

**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.

**PLAINTIFFS' REPLY TO
DEFENDANTS' MEMORANDUM
ON ADDITIONAL RELIEF**

Pursuant to the Court's Order for Supplementary Briefing Schedule,¹ (Doc. 124, Aug. 15, 2016), as modified by Consent Order (Doc. 127, Aug. 19, 2016), Plaintiffs respectfully submit this reply to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Additional Relief (Doc. 136, Oct. 28, 2016) (hereinafter "Defs.' Mem."). Defendants' objections to Plaintiffs' proposed remedial schedule and request for a special election in 2017 in the affected districts are based on illusory administrative issues rather than any showing that Plaintiffs are not legally entitled to the relief they seek. Administrative inconvenience cannot outweigh the violations of Plaintiffs' and North Carolina voters' constitutional rights, which have existed for three elections already. Additionally, Defendants' complaints of administrative challenges are overblown and unfounded.

¹ Defendants did not comply with the Court's direction in its Order that each party's brief on this motion shall be no longer than twelve pages. Plaintiffs respectfully request that this Court therefore disregard the material appearing on pages 13-17 of Defendants' Memorandum.

A. Plaintiffs' Proposed Deadline of January 25, 2017 for a Remedial Plan is Reasonable.

Defendants, the North Carolina General Assembly, and the general public have known since August 19, 2016 that the 28 legislative districts found to be unconstitutional racial gerrymanders in this case must be redrawn. Indeed, there is nothing to stop the North Carolina General Assembly from redrawing those unconstitutional districts before the end of the year.² Moreover, it is clear from Dr. Hofeller's own declaration that he has already determined the county clusters impacted by the court's ruling and identified the county groupings that he believes are necessary to use in any remedial plan.³ Hofeller Decl. 6-7 (Doc. 136-1, Oct. 28, 2016). If his county cluster map is correct, all that remains to be done is to divide multi-district clusters into single-member districts, keeping counties whole and drawing compact districts, as required by the North Carolina Supreme Court's interpretation of the state constitution in the *Stephenson* cases. *See Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003).

Contrary to Defendants' contention, the steps needed to enact a remedial plan in this case are not more complicated than those involved in *Harris v. McCrory*, where the defendants described how Dr. Hofeller, Senator Rucho and Representative Lewis, with their counsel, met "shortly following the Court's decision," discussed redistricting

² Two weeks ago, the Governor indicated he would call a special session of the legislature in December to address flood relief. Craig Jarvis, *McCrory will ask for special session on storm recovery*, News & Observer (Oct. 28, 2016), <http://www.newsobserver.com/news/politics-government/state-politics/article111070032.html>.

³ According to Dr. Hofeller's declaration, there are thirty-five counties in the current state senate map and forty-one counties in the state house map that are not impacted by the Court's opinion and do not need to be changed in any way. *See* Hofeller Decl. Maps 3 & 6 (Doc. 136-1, Oct. 28, 2016).

concepts, and drew “conceptual” remedial maps. Defs’ Resp. to Pls.’ Objections and Mem. of Law Regarding Remedial Redistricting Plan 8, *Harris v. McCrory*, No. 13-cv-949 (M.D.N.C. Mar. 7, 2016), ECF No. 159 (Attached as Ex. A). Public hearings were held on one day in six locations, feedback was incorporated, criteria were adopted, and the General Assembly enacted remedial districts, all within the two weeks allowed by the court. *Id.* at 8-17. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (ruling on February 5 that legislature had until February 19, 2016, to enact a remedial districting plan). Here there is significantly more time, more than five months, between the date of the Court’s decision and the January 25, 2017 deadline proposed by Plaintiffs.

