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

SANDRA LITTLE COVINGTON, *et al*., Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al*., Defendants.	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR ADDITIONAL RELIEF**

Pursuant to the Court's Order for Supplementary Briefing Schedule, (Doc. 124, August 15, 2016), as modified by Consent Order (Doc. 127, August 19, 2016), Plaintiffs respectfully submit this memorandum in support of their Motion for Additional Relief. The additional relief Plaintiffs seek is well within the equitable powers of this Court to grant and is fully justified by ample precedent in redistricting jurisprudence. Plaintiffs incorporate herein by reference all of the arguments and legal authorities previously submitted to the Court on the issue of an appropriate remedy in this matter in Plaintiffs' Post-Trial Briefing on Remedy (Doc. 115, May 6, 2016) and its attachments, most particularly the authorities cited on pages 2-6 of the brief concerning the Court's jurisdiction to implement a remedy even while an appeal is pending and Plaintiffs' right to a full remedy to avoid further irreparable harm.

I. STATEMENT OF THE CASE

Plaintiffs filed this action on May 19, 2015 (Doc. 1) and, on October 7, 2015 filed a motion for a preliminary injunction (Doc. 23), seeking to avoid the continuing use of

unconstitutional racially gerrymandered districts, which was denied. (Doc. 39) Following the trial of this action on April 11 – 15, 2016, Plaintiffs sought an order requiring the North Carolina General Assembly to immediately redraw the unconstitutional districts. (Doc. 115) In this Court's Order and Judgment entered August 15, 2016 (Doc. 125), holding that the twenty-eight districts challenged in this case are unconstitutional, Plaintiffs' request for immediate relief was denied and the 2016 elections are proceeding using the 2011 districts. Plaintiffs now seek an order requiring the Defendants to remedy the constitutional violations in the twenty-eight districts[1] at issue in this case within two weeks of the General Assembly reconvening in January 2017, and directing the Defendants to conduct special elections in those districts in 2017.

II. ARGUMENT

A. Plaintiffs' Request that Remedial Districts Be Drawn by January 25, 2017 is Reasonable.

The primary responsibility for reapportionment of state legislative districts rests with the legislature, which should be afforded an adequate opportunity to "reapportion according to federal constitutional requisites in a timely fashion." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). As the U.S. Supreme Court has explained:

> When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford

[1] Only the twenty-eight districts (out of 170 state legislative districts) found unconstitutional need to be redrawn. While neighboring districts and county clusters in some areas of the state will be impacted, other areas of the state, and most notably districts in the western region of the state, do not need to be redrawn to remedy the unconstitutional districts.

> a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution.

Wise v. Lipscomb, 437 U.S. 535, 540 (1978). The time period requested by Plaintiffs does afford the Defendants that reasonable opportunity to adopt a remedial measure in place of the unconstitutional districts currently in use.

This Court issued its judgment on August 15, 2016, and the legislature could at any time from that date convene in special session to consider and enact a redistricting plan that cures the constitutional defects found in the twenty-eight districts at issue in this case. Alternatively, Defendants could wait until the next regular session to redraw. Plaintiffs request that this Court allow the Defendants no longer than two weeks after the next regular session of the North Carolina General Assembly is underway, that is, until January 27, 2017 to adopt remedial districts.

This time period is consistent with state law provisions applicable in these circumstances, *see* N.C. Gen. Stat. § 120-2.4 (state courts must give legislature at least two weeks to remedy defects identified in a redistricting plan).[2] It is consistent with, and indeed well beyond, the time period allowed in similar recent litigation in North Carolina. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D. N.C. 2016) (three-judge court)

[2] Plaintiffs do not contend that this state statute constrains this court but only point out that the relief Plaintiffs seek is consistent with this state policy, *see also, Stephenson v. Bartlett,* 358 N.C. 219, 230, 595 S.E.2d 112, 119-20 (2004) (holding that N.C. Gen. Stat. § 120-2.4 does not unconstitutionally limit the authority of judicial branch to remedy constitutional violation).

(ruling on February 5, 2016 that Defendants have until February 19, 2016 to enact remedial districts); *Stephenson v. Bartlett,* No. 01-cvs-2885 (Johnston County Superior Ct. May 8, 2002) (allowing the General Assembly 12 days to draw new redistricting plans for the State House and State Senate) (Attached as Appendix 1).

