IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-399

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al,* Defendants.	**PLAINTIFFS' STATEMENT IN RESPONSE TO COURT'S NOTICE OF JUNE 9, 2017**

In response to the Court's Notice of June 9, 2017, Plaintiffs respectfully submit the following statement addressing (1) how the components of the "equitable weighing process" favor granting Plaintiffs immediate relief, including adoption of a new districting plan and special elections in 2017, *North Carolina v. Covington*, No. 16-1023, slip op. at 2 (June 5, 2017) (per curiam), (2) why the Attorney General is the only officer authorized by state law to speak for the State of North Carolina, and has the authority to speak for the State on all the equitable considerations relevant to the remedial issues here including the three factors identified by the Supreme Court, (3) how the General Assembly has refused to comply with the Court's remedial order of August 2016, and (4) why the General Assembly is not entitled to further time to do so. (*See* Doc. 153 at 3-4.) Further, Plaintiffs contend that the question of when remedial districts must be drawn is separate and distinct from the question of whether equitable considerations justify special

elections in 2017. Plaintiffs will address each of the Court's issues as they are outlined in the Notice.[1]

I. This Court was correct to conclude that the balance of equities favors holding special elections in 2017.

In reversing and remanding this Court's November 29, 2016 remedial order, the Supreme Court did not hold that special elections in 2017 are an inappropriate remedy in these circumstances, acknowledging instead that "this Court has never addressed whether or when a special election may be a proper remedy for a racial gerrymander." No. 16-1023, slip op. at 2-3. Rather, the Supreme Court remanded the case so that this Court could engage in "an equitable weighing process" that considers "the severity and nature of the particular 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.* Ample legal precedent and evidence already in the record support the conclusion that special elections in 2017 are warranted. Plaintiffs will address the ongoing harm they have suffered, the relatively minimal potential disruption to the ordinary processes of governance, and the appropriateness of their proposed remedy in turn.[2]

[1] The question of when remedial districts must be enacted is addressed in issues three and four.
[2] Plaintiffs have also requested an expedited evidentiary hearing to further assist the Court in conducting its analysis of whether special elections should be held in 2017. (*See* Pls.' Mot. for Expedited Evidentiary Hr'g, Doc. 151.)

A. The well-documented harms of racial gerrymandering continue to severely burden millions of North Carolina residents nearly six years after the challenged districts took effect.

The Supreme Court has repeatedly condemned the unconstitutional use of race in assigning voters to election districts, and has thoroughly explored the many ways in which race-based classifications like the one at issue here undermine the democratic process and harm individual voters. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643, 647, 648 (1995) (racial gerrymandering is "stigmatiz[ing]," "pernicious," "political apartheid," and "altogether antithetical to our system of representative democracy"); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630-31 (1991) ("causes continued hurt and injury"); *United Jewish Orgs. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring in part) ("bears no relationship to an individual's worth or needs"); *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting) ("a divisive force in a community" and "at war with the democratic ideal"); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("odious to a free people").

The record in this case is replete with examples of how these racially gerrymandered legislative districts have harmed North Carolina voters and elected officials since the districts were enacted in 2011.[3] Plaintiff Rev. Julian Pridgen explained

[3] *See, e.g.*, Trial Tr. vol I., 4/11/16, 72:2-6, 72:21-73:13, 80:5-82:25 (testimony of Sen. Dan Blue); *id.* at 199:18-23 (testimony of Yvonne Johnson); *id.* at 213_12-214:10, 214:13-215:7 (testimony of Rev. Julian Pridgen); Trial Tr. vol. II, 4/12/16, 12:9-13:2, 13:5-11, 15:8-20, 17:17-18:7, 18:20-19:11, 22:25-23:9 (testimony of Sen. Angela Bryant); *id.* at 68:6-69:10, 74:10-16 (testimony of Dan Clodfelter); *id.* at 80:21-81:6 (testimony of Antoinette Mingo); *id.* at 86:8-22, 89:12-14, 90:5-18 (testimony of Claude Dorsey Harris); *id.* at 100:20-25, 102:19-23, 103:1-2, 103:13-15 (testimony of Sandra Covington); *id.* at 124:18-126:11, 131:20-132:18 (testimony of

