

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK)
CAUCUS, et al.,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF ALABAMA, et al.,)
)
Defendants.)

CIVIL ACTION NO.
2:12-cv-691-WKW-MHT-WHP
(3-judge court)

DEMETRIUS NEWTON, et al.,)
)
Plaintiffs,)
)
v.)
)
THE STATE OF ALABAMA, et al.,)
)
Defendants.)

CIVIL ACTION NO.
2:12-cv-1081-WKW-MHT-WHP
(3-judge court)

JOINT PROPOSED REMEDY PHASE PROCEDURES

Come now the parties jointly and in compliance with the Court's order of January 20, *doc. 318*, jointly submit this proposed procedure for the remedy phase of this litigation:

DAY NO.	DATE	DEADLINE OR EVENT
o ⁱ	May 23, Tuesday	Deadline for enacting remedial plans (including signing by the Governor or override a veto by the Legislature)
<i>Schedule if the State enacts remedial plans</i>		
7	(May 30, Tuesday)	State files: <ul style="list-style-type: none"> • remedial plans as enacted, • maps of the remedial plans, • transcripts of hearings, • “stat packs” for the remedial plansⁱⁱ, • a description of the process followed to enact the remedial plans, including the identities of all participants in the process, • criteria followed in drawing new districts, including the extent to which race was a factor in drawing a district in which blackⁱⁱⁱ VAP is greater than 50.00%, and • for any district intentionally drawn with a black VAP <u>in a manner that subordinates traditional districting principles</u>^{iv}, the factual basis upon which the Legislature concluded that the VRA requires such a black VAP.
21	(June 13, Tuesday)	Deadline for plaintiffs to file objections to the remedial plans
35	(June 27, Tuesday)	Deadlines for the State to reply to the plaintiffs’ objections
<i>Schedule if the State fails to redistrict v</i>		
3	(May 26, Friday)	Plaintiffs file proposed redistricting plans including: <ul style="list-style-type: none"> • descriptions of the proposed plans, • maps of the proposed plans, • “stat packs” for the proposed plans, • a description of the procedure used to draw the proposed plans, <i>including the extent to which the proposed plans adhere to or deviate from the Redistricting Committee Guidelines,</i> • <i>criteria followed in drawing new districts, including the extent to which race was a factor in drawing a district in which black VAP is greater than 50.00%, and</i> • <i>for any district intentionally drawn with a black VAP in a manner that subordinates traditional districting principles, the factual basis upon which the plaintiff concluded that the VRA requires such a black VAP.</i>
24	(June 16, Friday)	Deadline for the State to file objections to the plaintiffs’ proposed plans
38	(June 30, Friday)	Deadlines for the plaintiffs to reply to the State’s objections
<i>Schedule to be determined by the Court after the above events</i>		
	<i>Date set by Court</i>	Prehearing conference
	<i>Date set by Court</i>	Hearing/oral argument/submission on briefs

ⁱ Day “o” is the date on which new redistricting bills become law, and in no event later than May 23, 2017, which is the last day of the 2017 legislative session. Dates in

parenthesis are the latest possible dates under this proposed schedule. However, if the new redistricting legislation becomes law earlier than May 23, the subsequent dates will be adjusted accordingly.

ii “Stat packs” for each plan will include (1) all-districts population report, showing VAP and breakdown by race, (2) districts statistics report, (3) population summary, and (4) assigned district split by county, city, or precinct.

iii “Black” means single race, consistent with redistricting in this case to date.

iv The *Newton* plaintiffs do not agree to the underlined language, in that the language replaces a definite standard (“with a black VAP greater than 50.00%”) with language (“a black VAP” where all districts have some black VAP; and “in a manner that subordinates traditional redistricting principles” without making clear who decides the issue of subordination) that makes the obligations of the parties indefinite and uncertain.

