

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

SANDRA LITTLE COVINGTON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:15-cv-399
)	
THE STATE OF NORTH CAROLINA, et al.,)	
)	
Defendants.)	

**POSITION STATEMENT BY
THE STATE OF NORTH CAROLINA AND THE STATE BOARD OF ELECTIONS
DEFENDANTS IN RESPONSE TO THE COURT’S JUNE 9 NOTICE; RESPONSE TO
PLAINTIFFS’ MOTION TO SET DEADLINES FOR REMEDIAL PLAN AND
PLAINTIFFS’ MOTION FOR EXPEDITED EVIDENTIARY HEARING**

INTRODUCTION

The Supreme Court has summarily affirmed this Court's judgment that 28 state legislative districts drawn by the North Carolina General Assembly are unconstitutional racial gerrymanders. *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 n.* (2017).

The Supreme Court has also asked this Court to reconsider whether a special election would be a proper remedy for the General Assembly's unconstitutional districting. *Id.* at 1625-26. Specifically, the Supreme Court has directed this Court to consider "the severity and nature" of the constitutional violation, "the extent of the likely disruption to the ordinary processes of governance if early elections are imposed," and "the need to act with proper judicial restraint when intruding on state sovereignty." *Id.* at 1626.

On June 8, Plaintiffs moved that this Court (1) set a hearing on the need for and feasibility of holding a special election before the 2018 elections and (2) set a series of deadlines to develop a remedial districting plan. (Docs. 150, 151.)

The next day, this Court directed Defendants to respond to Plaintiffs' motions. The Court also invited Defendants to discuss how the factors stated by the Supreme Court apply in the circumstances of this case. (Doc. 153 at 3-4.) The Court also invited Defendants to address, among other points, what steps the State has taken to comply with this Court's August 11, 2016, order, and whether the State is entitled to additional time to comply with that order. *Id.* at 4.

The State Defendants¹ respectfully offer this response to the Court's June 9 order and Plaintiffs' June 8 motions.

¹ The State Defendants who are filing this response are the State of North Carolina ("the State") and the State Board of Elections and its members, all of whom have been sued in their official capacities ("the State Board"). Under a recently enacted state statute, the Bipartisan State Board of Elections and Ethics Enforcement has replaced the State Board of Elections. *See*

The State does not dispute the severity of the harms that flow from unconstitutional gerrymandering. Even so, a special election would disrupt the ordinary processes of state government and would intrude to some degree on state sovereignty. But should the Court decide that the nature and severity of the harms found in this case justify such a remedy, the State and the State Board stand ready to implement it.

The State takes no position on the schedule for the creation of a remedial map-drawing plan, but it believes that a swift decision on a remedy would advance the public interest. To devise that remedy, the Court should follow fair procedures that will allow the Court to hear from all parties and to gather any further information the Court needs.

The General Assembly has scheduled two “special sessions” to commence on August 3, 2017 and September 6, during which it can respond to “actions related to litigation concerning the districts for . . . State House [and] State Senate.” Resolution 2017-12, §§ 1.2(4) (session commencing on August 3), 2.2(7) (session commencing on September 6).

The State Board takes no position on the merits of Plaintiffs’ motions or on the questions posed by the Court in its June 9 order. The Declaration of Kim Westbrook Strach (Ex. A) is offered with this position statement, and the State Board staff stands ready and willing to assist the Court by providing further information as the Court finds necessary.

2017 N.C. SESS. LAW 6, sec. 4(c). The new Bipartisan Board does not yet have members appointed to it.

The Attorney General of North Carolina represents the State and the State Board of Elections defendants in this case. Section IV of this response discusses this issue.

ARGUMENT

I. The Public Interest Calls for a Prompt Decision on the Schedule for Map Drawing and Elections.

The State acknowledges that racially gerrymandered districts constitute a severe constitutional violation. The State takes no position on whether the severity of the constitutional violation found by this Court warrants a special election before the scheduled 2018 elections.

Nor does the State take a position on a preferred schedule for map drawing.