that the racially gerrymandered districts affected members of his community in Kinston "in a kind of post-traumatic stress way" that "contributes to a history of systematic racism and pain." Trial Tr. vol. I, 4/11/16, 213:12-214:10. Plaintiff Sandra Covington of Cumberland County testified that she was "plucked out of my district and placed into another district simply because of my race," and could no longer vote for her candidate of choice, who was white and was drawn out of her district and placed in a majority-black district. Trial Tr. vol. II, 4/12/16, 102:19-23, 102:19-103:2. Former Sen. Eric Mansfield told the Court that the districts were premised on the idea "that I could not represent whites, not because I was incompetent, not because I was inarticulate, not because I did not have great character, it was just simply because I was black." Trial Tr. vol. II, 4/12/16, 124:18-126:11. Former legislator Albert Kirby echoed that assessment:

> [I]t was not necessary to increase the number of African-Americans in my district in the manner that it was increased. In fact, I would have done just fine. They could have decreased it. I was born and raised in Clinton. Most of the people in Sampson County I know very well. I know what they think. They know me. And the idea of having to add African-Americans to vote for me was just—was—it's kind of insulting.

Trial Tr. vol. II, 4/12/16, 150:16-23. Rep. Larry Hall of Durham and Sen. Angela Bryant of Rocky Mount described the voter confusion created by district lines that hopped from one side of a street to another, split precincts, and divided communities of interest. Trial Tr. vol. II, 4/12/16, 12:9-13:2, 13:5-11, 15:8-20, 17:17-18:7, 18:20-19:11, 22:25-23:9 (testimony of Angela Bryant); *id.* at 187:7-24, 212:6-19 (testimony of Larry Hall); *see*

Eric Mansfield); *id.* at 150:16-23 (testimony of Albert Kirby); *id.* at 167:7-10 (testimony of Milo Pyne); *id.* at 187:7-24, 212:6-19 (testimony of Rep. Larry Hall).

also Pls.' Ex. 2112 (polling showed statistically significant difference in ability of voters to identify candidates who would appear on their ballot in districts that were highly non-compact and had many split precincts). Sen. Dan Blue of Wake County and former Sen. Dan Clodfelter of Mecklenburg County testified about how the racially gerrymandered district lines set back decades of progress in building cross-racial coalitions in many parts of the state. Trial Tr. vol. I, 4/11/16, 72:2-6, 72:21-73:13, 80:5-82:25 (testimony of Dan Blue); Trial Tr. vol. II, 4/12/16, 68:6-69:10 (testimony of Dan Clodfelter).

North Carolina residents have been subject to this unconstitutional race-based classification since the General Assembly's 2011 redistricting process, and continue to be governed by a state legislature elected from a racially gerrymandered districting scheme. (*See* 11/29/16 Order, Doc. 140 (acknowledging that "the legislators just elected under the unconstitutional racial gerrymander . . . will come into office in mid-January 2017").) To achieve this result, as Plaintiffs proved to the satisfaction of this unanimous Court, the General Assembly systematically moved white voting age population out of the so-called VRA districts and moved black voting age population into those districts in its place. *See, e.g.*, Trial Tr. vol. II, 4/12/16, 120:23-122:15, 126:23-127:7, 129:19-25 (testimony of Eric Mansfield); 3d Joint Stip., Doc. 90, ¶¶ 4, 22, 37, 55, 72, 90, 123, 140, 155, 189, 207, 226, 244, 262, 279, 304, 316, 349, 370, 403, 418, 430.

