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

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

PLAINTIFFS' RESPONSE TO LEGISLATIVE DEFENDANTS' NOVEMBER 17, 2017 FILING

The Special Master instructed the parties to provide proposed objections and revisions to the Draft Plan and specifically encouraged the parties to include suggestions as to how incumbents should be unpaired. ECF 212 at 19. Legislative Defendants provide only abstract objections, not meaningfully engaging with any element of the Draft Plan, and offer no alternative plan or suggestions for unpairing incumbents for the Special Master's consideration (or upon which Plaintiffs could comment). Indeed, this lack of meaningful response from Legislative Defendants is surprising since a large portion of their brief complains about the absence of another chance to remedy the continued unconstitutionality in the 2017 enacted plan. When presented with an opportunity by the Special Master to do just that, Legislative Defendants declined.

Nonetheless, Plaintiffs submit the following observations to assist the Special Master in completing the task assigned to him.

I. UNDER THE NORTH CAROLINA CONSTITUTION, THE COURT DID NOT AUTHORIZE THE LEGISLATURE TO ENGAGE IN MID-DECADE REDISTRICTING BEYOND THAT WHICH WAS NECESSARY TO REMEDY RACIAL GERRYMANDERING, AND THUS THE SPECIAL MASTER'S MODIFICATIONS ARE APPROPRIATE

Legislative Defendants' continued protestations that the legislature was free to make any changes it saw fit to all Wake and Mecklenburg County House Districts during the 2017 remedial process defies all logic and legal reasoning. A federal court can only authorize a legislature to depart from state constitutional demands insofar as is necessary to correct violations of federal law. *See 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."). The Court's reading of Article II, Sections 3(4) and 5(4) of the North Carolina constitution is neither "novel," Defs' Br. at 13, nor inconsistent with North Carolina state law precedent. It is difficult to imagine any directive more "clear, complete, and unmistakable," *Kornegay v. Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920), than the plainly-worded rule that legislative districts "shall remain unaltered until the return of another decennial census." N.C. CONST. art. II §§3(4) and 5(4).

In Wake and Mecklenburg Counties, it is factually incorrect that "the shapes and locations of the non-adjoining districts were directly caused by the location of the illegal districts," Defs' Br. at 13-14, and thus must somehow be altered in correcting the racial gerrymanders. Plaintiffs' proposed maps for these two counties, introduced during the

legislative session and presented to this Court, demonstrate that the racial gerrymanders can be remedied without touching the five implicated districts, and there is no "domino effect" on every district in the county. Defs' Br. at 14. Were the Special Master to suggest to the court that the legislature should have free rein to redistrict county-wide, even where such alterations are not necessary to remedy a federal law violation, then the Court would commit the very errors that were central in *Perry v. Perez*, 565 U.S. 388, 392 (2012), where a federal court erroneously disregarded state law and policy. The Special Master should decline to offer such poor advice.

II. THE AVAILABILITY OR USE OF RACIAL DATA DOES NOT EQUATE TO RACIAL PREDOMINANCE IN REDISTRICTING

Legislative Defendants' only remotely-specific condemnation of the Draft Plan is that the Special Master employed "racial sorting" in the plan. Defs' Br. at 15. As Legislative Defendants should know—after years of litigation over its 2011 maps and three recent United States Supreme Court decisions reiterating the standards for the appropriate use of race—the consideration of race in redistricting does not condemn a plan as an unconstitutional racial gerrymander. *See Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring); *see also Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 555 (3d Cir. 2011); *Prejean v. Foster*, 227 F.3d 504, 509 (5th Cir. 2000); *Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006). The use of race in drawing district lines only triggers heightened scrutiny where race is "the predominant factor motivating the [mapdrawer's] decision to place a significant number of voters within or without a particular district." *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) (quoting *Miller v. Johnson*,

515 U.S. 900, 916 (1995)) ("*ALBC*"); *see also Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2016).

These three recent cases paint a detailed picture of what actually constitutes a mechanical racial target. *See ALBC*, 135 S. Ct. at 1257, 1271 (finding that the "primary redistricting goal [] to maintain existing racial percentages in each majority-minority district" was a mechanical racial target); *Cooper*, 137 S. Ct. at 1468-69 (holding that a prerequisite that certain districts "must include a sufficient number of African-Americans" to make the "majority black district[s]," regardless of the level of racially polarized voting in the region, is a "textbook example of race-based districting") (internal quotations omitted); *Bethune-Hill,* 137 S. Ct. at 802 (ruling that the legislature's predetermination that each district that elected an African-American representative must have, as redrawn, at least 55% black voting age population was, in all but one instance, an unjustified racial target). Contrary to Legislative Defendants' allegations, mechanical racial targets do not exist and predominate in the redistricting process where, in areas of the state with substantial African-American populations, compact districts drawn from whole precincts and respecting political subdivisions might have black voting age populations ranging from 39% to 43.6%. Defs' Br. at 15. This geographically-predictable outcome is neither surprising nor constitutionally suspect. There is no racial gerrymandering or racial sorting in the Draft Plan because there is neither "circumstantial evidence of a district's shape and demographics" that race predominated "or more direct evidence going to [] purpose." *Bethune-Hill,* 137 S. Ct. at 797. In making these specious claims, Legislative Defendants

can point to no evidence that the Special Master "subordinated traditional race-neutral districting principles . . . to racial considerations," because none exists. *Id*.

CONCLUSION

The three-judge panel provided the Special Master with detailed instructions on how to construct a proposed remedial map, *see, e.g.*, Court Order, ECF 206 at 5-13 (detailing, among other things, the data the Special Master was to obtain or refrain from using, the traditional redistricting criteria he was to respect, and many others). The Special Master's Draft Plan evidences that he understood the detailed instructions from the Court and has a firm grasp on compliance with the United States Supreme Court's precedent on racial gerrymandering.

Therefore, Plaintiffs respectfully urge the Special Master to reject Legislative Defendants' broad and abstract objections, make only the proposed slight adjustments proposed by Plaintiffs to the Draft Plan, and otherwise present the Draft Plan to the Court for its consideration in its current form.

Respectfully submitted this 21st day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have 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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This 21st day of November, 2017.

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