Requiring the Defendants to remedy the constitutional defects in the twenty-eight house and senate districts at issue here in January 2017 is justified on pragmatic and equitable grounds. First, legislative action by January 25, 2016 is necessary to allow Plaintiffs' additional relief of special legislative elections in those districts in 2017. In order to have ample time for court review and administrative implementation of the new districts with primary and general elections in 2017, new districts should be in place as early as possible in 2017. Second, even if there are no new elections in those districts in 2017, voters, potential candidates and the general public should have notice at the earliest possible time of the new election districts. The longer there is uncertainty, the greater harm to the plaintiffs and the public that follows. There is no justification for delaying the Defendants' consideration of remedial districts beyond January 25, 2017.

Finally, it is well established that if the Defendants fail to enact a remedy, the responsibility falls to the Court to craft a remedial plan. *See Personhuballah v. Alcorn,* 155 F. Supp. 3d 552, 557 (E.D. Va. 2016) (three-judge court) (citing *White v. Weiser,* 412 U.S. 783, 794-95 (1973)); *Connor v. Finch,* 431 U.S. 407, 415, 425 (1977) (district court must draw legislative districts expeditiously that comply with constitutional requirements where the legislature fails to do so). *See also Chatman v. Spillers,* 44 F.3d 923, 925 (11th

Cir. Ga. 1995) (it was error for the trial court to refuse to order special elections where the city failed to enact a remedy). Allowing the Defendants until January 25, 2017 to carry out their responsibility to enact remedial districts is more than fair and equitable in these circumstances.

B. Special Elections in 2017 in the Remedial Districts are Necessary to Avoid Further Violation of Plaintiffs' Constitutional Rights.

Plaintiffs request that this Court order Defendants to conduct special elections in the redrawn house and senate districts in 2017. While the Court exercised its discretion to allow the 2016 elections to proceed using the unconstitutional districts, the general rule is that "once a State's apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims,* 377 U.S. at 585. The use of unconstitutional racially gerrymandered districts to elect representatives irreparably harms Plaintiffs in this case and they "are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan." *Harris v. McCrory,* 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (three-judge court) (citing *Page v. Va. Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015)).

"A denial of constitutionally protected rights demands judicial protection." *Reynolds v. Sims,* 377 U.S. at 566. Where a legislature has impermissibly used race to draw districts, the harm of that governmental use of racial classifications extends to everyone in the district and "the public has an interest in having … representatives

elected in accordance with the Constitution." *Personhuballah,* 155 F. Supp. 3d at 560-61. A special election in 2017 is necessary to prevent further harm to Plaintiffs and all North Carolina voters residing in the unconstitutional districts. As the Court has acknowledged, Plaintiffs have already suffered "substantial stigmatic and representational injuries." Mem. Op. 161, Aug. 11, 2016 (Doc. No. 123). The interests of the public as a whole also are best served by implementing constitutional redistricting plans as soon as possible. Since the districts were first enacted in 2011, this legislature has enacted over 1,000 laws.[3] Indeed, "[t]he public has a strong interest in having elections conducted according to constitutionally drawn districts, instead of pursuant to racially gerrymandered lines that violate the constitutional rights of all citizens within those districts." *Johnson v. Miller*, 929 F. Supp. 1529, 1560-61 (S.D. Ga. 1996). The "paramount fact is that all persons" in these districts "are currently represented by unconstitutionally elected officials." *Tucker v. Burford*, 603 F. Supp. 276 (N.D. Miss. 1985) (ordering the terms of county officials shortened and a special election to fill the remainder of the terms).

[3] Numerous laws enacted since 2011 have been held unconstitutional or enjoined by state and federal courts. *See, e.g., Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) *cert. denied sub. nom.*, *Walker-Mcgill v. Stuart*, 135 S. Ct. 2838 (2015) (N.C. Gen. Stat. § 90-21.85 violated the First Amendment where it required a physician to speak to a patient who was not listening, rendered the physician the mouthpiece of the state's message, and omitted a therapeutic privilege to protect the health of the patient); *NAACP v. McCrory,* No. 16-1468, 2016 U.S. App. LEXIS 13797 (July 29, 2016) (Parts of Session Law 2013-381, a comprehensive election reform measure held unconstitutional); *N.C. Ass'n of Educators v. State,* 786 S.E.2d 255 (N.C. 2016) (Career Status Law unlawfully infringed upon the contract rights of those teachers who had already achieved career status in violation of the Contract Clause, U.S. Const. art. I, § 10).