This wide-ranging racial gerrymander taints legislative election districts in seventy-seven of North Carolina's one hundred counties, which together contain nearly eight million people—or eighty-three percent of the state's population—who since 2012 have been denied the opportunity to be represented by legislators elected from

constitutional districts. (*See* Decl. of Thomas Hofeller, Oct. 28, 2016, Doc. 136-1.) To remedy this sprawling constitutional violation in compliance with the state constitutional whole county provision, House districts impacting sixty counties and Senate districts impacting sixty-five counties must be redrawn, for a total of seventy-seven counties affected by necessary changes in either a House or Senate district or both.[4] *See id.* Significantly, to Plaintiffs' knowledge, there has never been a case where such a large percentage of the legislative districts in a state have been declared racial gerrymanders and unconstitutional. The extensive scope of the violation here weighs heavily in favor of this Court's quick action. While of course it may be true that a judicial finding that one or two districts out of hundreds in a state legislative body are racial gerrymanders or otherwise illegal may not, on balance, necessitate special elections, *see* No. 16-1023, slip op. at 3, that simply is not the case here. Nearly all of the state is affected by the legislature's unconstitutional line-drawing. A special election is warranted where the scope of the unconstitutional action impacts eighty-three percent of the state's population.

North Carolinians have the right to have their laws enacted by representatives elected from constitutionally compliant districts. Yet this illegally constituted legislature has demonstrated that it is willing to go to unconstitutional lengths to retain power. Since the districts drawn in 2011 took effect, the General Assembly has enacted a number of

[4] Twenty-three counties contain neither an affected House nor Senate district and are not part of an affected county grouping: Brunswick, Buncombe, Carteret, Catawba, Cherokee, Clay, Davidson, Graham, Haywood, Henderson, Jackson, Jones, Macon, Madison, McDowell, Mitchell, New Hanover, Polk, Rutherford, Swain, Transylvania, Union, and Yancey. (*See* Decl. of Thomas Hofeller, Doc. 136-1.)

laws that state and federal courts have struck down as unconstitutional, the majority of which have been related to elections.[5] The public's faith in the legitimacy of the legislature is thus undermined so long as the constitutional violations continue unabated.

B. Adopting a new districting plan and holding special elections in 2017 is administratively feasible, and expedited evidentiary submissions on this issue are appropriate.

To demonstrate that adopting a new districting plan and holding special elections in 2017 is administratively feasible, Plaintiffs renew their request for an expedited evidentiary hearing, or deadlines for the submissions of affidavit testimony, to address the fact-intensive inquiry as of this date into "the extent of the likely disruption to the ordinary processes of governance if early elections are imposed." (Notice, Doc. 153 at 4; *see* Pls.' Mot. for Expedited Evidentiary Hr'g, Doc. 151.)

[5] *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory,* 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 581 U.S. __ (2017) (parts of Session Law 2013-381, a comprehensive election reform measure, held unconstitutional); *City of Greensboro v. Guilford Cty. Bd. of Elections*, No. 1:15-cv-559, 2017 U.S. Dist. LEXIS 50253 (M.D.N.C. Apr. 3, 2017) (redistricting plan for the Greensboro City Council violated one person, one vote); *Cooper v. Berger*, No. 16-cvs-15636 (Wake Cty. Super. Ct. Mar. 17, 2017) (three-judge panel) (law restructuring boards of elections and appointment process for those boards violated separation of powers); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (two separately-enacted redistricting plans for the Wake County Commission and School Board violated one person, one vote); *City of Asheville v. State*, 794 S.E.2d 759 (N.C. 2016) (law involuntarily transferring city water system to a metropolitan district violated N.C. Const. art. II, § 24); *N.C. Ass'n of Educators v. State,* 786 S.E.2d 255 (N.C. 2016) (Career Status Law unlawfully infringed upon the contract rights of those teachers who had already achieved career status in violation of the Contract Clause, U.S. Const. art. I, § 10); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016) (law creating coal ash commission violated separation of powers); *Faires v. State Bd. of Elections*, No. 15-cvs-15903 (Wake Cty. Super. Ct.) (three-judge panel), *aff'd by equally divided court*, 368 N.C. 825 (2016) (judicial retention elections violated state constitution).

