IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:15-CV-00399

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| SANDRA LITTLE COVINGTON, *et al.,* | ) |
| | ) |
| Plaintiffs, | ) |
| | ) |
| v. | ) |
| | ) |
| STATE OF NORTH CAROLINA, *et al.* | ) |
| | ) |
| Defendants. | ) |

**DEFENDANTS' EMERGENCY MOTION TO STAY REMEDIAL ORDER PENDING DISPOSITION OF JURISDICTIONAL STATEMENT**

Defendants respectfully move this Court to stay its 29 November 2016 order imposing a 15 March 2017 deadline for enactment of remedial legislative districts and imposing a special election in the Fall of 2017 ("Remedial Order") (D.E. 140) pending final disposition of the Jurisdictional Statement filed with the United States Supreme Court on 15 November 2016. Because of the exigent nature of the circumstances, defendants request an expedited ruling on this motion so that defendants can immediately seek relief in the United States Supreme Court if necessary. In support of this motion, defendants show the Court:

1. A special election is an extraordinary remedy that warrants extraordinary caution. While unconstitutional districts surely impose harm on voters within those districts, abrogating the results of a majority of elections across the state by halving legislative terms and replacing duly elected legislators in off-schedule elections with historically low turnout would impose harm on every single voter in the state of North

Carolina. And where the special election is ordered notwithstanding the fact that the state supreme court has twice upheld the constitutionality of the very same districts, requiring a special election also imposes sovereign harms on the State itself. In light of those irreparable harms, as well as the massive cost to taxpayers of holding special elections, such a drastic remedy should be imposed only when the constitutional violation is unmistakable and finally adjudicated. That is not the case here.

2. The Supreme Court of the United States has yet to consider this case on the merits, but is likely to do so in the next few months. On November 15, defendants filed a jurisdictional statement in the Supreme Court. *See* Exhibit A. Unlike in the discretionary certiorari process, the Supreme Court has direct appellate jurisdiction over redistricting decisions by three-judge panels, requiring it to review this Court's decision on its merits. When it does, for the reasons explained in defendants' jurisdictional statement, there is at least the requisite "fair prospect" to warrant a stay, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010), that the Court will note probable jurisdiction and reverse, thereby eliminating the need for the new maps and special election that this Court has ordered.

3. Moreover, there are numerous other redistricting cases now pending at the Supreme Court that involve issues closely related to those in this case and may ultimately require this Court to reconsider its merits ruling. For instance, in *Harris v. McCrory*, 159 F. Supp. 3d 600 (2016), defendants filed a jurisdictional statement with the Supreme Court. *See* Supreme Court Docket 15-1262. On June 27, 2016, the Court noted probable jurisdiction and ordered briefing on the merits. *Id*. The case has been scheduled for oral argument before the Supreme Court on 5 December 2016. *Id*. In addition, on 30 June

2016, the plaintiffs in *Dickson v. Rucho*, 368 N.C. 481, 485-86, 781 S.E.2d 404, 410-11 (2016), filed a petition for a writ of *certiorari*, which was circulated for a conference of the Supreme Court on 26 September 2016. *See* Supreme Court Docket 16-24. It is highly likely that all three decisions regarding North Carolina's 2011 redistricting will be reviewed by the Supreme Court, and any one of them may well produce an opinion that significantly impacts this case. Therefore, staying the imposition of any remedy in this case will ensure that the State and its residents do not suffer the harm of undergoing the burdensome tasks of drawing new maps and preparing for a special election before the Supreme Court can determine whether the North Carolina Supreme Court or this Court correctly applied the law on racial gerrymandering.

4. Even apart from the merits of plaintiffs' racial gerrymandering claims, defendants also are reasonably likely to receive interim relief from the Supreme Court because the Remedial Order is not supported by law. The Remedial Order identified only two out-of-state district court decisions for the proposition that this Court has the authority to grant such relief. (D.E. 140 at 2) (citing *Butterworth v. Dempsey*, 237 F. Supp. 302, 306 (D. Conn. 1965) (per curiam); *Smith v. Beasley*, 946 F. Supp. 1174, 1212-13 (D.S.C. 1996)) But the authority to grant relief does not justify overreaching relief. And unlike this Court, the court in *Smith* warned the defendants and voters in its initial merits order that it would be shortening legislative terms and ordering a new election. *Smith*, 946 F. Supp. at 1212-13. The *Smith* decision also involved far fewer districts and therefore did not involve the specter of a court invalidating *millions* of validly cast votes. *Id.* at 1213.

5. On the other hand, ample authority cautions lower federal courts against overreaching injunctive relief in cases involving state election laws, including redistricting plans. *See, e.g., Hunt v. Cromartie*, 529 U. S. 1014 (2000); *Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994); see also *Watkins v. Mabus*, 502 U.S. 952 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991) (three judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)); *Growe v. Emison*, 507 U.S. 25, 35 (1993) (noting that elections must often be held under a legislatively enacted plan prior to any appellate review of that plan). Accordingly, there is a reasonable likelihood that the Remedial Order will be stayed or vacated by the Supreme Court even if defendants do not succeed on the ultimate merits of this case.

6. Without a stay of the Remedial Order, irreparable injury is certain to occur. At the outset, forcing the State to redistrict and hold a special election imposes obvious injuries on the State and the legislators who were elected to serve two-year terms. Moreover, if, as is likely, most of the 120 legislative districts have to be redrawn to comply with this Court's orders, irreparable injuries will be suffered by the State's residents as well. The evidence submitted by defendants (D.E. 136-3, ¶¶ 50-51) suggests that the turnout in a November 2017 special election will be abysmal, and likely at least 50% to 75% lower than the number of voters who voted in the November 2016 general election (4,769,592 voters as of today). And if this Court's decision is reversed or

modified after the court-ordered special election, it will not be possible to replace the representational rights lost by the millions of November 2016 voters whose votes likely will be eliminated by the shortened terms imposed by the Remedial Order. That harm, which is no fault of those voters, should at a minimum be weighed against the alleged "injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." (D.E. 140 at 2-3) Respectfully, the supposed injury caused by allowing legislators (including many African American legislators in affected districts) to serve the final year of a two-year term "pales in comparison" to the harm of eliminating millions of votes validly cast (with the express permission of this Court) for those legislators to serve a two-year term. (*Id.*) The injury to these millions of voters by the Remedial Order compounds the injury already caused by a separate federal appellate decision enjoining North Carolina election law reforms. While that decision criticized the State for enacting election laws the court contended would reduce African American turnout, it was only after the appellate court imposed a regime of election laws for the 2016 presidential election that African American participation was suppressed in a presidential election to levels not seen since 2004. It is counterintuitive that the Court would order a special election ostensibly to protect African American voting rights but order that the special election occur under a court-ordered election regime which suppressed African American participation to levels not seen in a decade. Thus, the irreparable harm to North Carolina voters alone warrants a stay of the Remedial Order pending review by the Supreme Court.

7. In addition, by the time of Supreme Court review, the electoral disruption described by defendants in opposition to plaintiffs' special election request likely will have already occurred and cannot be taken back. (D.E. 136-3). Under these circumstances it is neither equitable nor fair to the voters of North Carolina to compel the irreparable injury that will flow from holding special elections in 2017.

WHEREFORE, the Court should stay the Remedial Order pending final disposition of the Jurisdictional Statement filed with the United States Supreme Court in this matter on 15 November 2016.

Respectfully submitted this 2nd day of December, 2016.

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## CERTIFICATE OF SERVICE

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This the 2nd day of December, 2016.

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