v The *Newton* plaintiffs do not agree to the language in italics. The *Newton* plaintiffs believe this Court’s Order should take the same form as the remedial order the three-judge court recently issued in similar circumstances in *Covington v. State of North Carolina* (attached as Ex. A). That Order simply provided a date by which the plaintiffs were to submit any proposed remedial plans of their own. It is the State that has violated the Constitution, not the plaintiffs; the State bears the burden of proving that its remedial plans fully cure those violations. The *Newton* plaintiffs do not believe it appropriate for plaintiffs to be under a court order to produce the full range of documentation, production of which might entail significant financial and administrative burdens, that the State must provide. The *Newton* plaintiffs therefore ask the Court to replace the language in italics with this language: “Plaintiffs will supply the documentation necessary to explain their proposed remedial plans.”

Respectfully submitted on February 7, 2017.

s/Andrew Brasher

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Exhibit A

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

SANDRA LITTLE COVINGTON, et al.,)	
)	
Plaintiffs,)	
v.)	1:15-CV-399
)	
THE STATE OF NORTH CAROLINA, et al.,)	
)	
Defendants.)	

ORDER

With this lawsuit, filed in May 2015, the plaintiffs, individual North Carolina citizens, challenged the constitutionality of nine state Senate districts and nineteen state House of Representatives districts "as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." First Am. Compl. ¶ 1, ECF No. 11. In an opinion filed on August 11, 2016, this Court held that the challenged House and Senate Districts as drawn in 2011 were unconstitutional and, without imposing a deadline, directed the legislature to draw new districts. Mem. Op., ECF No. 123; Order and J., ECF No. 125.

Because the Court's Order finding racial gerrymandering was entered on the eve of the November 2016 regular election, the Court determined that the 2016 election should proceed under the unconstitutional districts. Mem. Op., 160-63, ECF No. 123. The Court enjoined the defendants from conducting any elections using

the unconstitutional districts after November 2016. Mem. Op., ECF No. 123; Order and J., ECF No. 125.

The plaintiffs ask the Court to establish a deadline of January 25, 2017, for the legislature to pass legislation establishing new districts and to order a special election in 2017 using those districts, while the defendants ask the Court to allow the legislators elected in the unconstitutional districts to continue to hold office until 2018. The Court ordered supplemental briefing, Order, ECF No. 124, which is now complete.

The Court earlier concluded that the challenged districts violate the equal protection rights of the plaintiffs and other voters and that the plaintiffs are "entitled to swift injunctive relief." Mem. Op. 163, ECF No. 123. The Court has the authority to shorten the term of existing legislators, order special elections, and alter the residency requirements for those elections, because "[i]t is fundamental that state limitations—whether constitutional, statutory or decisional—cannot bar or delay relief required by the federal constitution." Butterworth v. Dempsey, 237 F. Supp. 302, 306 (D. Conn. 1965) (per curiam); see also Smith v. Beasley, 946 F. Supp. 1174, 1212-13 (D.S.C. 1996).

While special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial

gerrymander. The Court recognizes that special elections typically do not have the same level of voter turnout as regularly scheduled elections, but it appears that a special election here could be held at the same time as many municipal elections, which should increase turnout and reduce costs. A special election in the fall of 2017 is an appropriate remedy.

The plaintiffs contend that the deadline for the General Assembly to draw remedial districts should be January 25, 2017. Mem. in Supp. of Pls.' Mot. for Additional Relief 2, ECF No. 133. The defendants contend that the deadline should be May 1, 2017. Defs.' Mem. in Opp'n to Pls.' Mot. for Additional Relief 2, ECF No. 136.

To the extent that the defendants' argument is based on the fact that the plaintiffs' proposed schedule would only give the State two weeks to draw new districts, we reject that argument. This Court's order finding the current districts unconstitutional was entered on August 15, 2016, and the State has already had over three months to work on a redistricting plan. Nothing has prevented the State from holding hearings, commissioning studies, developing evidence, and asking experts to draw proposed new districts over this three month period. Indeed, nothing prevented the current legislature from complying with the Court's order to redistrict.