To the extent that Legislative Defendants might contend there is not sufficient time to hold special elections in November 2017, or that ordering an abbreviated election schedule might somehow infringe on the sovereignty of the State, the Court need only look to the North Carolina Supreme Court's remedy in *Stephenson v. Bartlett*. *See* 355 N.C. 354, 358-61, 386 (2002) (holding that the General Assembly's legislative redistricting plan enacted after the 2000 Census violated the whole county provision of the state constitution). On April 30, 2002, the state Supreme Court in *Stephenson* affirmed a trial court order invalidating numerous districts in both the House and Senate plans enacted by the General Assembly and remanded the matter to the trial court for remedial proceedings. *Id.* On remand, the trial court granted the General Assembly approximately two weeks to enact new plans and to submit those plans to the trial court for review and approval. *See Stephenson v. Bartlett*, 357 N.C. 301, 303 (2003). On May 17, 2002, the General Assembly as directed enacted new plans and presented them to the trial court. *Id.* On May 31, 2002, the trial court rejected those plans and imposed its own plans. *Id.* at 303-04.

Efforts to have the trial court's extraordinary exercise of judicial power reversed were rejected by the North Carolina Supreme Court on June 4, 2002. *Id.* at 304. The trial court's plans took effect on July 12, 2002, when they were precleared by the United States Department of Justice as then required by the Voting Rights Act. *Id.* Primary elections were held on September 10, and the general election was held November 5, 2002, all without incident. *Id.* Thus, even in North Carolina, there is ample precedent for the court action that Plaintiffs seek here.

C. The Court's power to order adoption of a new districting plan and special elections in 2017 is well supported by federal precedent.

Some infringement on state sovereignty is inevitable in the case of special elections, yet the power of a federal district court to order a special election where there is a constitutional violation is well settled. *See, e.g.*, *Pope v. County of Albany*, 687 F.3d 565, 569-70 (2d Cir. 2012) (collecting cases on power to order special election even when election under invalid law has already taken place); *Arbor Hill Concerned Citizens v. County of Albany*, 357 F.3d 260, 262-63 (2d Cir. 2004) (collecting cases on power to order special elections). A court's remedial power in a racial gerrymandering case is no less than its remedial power in any other case involving unconstitutional racial discrimination in elections. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971) (one type of racial discrimination case "does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right"). District and appellate courts have not hesitated to order special elections in cases in which a redistricting scheme violates the equal protection clause of the Fourteenth Amendment or the Voting Rights Act.[6] Moreover, the Supreme Court has approved special elections in a case that involved one person, one vote claims as well as

[6] *See, e.g.*, *Cousins v. City Council of Chicago*, 503 F.2d 912, 914 (7th Cir. 1974) (ordering special elections in a 14th Amendment case involving race-based redistricting); *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (one person, one vote case); *United States v. Osceola County*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (Section 2 vote dilution case); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (racial gerrymandering case); *Ketchum v. City Council of Chicago*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) (Section 2 vote dilution case); *Tucker v. Burford*, 603 F. Supp. 276 (N.D. Miss. 1985) (one person, one vote case); *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (three-judge panel) (one person, one vote case).

racial discrimination claims. *See Connor v. Coleman*, 425 U.S. 675 679 (1976) (in a mandamus case, directing the district court to "order[] any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter.") These courts have ordered districts to be redrawn and new elections held within a matter of months, and have ordered term lengths shortened and state constitutional provisions suspended to effectuate remedies in election discrimination cases.[7]

But the court need not look very far for support for the remedial actions requested here: In an analogous racial gerrymandering case within the Fourth Circuit, a three-judge district court in South Carolina ordered special elections in nine legislative districts in

