

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

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

**DEFENDANTS' REPLY
BRIEF IN SUPPORT OF
EMERGENCY MOTION TO
STAY REMEDIAL ORDER**

On 2 December 2016, defendants filed an emergency motion to stay this court's remedial order of 29 November 2016. (D.E. 141) On 5 December 2016, this motion was submitted to the court. On Friday, 23 December 2016, plaintiffs filed their response in opposition to defendants' emergency motion.

A special election is an extraordinary remedy. If it is ever appropriate for a district court to abrogate the results of elections across the state and to mandate off-schedule elections, it is only after a close and careful balancing of the equities involved. *Bower v. Indiana Sec'y of State*, 837 F.3d 813, 818 (7th Cir. 2016). The remedial order failed to engage with the relevant equitable considerations, all of which weigh heavily against the extreme and intrusive remedy of a special election. Consequently, there is at least the requisite "fair prospect," *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010), that the

Supreme Court will note probable jurisdiction and reverse, thereby eliminating the need for the new maps and special election that this Court has ordered.¹

Absent a stay to allow defendants to seek relief from the Supreme Court, irreparable injury is certain to result, as the State will be forced to expend considerable resources preparing for special primary and general elections, and the legislature will be required to spend the first six weeks of its already-shortened term drawing new districting maps. Worst of all, the remedial order would inflict irreparable harm upon North Carolina voters, who went to the polls on the understanding that the legislators they elected would serve two-year terms, only to find that their voting power has been retroactively reduced by half. And the resulting representational harms would not be remedied by the special election, as turnout at North Carolina special elections has historically been abysmal, *see* D.E. 136-3 at 15, meaning that millions of North Carolinians will be deprived of their franchise.

Defendants reiterate their request that this Court expedite its ruling on defendants' motion. The General Assembly is scheduled to convene its 2017 regular session on or about 11 January 2017. This Court's remedial order has mandated that the General Assembly enact new districting plans no later than 15 March 2017. As we have explained, by virtue of the Court's remedial order, North Carolina will be required to change over 70% of the districts enacted by the General Assembly in 2011 resulting in

¹ Plaintiffs incorrectly state that defendants do not seek a stay of the Court's order requiring the legislature to draw new districts by the March deadline. Response at 13. Defendants have, in fact, sought a stay of the entire remedial order.

special elections for over 70% of the General Assembly in 2017. (D.E. 136, Defendants' Memorandum in Opposition to Plaintiffs' Motion for Additional Relief, at 5.6.)²

Because of the large number of districts that must be changed pursuant to this Court's order, it is imperative that the General Assembly know no later than 11 January 2017, whether it will obtain relief—either from this Court or from the Supreme Court—from the Court's order of 29 November 2016.³

For these reasons, defendants respectfully request that this Court rule on defendants' emergency motion as soon as possible so that further relief may be sought from the United States Supreme Court, if necessary, before the new General Assembly convenes on 11 January 2017.

² Plaintiffs have not cited any case in which a federal court ordered special elections and shortening of terms for over 70% of the state's legislature in districts already found legal by a state court. Most of the cases cited by plaintiffs in their response involve only one county or one city. See Response at 9 (citing *United States v. Osceola County*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006); *Tucker v. Burford*, 603 F. Supp. 276 (N.D. Miss. 1985); *Ketchum v. City Council of Chicago*, 630 F. Supp. 551 (N.D. Ill. 1985)). And, in the one case plaintiffs cite involving a statewide redistricting plan, the district court in its merits order gave notice to the public and candidates that candidates elected in the upcoming election would have their terms shortened to one year. *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981).

³ On 13 September 2016, defendants filed a notice of appeal from this Court's judgment of 11 August 2016. Defendants filed their jurisdictional statement with the United States Supreme Court on 14 November 2016. (Supreme Court No. 16-649). On 22 December 2016, defendants filed a notice of appeal from this Court's remedial order.

Respectfully submitted, this the 23rd day of December, 2016.

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/s/ Thomas A. Farr

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day 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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*Local Rule 83.1
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This the 23rd day of December, 2016

/s/ Thomas A Farr

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