

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

SANDRA LITTLE COVINGTON, et)
al.,)
)
Plaintiffs,)
)
v.) 1:15-CV-399
)
THE STATE OF NORTH)
CAROLINA, et al.,)
)
Defendants.)

ORDER

On August 11, 2016, this Court unanimously concluded that the Defendants unjustifiably relied on race in drawing lines creating twenty-eight majority-minority districts in the 2011 state legislative districting plans, in violation of the Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment. *Covington v. North Carolina*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (mem.). To remedy the constitutional violation, the North Carolina General Assembly enacted proposed remedial plans on August 31, 2017. On September 15, 2017, the Plaintiffs filed objections to three Senate districts and nine House districts created by the proposed remedial plans. Thereafter, the Legislative Defendants filed a response to Plaintiffs' objections. This Court held a hearing concerning the objections on October 12, 2017.

After careful review of the parties' written submissions, arguments, and evidence, the Court has serious concerns that 2017 Enacted Senate Districts 21 and 28 and 2017 Enacted House Districts 21 and 57 fail to remedy the identified constitutional violation.

See id. at 146-47 (Senate District 21); *id.* at 147-48 (Senate District 28); *id.* at 155-56 (House District 21); *id.* at 163-64 (House District 57). Among other concerns, some or all of the proposed remedial districts preserve the core shape of the unconstitutional version of the district, divide counties and municipalities along racial lines, and are less compact than their benchmark version. In some cases, the General Assembly's use of incumbency and political data in drawing its proposed remedial districts embedded, incorporated, and perpetuated the impermissible use of race that rendered unconstitutional the 2011 districts. The 2017 Enacted Districts do not appear to cure the constitutional violations found as to 2011 Enacted House Districts 21 and 57 and Senate Districts 21 and 28. The Court is concerned that, among other things, some of the districts proposed by the Plaintiffs may be the result of impermissible political considerations. *See infra* ¶ 2(h).

The Court further has serious concerns that the 2017 redrawing of 2011 Enacted House Districts 36, 37, 40, and 41 in Wake County and House District 105 in Mecklenburg County exceeded the authorization to redistrict provided in the Court's previous orders. None of these districts as enacted in 2011 was found to be an unconstitutional racial gerrymander, nor do any of these districts adjoin such a district. The Legislative Defendants have not provided any evidence that it was necessary to redraw these districts in order to cure the constitutional violations found by the Court as to 2011 House Districts 33 and 38 in Wake County or House Districts 99, 102, or 107 in Mecklenburg County. Unless required by court order, the General Assembly was prohibited by the North Carolina Constitution from redrawing these districts. N.C. Const.

art. II §§ 3(4), 5(4). If these 2017 Enacted Districts cannot be used, it also becomes impossible to use the other 2017 Enacted Districts in Mecklenburg and Wake Counties, thus necessitating the redrawing of the 2011 unconstitutional districts – House Districts 33, 38, 99, 102, and 107 – and only such adjoining districts as are necessary to remedy the violations found as to those districts. *See Covington*, 316 F.R.D. at 159-61 (House Districts 33 and 38); *id.* at 164-66 (House Districts 99, 102, and 107); *see also Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) (per curiam) (“[I]f a violation of federal law *necessitates* a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs.” (emphasis added)).

Constitutionally adequate districts must be in place in time for the 2018 election, and the Court finds it appropriate to appoint a Special Master to assist the Court in drawing such districts, should the Court ultimately determine they are necessary. *See* Doc. 202 at 2. After reviewing the Special Master’s report, and with the benefit of his analysis, this Court will issue an order finally deciding whether the Plaintiffs’ objections will be sustained and determining the districting plan to be used going forward. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 562-65 (E.D. Va. 2016) (relying on special master report and remedial districting plan to assess proposed legislative remedial plan); Order Appointing Special Master, *Navajo Nation v. Ariz. Indep. Redistricting*, Nos. CV 02-0799, 02-0807 (D. Ariz. May 17, 2002) (appointing special master “to evaluate evidence regarding proposed redistricting plans,” including remedial plan adopted by state redistricting body, and to “assist the court in developing an appropriate plan”).