[7] *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (providing up to five months for the district court to approve a new districting plan and order new elections, with the newly elected representatives to take office within 30 days of their election); *Brown v. Ky. Leg. Research Comm'n*, 966 F. Supp. 2d 709, 726 (E.D. Ky. 2013) (in August, three days before a scheduled special legislative session, enjoining use of the unconstitutional districts in the November election and noting that a state constitution residency requirement did not constrain the court under the federal constitution); *Perez v. Perry*, No. 5:11-cv-360, ECF No. 685 at 3 (W.D. Tex. Mar. 1, 2012) (shortening the residency requirement in state constitution in connection with ordering special election schedule) (previously docketed in this case as Doc. 133-4); *id.*, ECF No. 486 at 3 (W.D. Tex. Nov. 4, 2011) (same) (previously docketed in this case as Doc. 134-3); United States v. *Osceola County*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (in December, adopting the plaintiffs' proposed plan when the county's remedial map was inadequate and ordering special elections in the spring); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) (where the state constitution set term lengths, shortening the terms of legislators elected under an unconstitutional plan and ordering special elections for representatives to serve the balance of those terms); *Ketchum v. City Council of Chicago*, 630 F. Supp. 551, 565 (N.D. Ill. 1985) (in December, adopting a compromise plan and scheduling a special election in all affected districts to coincide with already-scheduled elections in March); *Tucker v. Burford*, 603 F. Supp. 276, 279 (N.D. Miss. 1985) (in February, setting aside the previous November's elections and ordering that incumbents should hold office only until new elections could be held under the new districts the county had already begun to redraw); *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981) (in August, shortening legislators' terms and ordering that while legislative elections should proceed under the unconstitutional districts in November, the state must draw new districts by February 1).

1997. *See Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996). In its opinion in September 1996, the district court allowed elections to proceed under the unconstitutional districts in November 1996. *Id.* The court shortened the terms of office provided for in the South Carolina Constitution to one year, and ordered that the representatives elected in the 1997 special elections would serve the balance of those representatives' terms. *Id.* The same nature of remedy (shortened terms and odd-year elections) is necessary here.

After three election cycles under North Carolina's unconstitutional legislative districting scheme, the most recent of which represents the "unusual case" contemplated in *Reynolds v. Sims*, the Court need not balance the equities in a neutral fashion that treats as equals the millions of residents whose rights have been violated and the interests of the ongoing violators. 377 U.S. 533, 585 (1964). Rather, the Court's "task is to correct . . . the condition that offends the Constitution," in this case a legislative districting scheme that violates the equal protection clause because it makes impermissible use of race. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). The Court has already enjoined use of the unconstitutional districts and given the General Assembly ten months to adopt a new districting plan, and as explained in Part IV below, ordering an interim remedial plan in those circumstances is appropriate. Further, while the Court should engage in some expedited fact-finding as part of its analysis of whether special elections should be held, Plaintiffs' position is that no intervening events have occurred since the Court previously balanced the equities and found that special elections in 2017 are feasible and appropriate that would alter that conclusion. The balance of the equities

continues to support an expedited schedule for adoption of a remedial map and special elections in the new districts in 2017.

II. Under state law, the Attorney General speaks on behalf of the State of North Carolina.

The State of North Carolina, named as a Defendant in this case and not asserting sovereign immunity, *see* 1st Am. Compl. ¶ 41 (Doc. 11); Defs.' Answer to Am. Compl. ¶ 41 (Doc. 14), is the Defendant with authority under state law to address the equitable considerations relevant to the remedies requested by the Plaintiffs. The Attorney General of North Carolina is a constitutional officer directly elected by the people. N.C. Const. art. III, § 7(1). North Carolina law makes clear that the Attorney General represents the State in litigation. "It shall be the duty of the Attorney General: (1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other 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. In addition, the Attorney General serves as "counsel for all departments, officers, agencies, institutions, commissions, bureaus or other organized activities of the State." N.C. Gen. Stat. § 147-17(b); *see also* N.C. Gen. Stat. § 114-2 (the duties of the Attorney General include representing "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."). Therefore, in the context of this litigation, the Attorney General speaks for the State of North Carolina and for the North Carolina State Board of Elections.

Where the Attorney General is involved in an action on behalf of the State, the general rule is that "the attorney general has control of the action and may settle it when he determines it is in the best interests of the state to do so." *Tice v. Dept. of Transportation,* 67 N.C. App. 48, 51 (1984). Particularly where the case involves constitutional issues, the Attorney General is "within his authority" to address those issues on behalf of the state. *Hendon v. North Carolina State Bd. of Elections,* 633 F. Supp. 454, 459 (W.D. N.C. 1986). Indeed, "the Court must resolve any ambiguity in North Carolina statutory provisions defining the reach of the Attorney General's authority in favor of a broader scope consistent with the common law." *Nash Cnty. Bd. of Educ. v. Biltmore*, 464 F. Supp. 1027, 1033 (E.D.N.C. 1978).