It is well established that "[f]ederal courts have often ordered special elections to remedy violations of voting rights." *Ketchum v. City Council of Chicago,* 630 F. Supp. 551, 565 (N.D. Ill. 1985); *see also, Cousins v. City Council,* 503 F. 2d 912, 914 (7th Cir. 1974) (in resolving challenge to Chicago City Council redistricting, district court ordered special elections in the affected wards); *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (ordering special elections and shortening terms to implement remedial districting plan in Section 2 vote dilution case).

The relief that Plaintiffs seek here is precisely what the three-judge panel ordered in *Smith v. Beasley,* 946 F. Supp. 1174 (D.S.C. 1996), following its holding that six house districts and three senate districts in South Carolina's legislative redistricting plans were unconstitutional racially gerrymandered districts. That court held that the 1996 elections could go forward using the unconstitutional districts because at the time of its ruling on September 26th, the general election was roughly six weeks away, but that a special election would be held in 1997 in any districts that had to be redrawn as a result of the court's ruling. *Id.* at 1212. Recognizing that racial gerrymandering causes significant harm and that citizens are entitled to have their equal protection rights vindicated as soon as possible, the court ordered that:

> In the House and Senate districts that are altered by the remedial districting plan, legislators elected in the 1996 general election will serve for only one year. Special elections must be held in 1997 to elect Representatives and Senators to serve the balance of the terms in the amended districts.

Id.

The Plaintiffs in this case are entitled to the same relief. "Particularly where 'voters are represented by unconstitutionally elected officials . . . [courts have] had no difficulty in determining that the terms of the officials elected' should be shortened and special elections held." *Ketchum,* 630 F. Supp. at 565 (quoting *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss.1985) (redistricting case). *See also Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation). Plaintiffs' request for a special election in 2017 also is bolstered by the fact that Plaintiffs sought relief in the form of a preliminary injunction in advance of the challenged election. *See Smith v. Cherry,* 489 F. 2d 1098, 1103 (7th Cir. 1973) *cert. denied*, 417 U.S. 910 (1974).

The same relief Plaintiffs seek here was also ordered in redistricting litigation in Virginia in 1981 where the court found that the legislature's state house and senate districts violated the equal protection clause on one-person one vote grounds. *See Cosner v. Dalton,* 552 F. Supp. 350 (E.D. Va. 1981) (three-judge court). The court there held that "[b]ecause Virginia's citizens are entitled to vote as soon as possible for their representatives under a constitutional apportionment plan, we will limit the terms of members of the House of Delegates elected in 1981 to one year." *Id.* at 364. North Carolina's citizens living in unconstitutional racially gerrymandered districts deserve no less. This court has the authority and the duty to protect Plaintiffs rights to equal protection in their exercise of the most fundamental right to vote, *see Reynolds,* 377 U.S. at 554-55; *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964) ("Other rights, even the most

basic, are illusory if the right to vote is undermined."), and should order that an election occur in the in the remedial districts in 2017.

Defendants' notice of appeal in this action is no reason to delay implementation of a remedy or to deny Plaintiffs the relief of a special election in the affected districts in 2017. Similar arguments to suspend any remedial efforts pending Supreme Court review were carefully considered and rejected in *Personhuballah v. Alcorn,* 155 F. Supp. 3d at 558 (stay denied by *Wittman v. Personhuballah,* 136 S. Ct. 998 (2016)). Seeking to delay implementation of an effective remedy is in essence an attempt to stay this Court's order, which should be the subject of a separate motion. *See, e.g., Larios v. Cox,* 305 F. Supp. 2d 1335 (N.D. Ga. 2004) (denying motion to stay order during pendency of Supreme Court proceedings and collecting cases).

Indeed, there are numerous examples of courts ordering the implementation of remedial plans shortly after ruling and before any further appeals are decided to ensure that voters already constitutionally harmed by illegal redistricting plans do not suffer further irreparable harm. *See, e.g., Vera v. Bush*, 933 F. Supp. 1341, 1352-53 (S.D. Tex. 1996) (ordering a remedial plan on August 6, 1996, for November 1996 elections); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) (denying motion to stay a May 22, 1996, deadline for the legislature to enact a remedial plan for the November 1996 congressional election); *Busbee v. Smith*, 549 F. Supp. 494, 518-19 (D.D.C. 1982) (ordering a court-drawn remedial plan on August 24, 1982, for two congressional districts), *aff'd* 459 U.S. 1166 (1983). Here there is no reason to delay. The court should

order the Defendants to hold special elections in 2017 in the newly-drawn remedial districts required by ruling on the merits in this case.