In view of the fast-approaching filing period for the 2018 election cycle and the specialized expertise necessary to draw district maps, the Court has previously given notice of its intent to appoint Professor Nathaniel Persily as Special Master pursuant to Federal Rule of Civil Procedure 53(a)(1)(C). *See* Doc. 202. The Court's selected Special Master has filed the affidavit required by Federal Rule of Civil Procedure 53(b)(3)(A). Doc. 203.

The parties have had an opportunity to object to the Court's selection of a Special Master. The Legislative Defendants filed objections, Doc. 204, and the Plaintiffs have responded. Doc. 205. The Court has considered those objections and overrules them. The State is not entitled to multiple opportunities to remedy its unconstitutional districts. *See Reynolds v. Sims*, 377 U.S. 533, 585-87 (1964) (affirming remedial districting map drawn by a district court after district court found state legislature's first proposed remedial map failed to remedy constitutional violation). Additionally, the fast-approaching candidate filing deadline necessitates an expedited schedule. In light of the need for an expedited schedule, the Court's two notices of its intent to appoint a special master, the first of which was issued approximately three weeks ago, provided the parties with more than adequate notice and opportunity to be heard. It is comparable to the timeline followed in similar cases. *See* Order, *Personhuballah v. Alcorn*, No. 3:13cv678, Doc. No. 241 (E.D. Va. Sept 25, 2015) (appointing special master approximately three weeks after first notifying parties of its intent to appoint special master); *see also* Order, *Personhuballah v. Alcorn*, No. 3:13cv678, Doc. No. 207 (E.D. Va. Sept. 3, 2015) (notifying parties of intent to appoint special master). The Legislative Defendants'

specific objections to the identified Special Master are speculative and insubstantial, and they have not made an alternative suggestion despite the Court's invitation to do so.

Pursuant to Federal Rule of Civil Procedure 53, it is hereby **ORDERED** that:

1. Dr. Nathaniel Persily is appointed as a Special Master to submit a report and proposed plans to remedy the unconstitutional racial gerrymander of 2011 Enacted Senate Districts 21 and 28 and House Districts 21, 33, 38, 57, 99, 102, and 107 (hereinafter the "Subject Districts"), as more specifically identified in this Court's opinion in *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd in relevant part*, 137 S. Ct. 2211 (2017) (mem.). His report is due no later than December 1, 2017.
2. In drawing remedial districts, the Special Master shall:
 - a. Redraw district lines for the Subject Districts and any other districts within the applicable 2017 county grouping necessary to cure the unconstitutional racial gerrymanders. As to House District 57, the redrawn lines shall also ensure that the unconstitutional racial gerrymanders in 2011 Enacted House Districts 58 and 60 are cured. As to 2011 Enacted House Districts 33, 38, 99, 102, and 107, no 2011 Enacted House Districts which do not adjoin those districts shall be redrawn unless it is necessary to do so to meet the mandatory requirements set forth in Paragraphs 2(b) through 2(e) of this Order, and if the Special Master concludes that it is necessary to adjust the lines of

a non-adjointing district, the Special Master shall include in his report an explanation as to why such adjustment is necessary.

- b. Use the 2010 Federal Decennial Census Data;
- c. Draw contiguous districts with a population as close as possible to 79,462 persons for the House Districts and 190,710 persons for the Senate Districts, though a variance up to +/- 5% is permitted and authorized if it would not conflict with the primary obligations to ensure that remedial districts remedy the constitutional violations and otherwise comply with state and federal law, would enhance compliance with state policy as set forth in subsection (f) below, and would not require redrawing lines for an additional district.
- d. Adhere to the county groupings used by the General Assembly in the 2017 Enacted Senate and House Plans;
- e. Subject to any requirements imposed by the United States Constitution or federal law, comply with North Carolina constitutional requirements including, without limitation, the Whole County Provision as interpreted by the North Carolina Supreme Court.
- f. Make reasonable efforts to adhere to the following state policy objectives, so long as adherence to those policy objectives does not conflict with the primary obligations of ensuring that remedial districts remedy the constitutional violations and otherwise comply with state and federal law:

