IN THE

SUPREME COURT OF THE UNITED STATES

Nos. 16A1202, 16A1203

NORTH CAROLINA, et al.,

Appellants-Respondents,

v.

SANDRA LITTLE COVINGTON, et al.,

Appellees-Applicants.

RESPONSE TO APPLICATION FOR ISSUANCE OF MANDATE FORTHWITH

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FOURTH CIRCUIT:

Under Rule 44.1, a party has 25 days to decide whether to file a petition for rehearing. Plaintiffs' application to cut that time short identifies no compelling reason to deviate from the ordinary rule; in fact, their application is premised on the categorically false notion that the General Assembly would defy the district court's injunction if the mandate is not issued forthwith. In reality, the General Assembly stands ready and willing to enact a new districting plan in ample time for the scheduled 2018 primary and general elections. Because no good cause exists to depart from the ordinary course, this Court should deny the application.

The district court's initial order, which this Court summarily affirmed in No. 16-649, required the State to draw "new House and Senate district plans" and

enjoined the State from "conducting any elections for State House and State Senate offices after November 8, 2016, until a new redistricting plan is in place." JS1.App.149. The State will comply with that order, regardless of when the mandate issues and jurisdiction returns to the district court. *See, e.g.*, Br. Opposing Mot. to Affirm 10, *Covington v. North Carolina*, No. 16-1023 (U.S. Mar. 14, 2017) ("If there really is a racial gerrymander here, the State will remedy it."). In contending otherwise, plaintiffs emphasize that the General Assembly previously "expressed plans to adjourn for the year in … early July" and that "[t]he next regular session of the General Assembly is not scheduled to begin until May 2018, after the candidate filing period for the 2018 elections has closed and potentially after a primary election has been conducted for the 2018 election cycle." Appl.2. But whatever the General Assembly's previous plans and regardless of when they would have adjourned had this Court resolved the *Covington* appeals differently, the General Assembly now has another item on its agenda—*i.e.*, enacting a new districting plan—and it will adjust its calendar accordingly. With the 2018 primary elections almost a year away, there is more than sufficient time for the General Assembly to enact a new districting plan on a timeline that allows for the legislative and public consultation and debate that this inherently policy-driven task necessitates.

Although plaintiffs fail to mention it to this Court, their desire for expedition of the mandate appears to stem not from an interest in ensuring that the General Assembly has time to enact orderly changes for the 2018 election cycle, but rather

from an effort to pursue an even more extraordinary special-election order than the one this Court vacated in No. 16-1023. That is not mere speculation: Plaintiffs *already* have filed several motions in the district court, including a request for an evidentiary hearing "regarding the need for, and feasibility of, special elections," Dkt.151 at 5 (June 8, 2017), along with a separate motion to expedite consideration of that motion, Dkt.152 (June 8, 2017). Plaintiffs failed to mention in either motion that the district court currently lacks jurisdiction to act, despite having acknowledged that fact to this Court a mere two days earlier. *See* Appl.1 ("[T]he district court will not gain jurisdiction to begin remedial proceedings until it receives certified copies of this Court's judgments."). And while the district court has acknowledged that it presently lacks jurisdiction, it nonetheless has already "invited" the parties to brief "as expeditiously as possible," *inter alia*, whether the court should still order special elections to take place in November 2017. Dkt.154 at 3-4 (June 9, 2017).

Even setting aside that plaintiffs appear to be taking inconsistent positions in this Court and the district court (or at least engaging in selective disclosure), the simple reality is that expediting issuance of the mandate would not accomplish plaintiffs' apparent objective, and any special election ordered at this juncture would inflict enormous adverse consequences. According to plaintiffs' own calculations during the initial remedial phase of this case—calculations that were based on an exceedingly expeditious timeline that Appellants by no means endorse as realistic—special elections would have been possible only if this Court's mandate

had issued *more than a month ago*. Even by plaintiffs' own telling, state law and administrative realities necessitate a bare minimum of 14 days to design and enact a new districting plan; 8 days for a candidate-filing period; 21 days to prepare primary election ballots; 60 days to mail absentee primary election ballots; 21 days to prepare general election ballots; and 60 days to mail absentee general election ballots. *See* Pls.' Post-Trial Briefing On Remedy 17-18, Dkt.115 (May 6, 2016).[1]

Counting backwards from November 7th—the date on which municipal elections are currently scheduled across the State—the mandate would have had to issue no later than May 7th for the State to have enough time to complete the special-election process even on plaintiffs' exceedingly expedited timeline. And that timeline assumes that the district court could order a special election *immediately* upon acquiring jurisdiction, a step that would be difficult, if not impossible, to reconcile with this Court's recent order summarily reversing the district court for "address[ing] the balance of equities in only the most cursory fashion." *North Carolina v. Covington*, No. 16-1023 (June 5, 2017), slip op. 3. In reality, if the district court were to order such an extraordinary remedy, it would need several additional weeks to hold an evidentiary hearing, engage in the "equitable weighing process" this Court's precedents require, and issue a reasoned opinion setting out its justification for intruding so severely on state sovereignty. *Id.* at 2. Thus, even by

[1] Plaintiffs suggested in their filing that the two absentee-ballot periods could be reduced to 45 days but acknowledged that such a reduction would violate state law. Pls.' Post-Trial Briefing On Remedy 17-18, Dkt.115 (May 6, 2016). In all events, a 30-day reduction still would not buy enough time to complete the special-election process.

plaintiffs' own accounting, there is no permissible way for the district court to order a special election for 2017, much less to do so without unduly "intruding on state sovereignty" and "disrupt[ing] … the ordinary processes of governance." *Id.* at 3.