C. This Court Has Authority to Make Such Other Orders as Required to Implement the Appropriate Remedy.

Plaintiffs also seek an order that the Defendants produce the legislative history of the new districts at the same time the plans are submitted to this court for approval, and that the state constitutional residency requirement be slightly relaxed to avoid disadvantaging candidates who wish to seek office in the remedial districts who may have less than a year's notice of the district's location and boundaries. Ordering the production of the legislative history for the remedial plan is consistent with the procedure recently followed in another case in this district. *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. Feb. 5, 2016); *see also*, *Harris*, Case No. 1:13-cv-949, ECF No. 149 (Feb. 19, 2016) (Defs.' Notice of Filing of Legislative History Materials) (Attached as Appendix 2). Moreover, it is critically important to this Court's review of the remedial plan. This Court will have to determine whether the remedial state legislative plans truly cure the constitutional defect identified by this Court, without introducing any new constitutional defects. In order to do so, this Court must consider not only the effect that the altered district lines will have on voters, but the process by which those remedial district lines are created. Prompt production of a broad array of legislative history materials will enable this Court to conduct a meaningful review.

Plaintiffs also request that the Court slightly shorten the residency requirement contained in Article II, §§ 6-7 of the North Carolina Constitution, so that candidates for

the new legislative districts in 2017 need only be residents of the district from which they seek election for the period of time between the close of filing for the 2017 special election and the date of the election. The North Carolina Constitution states that a senator or representative "shall have resided in the district for which he is chosen for one year immediately preceding his election." N.C. Const. Art. II, §§ 6-7. However, where the district boundaries are not even known one year before the date of the election, this one-year residency requirement unfairly limits citizens' ability to run for office and voters' ability to elect candidates of their choice.

Federal courts have broad authority to modify election deadlines in order to ensure that elections under remedial plans proceed in an orderly fashion, and that authority includes the power to modify state constitutional residency requirements. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964); *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1964). In *Butterworth,* the court explained:

> It is fundamental that state limitations -- whether constitutional, statutory or decisional -- cannot bar or delay relief required by the federal constitution … of course it is elemental that if we have the power to enjoin an election to the General Assembly pursuant to an unconstitutional plan of districting and apportionment, we certainly have the power to approve a special election pursuant to a constitutional redistricting and reapportionment and to allow such election at the earliest practicable date without delay because of state constitutional or statutory limitations.

Id. See also, Valenti v. Dempsey, 211 F. Supp. 911, 913, (D. Conn. 1962) (A "state constitutional limitation need not be construed as a bar, for no state limitation on legislative action can prevent relief which the Federal Constitution, as construed by the Supreme Court, requires.") This principle applies here to the state constitutional

residency requirement. Where equity requires relaxing that requirement to allow the scheduling of a special election, vindication of the federal constitutional right to equal protection takes precedence.

It is common for federal courts to alter residency requirements, election deadlines and term lengths when necessary to implement remedial plans, even where those requirements are established by state constitutions. *See, e.g.*, *Perez v. Perry*, Case No. 5:11-cv-360, ECF No. 486 at *3 (W.D. Tex. Nov. 4, 2011) (shortening the residency requirement in Texas Constitution in connection with ordering special election schedule) (Attached as Appendix 3); *id*., ECF No. 685 at *3 (W.D. Tex. March 1, 2012) (same) (Attached as Appendix 4); *Brown. v. Ky. Leg. Research Comm'n*, 966 F. Supp. 2d. 709, 726 (E.D. Ky. 2013) (noting that state constitution residency requirement for state legislative office does not constrain deadline for drawing reapportionment plan consistent with federal constitutional standards); *see also Smith v. Beasley*, 946 F. Supp. at 1212-13 (shortening terms from 2 years to 1 year and ordering 1997 special elections for state legislative seats, even though the South Carolina Constitution set the terms for Senators as four years and Representatives as two years. S.C. Const. art. III, §§ 2, 6). The additional relief Plaintiffs seek is supported by precedent and necessary for equitable implementation of remedial districts to end the improper use of racial classifications in redistricting that occurred in 2011 when the current districts were enacted.

III. CONCLUSION

Accordingly, this Court should grant Plaintiffs' Motion for Additional Relief.

This the 30th day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 30th day of September, 2016.

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