The State believes that the public interest is best served by a prompt decision on the schedule for map drawing and on whether any other remedies, including special elections, will be required before the scheduled 2018 elections. A decision on these issues will give the State, the State Board, candidates, and voters the ability to plan and prepare for whatever remedy the Court finds appropriate.

A special-elections remedy would undoubtedly cause some disruption to the governance of North Carolina and would intrude on state sovereignty to some degree. However, if the Court finds that any disruption or intrusion is outweighed by the need to remedy the constitutional violation, the State and the State Board stand ready to administer that remedy.

A. The Formation of 28 Racially Gerrymandered Districts Has Caused a Severe Constitutional Violation.

The General Assembly's 2011 districting maps created 28 racially gerrymandered state legislative districts; the gerrymander affected 19 House of Representatives districts and nine Senate districts. As this Court has stated, this racial gerrymandering has caused North Carolinians to suffer "severe constitutional harms." *Covington*, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 1624, 1625 (2017).

Since the General Assembly enacted the 2011 maps, the State has had three election cycles for the General Assembly. The State vigorously defended those maps against constitutional challenge. However, this Court and the Supreme Court concluded that the challenges had merit. In light of these findings, the State acknowledges that racially gerrymandered districts constitute a severe constitutional violation.

B. A Special Election Would Disrupt the Ordinary Processes of State Governance.

The Supreme Court has also asked this Court to consider the extent of the likely disruption to the State if early elections are imposed. *Covington*, 2017 WL 2407467, at *3.

The extent to any disruption is, to some extent, dependent on the timing of early elections. Any special election should occur while the General Assembly is in recess. After a special election, the General Assembly would then convene for and carry out its 2018 legislative session in the ordinary course.

A special election would require special procedures, which may require this Court to issue special orders that would minimize the associated disruption. The General Assembly's current legislative session adjourned on June 30. The General Assembly is expected to reconvene for its 2018 legislative session on May 16, 2018. Resolution 2017-12, § 3.1. To avoid interrupting the regularly scheduled business of the General Assembly, if this Court were to order a special election, it should be scheduled to take place no later than March 2018. If a general election were to occur after January 30, 2018, it would likely require some adjustments to the 2018 election cycle. N.C. Gen. Stat. § 163-106.

An estimate for the likely expense to counties of carrying out a special election is approximately \$9.5 million for the primary election and \$9.5 million for the general election. (Doc. 136-3 ¶¶ 41-44.) This estimate includes expenses related to printing and counting ballots,

securing early-voting sites, administering the absentee-balloting process, administering operations on Election Day, and canvassing. (Doc. 136-3 ¶¶ 41, 44.) The estimate is based on experience from 2014, which included a statewide election for federal and state offices, including the United States Senate. Here, a special election would be of more limited scope than the 2014 election.

The record shows that a special election could take place no earlier than 26 weeks after legislative maps are final. (Doc. 136-3 ¶ 38; Declaration of Kim Westbrook Strach (Ex. A) ¶ 3.) This period includes 13 weeks to prepare for the primary election and 13 weeks to prepare for the general election. (Doc. 136-3 ¶ 38; Ex. A ¶ 3.)

In sum, a new election would require special procedures and would impose financial costs to counties as well as to the State. However, if the Court orders the State to hold a special election before the scheduled elections in 2018, the State and the State Board stand ready to administer that remedy.

C. A Special Election Would Intrude on State Sovereignty, But May Still Be Appropriate.

The Supreme Court has also asked this Court to consider the intrusions on state sovereignty that would result from ordering a special election. *Covington*, 2017 WL 2407467, at *3.

Holding a special election would intrude on the sovereignty of North Carolina, because it would require temporarily suspending provisions of the North Carolina Constitution. A special election would temporarily shorten the terms of certain legislators from two years to one. *See* N.C. Const. art. II, § 6 (establishing two-year terms for legislators). Because suspending this and other constitutional provisions would disrupt the State's usual procedures for governing itself, this Court should not lightly set these provisions aside—even temporarily.