Of course, the timeline on which plaintiffs' calculations were premised, which gives the General Assembly a whopping 14 days to complete the delicate process of redistricting, is wholly unrealistic. Redistricting is an inordinately complicated task that requires serious time and resources. During the 2011 process, for example, the General Assembly conducting 12 separate public hearings over the course of a month before drawing the maps, spent another month using the information gained during that process to draw the maps, conducted three more public hearings over the course of a month after releasing the maps, then deliberated for 10 days before enacting the maps. There is no reason to deviate from the normal order to assist plaintiffs in their apparent endeavor to deprive the people of North Carolina of the same careful consideration by their elected representatives this time around—especially given the district court's acknowledgment that "the large number of districts found to be racial gerrymanders will render the redistricting process somewhat more time-consuming." Dkt.140 at 4. Indeed, for the district court to force the General Assembly to draw new districts and hold a special election in less than half the time the court originally

contemplated would effectively punish Appellants for their *successful* appeal of the court's initial remedial order.[2]

Nor could the district court properly order a standalone special election for *2018*, as such an order would flunk any fairly administered equitable balancing test. The intrusion on state sovereignty would be extreme, as any such order would shorten constitutionally prescribed legislative terms, cast aside multiple constitutional provisions, and require the State to foot the bill for an expensive standalone special election (*i.e.*, one that is not held contemporaneously with a regularly scheduled statewide election). *See* Jurisdictional Statement 26-29, *North Carolina v. Covington*, No. 16-1023 (Feb. 21, 2017). On the other side of ledger, the special election would elect legislators with exceedingly short terms—so short, in fact, that those legislators would be forced to do the bulk of their campaigning for the regularly scheduled 2018 primary elections before their first legislative session even begins, and voters would have to evaluate incumbents without any information about how they discharged their duties during their previous term. And the only way around that conundrum would be to order further changes to

[2] That result would be all the more inequitable given that Appellants offered from the outset to expedite consideration of their appeal of the remedial order should this Court want to preserve the ability to hold special elections in November. *See, e.g.*, Application for Stay 4, *Covington v. North Carolina*, No. 16-1023 (U.S. Dec. 30, 2016). Having declined to take Appellants up on that offer, the Court should be loath to take any step that might be viewed as implicitly endorsing plaintiffs' efforts to deprive the State and its residents of the time necessary to draw new maps that fully and fairly consider the many factors this Court has instructed legislatures to consider when doing so.

established state election procedures, which would only exacerbate the intrusion on sovereignty and make special elections even more inequitable.

Moreover, this Court would then have to expedite its own proceedings in the inevitable appeal from such a special-election order to ensure that the State was not deprived of its ability to secure appellate review before being forced to hold a special election and disrupt "the integrity of [its] election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). And that is unlikely to be the only appeal arising from a special-election order, as the plaintiffs almost certainly would challenge the new districting plan on whatever grounds they consider most likely to result in partisan gain for their preferred political party. *Cf. Harris v. Cooper*, No. 16-166. Accordingly, granting plaintiffs' request to expedite issuance of the judgment is far more likely to encourage a remedy that would result in electoral chaos than one that would make any appreciable step toward fair and effective representation.

On the other hand, there are real costs to granting plaintiffs' request. Expediting issuance of the judgment by a couple of weeks would have no material impact on the General Assembly's ability to timely enact a new districting map, but it could be seized upon to justify an enormously misguided special-election remedy. Moreover, granting plaintiffs' request would signal that state defendants do not get the benefit of the 25-day rehearing period provided by this Court's rules in election cases, and it would invite further motions of this sort. Rehearing is seldom sought and even more rarely granted, but the rules nonetheless give litigants time to evaluate that option. Given this Court's appellate jurisdiction over election cases,

the possibility that this Court could note probable jurisdiction in another relevant case, such that a rehearing petition should be at least evaluated, is greater than in the context of this Court's certiorari jurisdiction. At the same time, the consequences of allowing the full 25-day period to run its course are generally less significant, as there is one less layer of possible delay between this Court and the trial court. While there may be rare circumstances where the Court can order *sua sponte* that a judgment or mandate should issue forthwith, this Court is generally not well-positioned to evaluate timeliness arguments that are better directed to the lower courts that will actually oversee the proceedings on remand.

Rather than encourage parties to routinely seek to foreshorten the rehearing period provided by the rules based on arguments better directed to the courts on remand, this Court should adhere to the timing provisions set forth in the rules. Doing so will not cause any appreciable harm to plaintiffs, as Appellants stand ready and willing to draw new maps on a reasonably expedited schedule, and the district court has already made crystal clear that it intends to resolve the remaining remedial questions expeditiously once it obtains jurisdiction. In the meantime, Appellants are entitled to the same brief period as all other litigants receive under this Court's rules to fully consider the option of seeking rehearing. Appellants therefore respectfully submit that the application should be denied.

Respectfully submitted,

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June 13, 2017

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CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Response to Application for Issuance of the Certified Copy of Judgment Forthwith, filed by hand-delivery to the Supreme Court of the United States, were served via Next-Day Service on the following parties listed below on this 13th day of June, 2017:

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