- i. Split fewer precincts than the 2011 Enacted Districts;
 - ii. Draw districts that are more compact than the 2011 Enacted Districts, using as a guide the minimum Reock (“dispersion”) and Polsby-Popper (“perimeter”) scores identified by Richard Pildes & Richard Neimi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993); and
 - iii. Consider municipal boundaries and precinct lines.
- g. After redrawing the districts, in view of the policy decision by the General Assembly that efforts to avoid pairing incumbents are in the interest of North Carolina voters, the Special Master may adjust district lines to avoid pairing any incumbents who have not publicly announced their intention not to run in 2018, but only to the extent that such adjustment of district lines does not interfere with remedying the constitutional violations and otherwise complying with federal and state law. Additionally, the Special Master shall treat preventing the pairing of incumbents as “a distinctly subordinate consideration” to the other traditional redistricting policy objectives followed by the State. *Ga. State Conf. of NAACP v. Fayette Cty. Bd. of Comm’rs*, 996 F. Supp. 2d 1353, 1363 (N.D. Ga. 2014) (collecting cases).
- h. Except as authorized in Paragraph 2(g), the Special Master shall not consider incumbency or election results in drawing the districts. *See*,

e.g., *Wise v. Lipscomb*, 437 U.S. 535, 541 (1978) (noting that courts lack “political authoritativeness” and must act “in a manner free from any taint of arbitrariness or discrimination” in drawing remedial districts) (quoting *Connor v. Finch*, 431 U.S. 408, 417 (1977)); *Wyche v. Madison Par. Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) (“Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.”); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (noting that “a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies”); *Favors v. Cuomo*, Docket No. 11–cv–5632, 2012 WL 928216, at *18 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-cv-5632, 2012 WL 928223, at *6 (E.D.N.Y. Mar. 19, 2012); *Molina v. Cty. of Orange*, No. 13CV3018, 2013 WL 3039589, at *8 (S.D.N.Y. June 3, 2013), *supplemented*, No. 13CV3018, 2013 WL 3039741 (S.D.N.Y. June 13, 2013), *report and recommendation adopted*, No. 13 CIV. 3018 ER, 2013 WL 3009716 (S.D.N.Y. June 14, 2013); *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004); *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750, at *4 (E.D. Tex. Nov. 14, 2001).

- i. The Special Master may consider data identifying the race of individuals or voters to the extent necessary to ensure that his plan cures

the unconstitutional racial gerrymanders and otherwise complies with federal law.

3. The Special Master may consider the plans submitted by the Plaintiffs and the 2017 Enacted plans as background. Because any remedy must be narrowly tailored to address the harm, he further should use any 2017 Enacted Districts within a relevant county grouping which do not abut or overlap with a Subject District, except to the extent modification of such district is necessary to comply with and meet the requirements of this Order. *See Personhuballah*, 155 F. Supp. 3d at 563 (discussing Supreme Court precedent and concluding that in remedying a violation, the only districts which should be changed are those that are “require[d]” to be changed). Any such decisions shall be explained in his report. Otherwise, he shall draw his own plans using the criteria set forth herein.
4. The Special Master is authorized to hire research and technical assistants and advisors reasonably necessary to facilitate his work, who shall be reasonably compensated by the State of North Carolina in the same way as the Special Master. He is authorized to buy any specialized software reasonably necessary to facilitate his work.
5. To facilitate the consideration of incumbency authorized by Paragraph 2(g), the parties shall confer and, no later than November 8, 2017, shall file a Joint Submission identifying incumbents covered by Paragraph 2(g) by name, address, and date first elected.

6. Upon request from the Special Master, the parties shall promptly make available to the Special Master electronic copies of trial and hearing transcripts, trial exhibits, motions, briefs, and evidentiary material otherwise submitted to the Court. Such a request shall be communicated by way of an email message to counsel of record for all parties.
7. The parties, including the North Carolina Legislative Analysis Division, shall promptly respond to the best of their ability to any reasonable request by the Special Master for supporting data or information as is reasonably necessary to carry out his assignment. All such requests and responses shall be made by email, with all counsel copied. Upon such a request, the requested party shall respond promptly to the best of its ability. The Special Master may, but is not required to, request briefs on such background matters as he would find helpful. The Special Master is not authorized to take new evidence, absent request to do so and approval from the Court.
8. The Special Master may, but is not required to, convene the parties for a discussion about logistics, software, data, and other housekeeping or technical issues, including whether it would or might save time or other resources to use computers, software, data, or other facilities and materials controlled by the State and to have technical assistance from a support person employed by the State in the use of such materials. He may convene such a discussion upon reasonable notice at a time and place and in a method convenient to him, though if an in-person meeting or hearing is convened it shall occur in North

Carolina. He shall advise the parties of the time and other details by way of an email message to counsel of record for all parties.