Nevertheless, the current legislature has apparently decided not to redistrict and to leave that task to the legislators just elected under the unconstitutional racial gerrymander, who will come into office in mid-January 2017. See N.C. Gen. Stat. § 120-11.1. Although the new legislature might ordinarily be able to accomplish redistricting in two weeks, we are sensitive to the defendants' concern that the large number of districts found to be racial gerrymanders will render the redistricting process somewhat more time-consuming.

That being said, the State's proposed schedule does not build in any time for the Court to make changes should the State's new districts be inadequate to remedy the constitutional violation. Under the State's proposed schedule, the State will have some eight and a half months to redistrict, the plaintiffs will then have seven days to review the new districts and object, and the Court will have only a few days to review the districts and any objections before the Board of Elections needs to begin the work necessary to hold elections in the fall.

The Court concludes that March 15, 2017, is a reasonable deadline for allowing the State the opportunity to draw new districts. This gives the State a total of seven months from the time the districts were held to be unconstitutional, which is longer than it took the 2011 legislature to redistrict the entire state; even if all the work is done by the newly elected

legislature, they will have some six weeks to accomplish the task. This schedule also will allow the Court enough time to consider whether the State has remedied its unconstitutional gerrymander and to act if it does not.

Finally, the plaintiffs ask that the defendants provide the Court and the plaintiffs with the information needed to evaluate the constitutionality of the new districts. See Pls.' Mot. for Additional Relief, ECF No. 132 ¶ 3. The defendants have not objected. See Defs.' Mem. in Opp'n, ECF No. 136.

It is ORDERED that:

1. The General Assembly of the State of North Carolina is given the opportunity to draw new House and Senate district plans for North Carolina House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 42, 43, 48, 57, 58, 60, 99, 102, and 107; and Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40, through and until 5 p.m. on March 15, 2017. The defendants shall file the new maps with the Court within seven days of passage.
2. Within seven days of passage, the defendants also shall file:
 - a. transcripts of all committee hearings and floor debates;
 - b. the "stat pack" for the enacted plans;
 - c. a description of the process the General Assembly

followed in enacting the new plans, including the identity of all participants involved in the process;

d. the criteria the General Assembly applied in drawing the districts in the new plans, including the extent to which race was a factor in drawing any district in which the black voting-age population (BVAP) is greater than 50%; and

e. as to any district intentionally drawn with a BVAP greater than 50%, the factual basis upon which the General Assembly concluded that the VRA obligated it to draw the district at greater than 50% BVAP.

3. The plaintiffs may file any objections within seven days of the filing of the redistricting plan with the Court. The defendants may respond seven days thereafter.

4. If the State fails to redistrict by March 15, 2017, the plaintiffs may file a proposed redistricting plan no later than March 17, 2017.

5. The term of any legislator elected in 2016 and serving in a House or Senate district modified by the General Assembly under the redistricting plan shall be shortened to one year.

6. Any citizen having established their residence in a House or Senate district modified by the General Assembly under the redistricting plan as of the closing day of the filing

period for the 2017 special election in that district shall be qualified to serve as Senator or Representative if elected to that office notwithstanding the requirement of Sections 6 and 7 of Article II of the North Carolina Constitution, which provides that each Senator and Representative, at the time of their election, shall have resided "in the district for which he is chosen for one year immediately preceding his election."

7. The State of North Carolina shall hold special primary and general elections in the fall of 2017, for the purpose of electing new legislators in these districts and such other districts which are redrawn in order to comply with Paragraph 1. The primary shall be held in late August or early September and the general election shall be held in early November, the specific dates to be determined by the legislature or, should the legislature fail to act, by this Court. Legislators so elected shall take office on January 2, 2017, and each legislator shall serve a one year term.

This 29th day of November, 2016.

/s/ James A. Wynn, Jr.

/s/ Thomas D. Schroeder

/s/ Catherine E. Eagles