Plaintiffs do not argue that North Carolina law requires the General Assembly be given only two weeks to enact new legislative districts in affected areas, as Defendants contend. *See* Defs.’ Mem. 14. Rather, the statute is evidence that two weeks is **sufficient** for Defendants to enact remedial districts. *See* N.C. Gen. Stat. § 120-2.4 (2003). The General Assembly was aware of the time needed to enact a legislative redistricting plan when it adopted the statute on November 25, 2003. It had enacted initial House and Senate plans on November 1, 2001; a second set of remedial plans on May 17, 2003; and a third set of remedial plans on November 25, 2003, the same date it enacted Section 120-2.4. *See* 2001 N.C. Sess. Laws 458; 2001 N.C. Sess. Laws 459; 2002 N.C. Sess. Laws 1; 2002 N.C. Sess. Laws 2; 2003 N.C. Sess. Laws 434. This statute has been on the books for almost thirteen years without amendment. There is nothing in the record to support Defendants’ contention that they need more than two weeks to enact a legislative redistricting plan. Defendants’ proposed timeline, which they assert should be used even

if a special election in 2017 is ordered, in fact puts a much greater burden on the State Board of Elections to implement the new districts and administer special elections during 2017 than Plaintiffs' proposed timeline would. Indeed, everything Defendants say in the first half of their argument about why special elections are not feasible administratively in 2017 is directly contradicted by the assertions in the second argument where they state that if they have until May 1, 2017 to enact remedial districts, there is still sufficient time "for elections to be held in November 2017."⁴ Compare Defs.' Mem. 6-9 and Strach Decl. 4-16 (Doc. 136-3, Oct. 28, 2016) with Defs.' Mem. 16-17.

B. Plaintiffs are Legally Entitled to Special Elections in the Affected Districts in 2017.

Defendants' arguments concerning the administrative burdens of conducting special elections for certain legislative seats in 2017 are exaggerated. See Bartlett Decl. 2-3 (Nov. 11, 2016) (Attached as Ex. B). The geocoding and ballot preparation issues are manageable. *Id.* The fact that counties are in the process of splitting certain precincts in preparation for the next census, see Defs.' Mem. 7-8, is a complete smokescreen, since by Defendants' own admission, the reason for so many divided precincts in the current plans was to meet the unjustified 50% black VAP criterion, see Op. 41 (citing Trial Tr. vol. V, 104:21-105:6 (Hofeller); Trial Tr. vol. IV, 43:16-20 (Rucho)). In legally drawn districts where race is not the predominant factor, district lines can more closely follow county lines and there is much less need to divide any current precincts.

⁴ Defendants presumably agree with Plaintiffs' request that in the event of special elections in 2017, the normal candidate residency period should be shortened, as they do not address this in their memorandum. See Pls.' Mem. in Supp. of Mot. for Additional Relief 10-12 (ECF No. 133, Sept. 30, 2016).

In opposing Plaintiffs' request for a special election in 2017, Defendants also rely on the nonsensical proposition that a contrary state court interpretation of the federal constitution, which was once vacated by the U.S. Supreme Court and is still on appeal, should "be considered" in determining whether legislators elected from unconstitutional districts based on race should continue to serve long after the voters' constitutional rights have been violated. *See Dickson v. Rucho*, 781 S.E.2d 404 (N.C. 2015), *petition for cert. filed*, No. 16-24 (U.S. June 30, 2016). Defendants' attempt to distinguish *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996), on the grounds that there was no state supreme court ruling upholding the districts found to be racial gerrymanders in that case is equally unavailing. The relevant question here is whether a court has the discretion to order special elections when its ruling that districts are racial gerrymanders comes too late to be implemented before an election. *Smith* is clear precedent that the court has such power and that plaintiffs are entitled to that relief.

Defendants offer no response, other than administrative burden, to the severe constitutional harms suffered by Plaintiffs and other North Carolina citizens by this illegally-constituted General Assembly. Any administrative burden is far outweighed by the harms Plaintiffs have suffered and will continue to suffer without relief. *See Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" cannot justify a practice that impinges upon a fundamental right); *Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (finding "administrative and financial burdens on the defendant are not . . . undue in view of the otherwise irreparable harm to be incurred by plaintiffs"). Thus, Plaintiffs, and all North Carolinians, are entitled to relief in 2017.

Respectfully submitted this the 15th day of November, 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 15th day of November, 2016.

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