Should the Court order a special election to take place before the scheduled 2018 elections, the State and State Board stand ready to comply.

II. The State Has Not Yet Drawn New Maps.

The August 11 order directed “the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans.” 316 F.R.D. at 177. The order, however, did not set a more specific deadline for compliance. *See id.*

On June 29, the General Assembly adjourned but scheduled two special sessions to begin on August 3 and September 6, 2017. Resolution 2017-12, §§ 1.2(4), 2.2(7). During these two sessions, the General Assembly can consider redistricting. *Id.* The General Assembly has also appointed members to the House and Senate redistricting committees, and leaders have committed to finishing new maps by mid-November.²

III. The Attorney General Represents the State and the State Board.

This Court has also asked the parties to address which defendants have authority under state law to address the above questions on behalf of the State. (Doc. 153 at 4.) This section addresses that issue.

Under North Carolina law, the Attorney General of North Carolina represents the State of North Carolina, as well as the State Board. The Attorney General’s authority to represent the State has overlapping roots in the North Carolina Constitution, common law, and statutes. Under the North Carolina Constitution, the Attorney General is an independently elected executive-branch officer whose authority includes powers that existed at common law. N.C. Gen. Stat. §

² Colin Campbell, *No Voter ID Revival Before Lawmakers Left Raleigh*, News & Observer (July 1, 2017), available at <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article159235729.html>.

114-1.1; see *Steelman v. City of New Bern*, 184 S.E.2d 239, 241 (N.C. 1971) (“common law” refers to the “common law of England as of the date of the signing of the Declaration of Independence”).

At the core of the Attorney General’s powers is “the common law duty to prosecute all actions necessary for the protection and defense . . . of the sovereign people of North Carolina.” *Martin v. Thornburg*, 359 S.E.2d 472, 479 (N.C. 1987); cf. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (holding that the Commonwealth of Puerto Rico, acting through its Attorney General, has parens patriae standing to “protect its residents”). This means that the Attorney General has the common-law authority “to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested.” *Martin*, 359 S.E.2d at 479.

In keeping with these principles:

- Section 114-2(1) of the North Carolina General Statutes entrusts the Attorney General “to appear for the State in any . . . court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.” N.C. Gen. Stat. § 114-2(1) (2015).
- Section 114-2(2) entrusts the Attorney General “to represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.” *Id.* § 114-2(2).
- Finally, the Attorney General, on request of a state officer or employee, may represent that officer or employee when he is sued “on account of an act done or

omission made in the scope and course of his employment” for the State. *Id.*

§ 143-300.4.

Section 147-17 of the General Statutes creates possible exceptions to these duties, but those exceptions do not apply here. That statute provides that the Governor of North Carolina may “employ private counsel as he may deem proper or necessary to represent the interest of the State.” *Id.* § 147-17(a). The Governor may also employ outside counsel for state agencies and officers, but only on an express condition: “if the Attorney General has advised him . . . that it is impracticable for the Attorney General to render the legal services.” *Id.*

Here, the above powers of the Governor are not in use. The Attorney General has not advised the Governor that it is impracticable for him to represent the State Board or its former members, nor has the Governor employed outside counsel for the State.

In sum, the Attorney General represents the State, as well as the State Board, in this case.³

CONCLUSION

For the reasons stated above, the State respectfully requests a swift decision on the issues before the Court and stands ready to administer whatever remedy the Court determines to be appropriate.

This 6th day of July, 2017.

JOSH STEIN
ATTORNEY GENERAL

/s/ Alexander McC. Peters

³ In this case, the plaintiffs have sued four individual legislators in their official capacities. (Doc. 11 at 1-2.) These legislators are not represented by the Attorney General. Rather, these legislators are represented by outside counsel of their choosing, consistent with a recently amended statute that governs the retention of private counsel by the General Assembly. *See* N.C. Gen. Stat. § 120-32.6(a), *as amended by* 2017 N.C. SESS. LAW 57, sec. 6.7.

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CERTIFICATE OF SERVICE

I, Alexander McC. Peters, hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will provide electronic notification of the same to the following:

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