9. If the Special Master determines that it would save time and otherwise facilitate prompt completion of his work to use state technical resources and so long as the parties consent to such use under terms which would not give the State advance or ex parte knowledge of the Special Master's work and which would prevent the State from accessing such work or communicating with its support employee about such work, the Court will entertain a request to supplement this Order.
10. If time permits and the Special Master would find it helpful, he may publicly release preliminary maps or plans and convene a hearing, meeting, or informal conference to evaluate whether the preliminary maps meet the criteria set forth herein or raise unanticipated problems. The Special Master shall advise the parties of the time and other details by way of an email message to counsel of record for all parties and shall file notice with the court. A transcript shall be prepared of any such hearing, meeting, or conference, and, if it does not occur in open court, be made available on the Court's docket.
11. The Special Master is prohibited from engaging in any ex parte communication with the parties or their counsel, except as specifically authorized by this Order.
12. The Special Master is prohibited from discussing this matter with anyone else, other than assistants or advisors he retains to complete his work, except as

specifically authorized by this Order. Any assistants or advisors retained by the Special Master may discuss the matter only with the Special Master.

13. The Special Master may communicate ex parte with the Clerk of Court, the Clerk's staff, and the Court about housekeeping, scheduling, and logistical matters. If necessary to clarify or supplement these instructions, the Special Master may communicate ex parte with the Court, provided he promptly advises the parties that the communication has occurred and discloses any material guidance he has received.

14. Pursuant to Rule 53(b)(2)(C), the Special Master shall maintain orderly files consisting of all documents submitted to him by the parties and any written orders, findings, and recommendations. All other materials relating to the Special Master's work should be preserved until relieved of this obligation by the court. The Special Master shall preserve all datasets used in the formulation of redistricting plans, and any drafts considered but not recommended to the court, in their native format.

15. The Special Master's final report shall contain:

- a. At least one recommended redistricting plan for each Subject District;
- b. For each county or county grouping encompassing a Subject District, a color map showing the recommended remedial plan;
- c. For each Subject District, an analysis (i) explaining the proposed remedial plan and the recommendation of that plan over the 2017 Enacted Districts or the Plaintiffs' proposed districts; (ii) covering any

matters required elsewhere in this Order; and (iii) discussing any criteria, issues, or questions which the Special Master believes may arise or which will otherwise aid the Court;

- d. A comparison of the Special Master's districts with the related 2011 and 2017 Enacted Districts as to population deviations; compactness; county, municipal, and precinct splits; incumbency pairing; Black Voting Age Population; and any other relevant criteria; and
- e. A "stat pack" for the recommended plans.

16. If any party believes the report should contain additional information, it shall meet and confer with other parties and thereafter file an appropriate request no later than November 6, 2017. In lieu of a brief in support, the request shall be accompanied by a Joint Submission including the positions of all parties so that responses will not be needed.

17. The Special Master shall file his report electronically on the Court's CM/ECF system. The Legislative Defendants shall promptly post the Special Master's report and supporting electronic files to its redistricting website.

18. The Court will review the report pursuant to Fed. R. Civ. P. 53(f).


19. If any party or non-party believes that one or more proposed districts set forth in the Special Master's report is legally unacceptable or otherwise should not be adopted, specific objections must be filed within five business days. Any response must be filed within three business days. Briefs are limited to 5000 words. Reply briefs limited to 2500 words may thereafter be filed within two

business days. The Court anticipates scheduling a hearing on the report in early January 2018. Fed. R. Civ. P. 53(f)(1).

20. The Court understands the candidate filing period to be from February 12 to February 28, 2018. Doc. 162-1. If that is or becomes incorrect, the Defendant State Board of Elections shall immediately advise the Court.

21. The Court may modify this order pursuant to Federal Rule of Civil Procedure 53(b)(4). The parties may seek to modify this order for good cause shown, but no such motion shall be filed without meeting and conferring in person with all other counsel. Absent agreement, the time to respond to such a motion is two business days and no reply will be permitted.

Entered by the Court, this the 1st day of November, 2017.


FOR THE COURT