after that, and certainly were.

11:50AM

20 But that actually leads into the third point I wanted
21 to make, Your Honor, which is this is not a Section 2 case.
22 It is not incumbent upon Plaintiffs as an element of any of
23 their claims to plead the Gingles requirements, these
24 preconditions. This is not a Section 2 case. This is about
11:51AM 25 their obligations to follow our state constitution's law, as

1 stated in Stephenson by the highest court of this land, to
2 ascertain what the VRA requires first. And this case is
3 rooted in state constitutional law.

11:51AM

4 And as the Court just heard, Legislative Defendants
5 can't affirmatively say -- they can't affirmatively say no
6 VRA districts are required. They can't affirmatively say
7 they did that step. They made a legal assumption. They
8 have made a legal assumption based on past cases. They've
9 made a legal assumption on their erroneous reading of
10 Stephenson. And I think that exchange highlights why the
11 declaratory relief in this case is so needed to relieve that
12 uncertainty.

11:51AM

13 THE COURT: All right. So, if a legislature
14 departs from Stephenson, the process set forth in
15 Stephenson, and draws maps that are compliant with the VHA,
16 the Whole County Provision of the constitution, does someone
17 have a right to come and challenge the process and then ask
18 the legislature to go back and follow that process and draw
19 maps?

11:52AM

20 MS. KLEIN: Not necessarily. And that's
21 different from this, because Plaintiffs have alleged harm.
22 Plaintiffs not only in those letters told all -- told the
23 Legislative Defendants of the harm, but they've alleged harm
24 in the claim. And for the purpose of the motion to dismiss
25 and the complaint, Your Honor, those allegations are assumed

11:52AM

11:52AM

1 true.

2 The Plaintiffs have alleged vote dilution. They
3 actually provided proof in Exhibit O, that's the letter sent
4 by Common Cause, of racially polarized voting. They sent
5 proof that voters of color were going to be denied their
6 ability to elect candidates of choice, and the Legislative
7 Defendants ignored it despite --

8 THE COURT: If the maps were passed.

9 MS. KLEIN: Yeah. And the Legislative
10 Defendants -- so, here, this case, the process matters. And
11 this case shows why. The process in Stephenson matters.
12 And courts in other matters have looked in and -- looked in
13 and said, during the legislative process, did the
14 legislature comply with notice requirements? Did the
15 legislature comply with notice requirements for public
16 hearings? There are a host of procedural requirements from
17 the state constitution.

18 The right to instruct has these requirements. That's
19 the Common Cause v. Forest case that they have cited to. In
20 that case, the court explicitly said, we're going to look at
21 what process the state constitution requires, that includes
22 notice, that includes ability of the public to actually
23 instruct their members while in session. And they stated
24 affirmatively that's what the constitution requires. They
25 didn't decline -- they didn't step back and decline

1 entirely. That's what Legislative Defendants are asking you
2 to do here.

3 THE COURT: All right. Anything more from the
4 Legislative Defendants?

11:54AM 5 MR. STRACH: No, Your Honor.

6 MR. STEED: Your Honor, from the State
7 Defendants, I would only add that we've briefed the reasons
8 why we agree that the point is moot at this point. We've
9 also laid out the administrative concerns in our briefing.
10 And if Your Honor would like to hear about them, I'm
11 prepared to answer any questions.

12 THE COURT: That's all right. I have read your
13 brief.

14 MR. STEED: Thank you, Your Honor.

11:54AM 15 THE COURT: And I have a motion for permission to
16 file an amicus brief, which I will grant. Although, it
17 doesn't really address the issues before the Court. It's
18 probably more suited for the North Carolina League of
19 Conservation Voters case, but I will -- at least for
20 purposes of this hearing, I've read it, I'll grant the
21 motion and accept the brief.

22 UNIDENTIFIED MALE AUDIENCE MEMBER: Thank you,
23 Your Honor. I'm glad to provide a copy if you care for one.

24 THE COURT: I've got a copy already.

11:54AM 25 All right. We're going to take a 15-minute recess.

1 THE BAILIFF: Court's in recess 15 minutes.

2 (A recess was taken from 11:55 a.m. to
3 12:15 p.m.)

4 THE COURT: All right. As to the preliminary
12:15PM 5 injunction requiring Plaintiffs to go back and follow the
6 process set out in Stephenson I, the Court finds that's
7 essentially asking this Court to undo what has already been
8 done without attacking the validity of the maps. And under
9 the longstanding case law of this state, asking the Court to
12:16PM 10 undo what has already been done does not form the basis for
11 preliminary injunction, because the issue is moot, and the
12 Court denies a preliminary injunction as to that issue.

13 As to a preliminary injunction delaying the filing
14 period and the primary, as long as the maps have not been
12:16PM 15 declared unconstitutional or violative of federal law,
16 there's no harm to address in this case, and, therefore, the
17 motion for preliminary injunction as it relates to delaying
18 the filing period or primary is denied in this case.

19 The Court is going to dismiss the action as moot and
12:16PM 20 for lack of subject matter jurisdiction as it essentially
21 asks the Court to interfere with the process of the General
22 Assembly prior to the completion of that process, which
23 would violate the principle of separation of power.
24 Certainly, once the process is complete, the Court can pass
12:17PM 25 upon the end result of that process.

1 Nothing I have said, nor should this order be construed
2 as any opinion of the Court on the constitutionality or
3 validity of the maps that have been passed. This is a very
4 narrow issue, and it is not in any way reflective of
12:17PM 5 whatever opinion I may hold or I may form as to what will be
6 presented to the Court on the three-judge panel that will
7 occur this Friday.

8 We will draft an order, and once the order is drafted,
9 we will have it filed. Court will be in recess.

12:18PM 10 **THE BAILIFF:** Court's in recess.

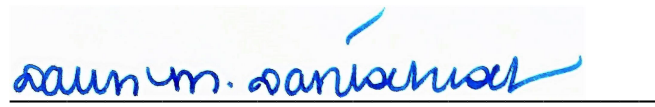
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CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken the November 30, 2021, Session of Wake County Superior Court is a true and accurate transcript of the proceedings as reported by me and transcribed by me or under my supervision. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This, the 2nd day of December, 2021.



Dawn M. Dantschisch, RMR, CRR, CRC
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