Under the North Carolina Constitution, the General Assembly is just one distinct branch of the State's government. N.C. Const. art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly."). Allowing legislators to speak for the entire state would usurp the power the state constitution and state statutes vest in the Attorney General. Here, the Attorney General appropriately represents the State of North Carolina and the North Carolina State Board of Elections, and those parties are the appropriate defendants to address the equitable considerations relevant to whether special elections in 2017 are an appropriate remedy in this case.

III. The General Assembly has refused to comply with the Court's August 2016 remedial order, which was not stayed or vacated.

Since this Court's memorandum opinion and order in August 2016 directed the General Assembly "to draw remedial districts in their next legislative session" and

enjoined the State from holding elections in the racially gerrymandered districts after November 2016, the General Assembly has yet to consider or adopt any remedial map. (*See* Mem. Op., Doc. 123.) The General Assembly's current legislative session began in January 2017, and legislative leaders have stated publicly that they intend to adjourn for the year in early July 2017. *See NC Legislature Aims to Leave Town by Early July*, News & Observer (May 5, 2017), http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article148796669.html.

Following the Supreme Court's summary affirmance and remand order in this case, on June 7, 2017 Gov. Roy Cooper issued a proclamation formally calling the General Assembly into extra session to adopt a remedial districting plan. (Proclamation, Doc. 150-1.) On June 8, 2017, legislative leaders took action to formally disregard the governor's proclamation and refused to convene the extra session, citing the fact that this Court had not yet received jurisdiction to enter a remedial order. *See* Laura Leslie, *Lawmakers Disqualify Cooper's Session Call*, WRAL (June 8, 2017), http://www.wral.com/lawmakers-disqualify-cooper-s-session-call/16750466; Colin Campbell, *Cooper Calls for Special Legislative Election Before Next Year's Session*, News & Observer (June 12, 2017), http://www.newsobserver.com/news/politics-government/state-politics/article155731354.html. In a June 13, 2017 filing in the Supreme Court, Legislative Defendants opposed Plaintiffs' application for expedited issuance of a mandate. Response to Application for Issuance of Mandate Forthwith 1-2, *North Carolina v. Covington*, Nos. 16A1202 & 16A1203 (U.S. June 13, 2017) (attached as Exhibit A). The State also filed a response stating that it consents to the immediate

issuance of a mandate and that "the public interest favors allowing the three-judge court to consider the property remedy in this case as promptly as possible." Response of State of N.C. and Bd. of Elections Ds to Appellees' Application for Issuance of Mandate Forthwith 2, *North Carolina v. Covington*, Nos. 16A1202 & 16A1203 (U.S. June 13, 2017) (attached as Exhibit B).

Moreover, the failure to enact remedial districts is unjustified. While the extent of the constitutional violation here is extensive, impacting eighty-three percent of the state's population, *see supra* at 5, the effort needed to correct it is not significant. Indeed, Dr. Hofeller filed an affidavit in this proceeding in October 2016 identifying what, in his opinion, are "the Optimal WCG's [whole county groupings] mandated by the North Carolina Supreme Court's *Stephenson* decisions," which he concluded "would be the Optimal WCG's used for any new General Assembly plans drafted subsequent to the Court's 2016 decision in the *Covington* case." (Decl. of Thomas Hofeller, Doc. 136-1, at 5, 16, 19.) That step of the redrawing process has already been completed. Moreover, as he points out, "many of the districts in the rural areas are entirely contained within single-district groupings and are self-drawing." (*Id.* at 8.) All that remains is to subdivide the county groupings that contain more than one district into the required number of districts. There is no reason why new district lines for the House and Senate districts in the affected areas cannot be made public and enacted by the General Assembly while the question of when those districts might be implemented is being resolved.

IV. The State is not entitled to further time to comply with the Court's August 2016 remedial order.

After ten months of inaction since this Court's August 2016 order and a formal refusal to adopt a remedial districting plan following the Supreme Court's summary affirmance and remand order in this case, the General Assembly has "fail[ed] to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). In those circumstances, "judicial relief becomes appropriate" in the form of a court-ordered interim plan. *Id.*

In *Reynolds*, the Supreme Court approved of just such an action, finding that:

> the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.

Id.

Indeed, a court possesses the equitable power to postpone or even cancel elections, and to impose new redistricting plans if the jurisdiction fails to do so. *See, e.g., Mahan v. Howell*, 410 U.S. 315, 332-33 (1973) (finding district court did not abuse its discretion in postponing primary elections from June until September); *Personhuballah v. Alcorn,* 155 F. Supp. 3d 552, 555-56 (E.D. Va. 2016) (three-judge panel) (the court appointed a special master to draw an appropriate remedial plan when the General Assembly failed to act by a court-mandated deadline, and adopted that plan); *Larios v. Cox*, 314 F. Supp. 2d

1357 (N.D. Ga. 2004) (three-judge panel) (appointing special master to prepare interim apportionment maps for legislative election districts when Georgia General Assembly failed to do so by court deadline); *Butterworth v. Dempsey*, 229 F. Supp. 754 (D. Conn.), *aff'd sub nom. Pinney v. Butterworth*, 378 U.S. 564 (1964), *on remand or subsequent appeal,* 237 F. Supp. 302 (D. Conn. 1965) (setting deadlines by which a special session of the legislature must adopt remedial maps, and appointing a special master to prepare interim maps in the event the legislature failed to act by the deadline or adopted maps that did not remedy the constitutional violation); *see also Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (three-judge panel) (providing two weeks for the legislature to adopt new districts, during which the North Carolina General Assembly adopted new maps and a schedule for special elections in the redrawn districts).

In *Butterworth v. Dempsey*, upon receiving the Supreme Court's mandate the three-judge district court issued a memorandum and order setting a deadline for the Connecticut General Assembly to adopt a new districting plan, and appointing a special master to begin work in case the legislature failed to act by the deadline or enacted new maps that did not remedy the constitutional violation. 237 F. Supp. at 311, 312-13. The district court explained:

> This Court has repeatedly stressed its preference that reapportionment of the legislature be done by the legislature itself rather than by the Court. We still prefer it that way. But the hour is late. And we now believe, in view of the ample and repeated opportunities which have been afforded to the legislature to perform what is primarily its function of reapportioning itself, that we as a Court must act if the legislature does not succeed in doing so. Hence our appointment of a special master to aid the Court in discharging its duty if further opportunity to the legislature to perform the task proves fruitless.

Id. at 308-10. The three-judge panel in *Larios v. Cox* took a similar approach, appointing a special master while encouraging the Georgia General Assembly, which had missed the court deadline to draw new districts and was currently in session, to enact a plan of its own before the court's remedial proceedings ended. 306 F. Supp. 2d 1212, 1213-14 (N.D. Ga. 2004).

The General Assembly's refusal to comply with this Court's August 2016 remedial order has consequences for voters and for potential candidates, who want to know what the new district configurations will look like. Here, regardless of the equitable considerations relating to a special election, the Court has the remedial power to hold that the General Assembly's extraordinary refusal to convene a special session as duly proclaimed by the Governor, and its refusal begin any process to adopt a remedial plan since August 2016, leaves the court with no option but to itself impose remedial plan for use in any future legislative elections. Such a remedy would provide the expediency needed to minimize the burden on state elections officials, the constitutional vetting needed to promote public confidence in elections, and the relief needed to ensure that Plaintiffs and millions of North Carolina residents have an opportunity to vote in elections free from racial discrimination.

Alternatively, to extend even greater deference to the legislature in light of the Court's obligation to give the legislature the first opportunity to remedy a constitutional violation in redistricting cases, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978), the Court could give notice that should the General Assembly not act to adopt a new plan within the

next two weeks, the Court will order the use of remedial districts recommended by a special master as soon as the mandate issues from the U.S. Supreme Court. *See Larios v. Cox*, 306 F. Supp. 2d 1212, 1214 (N.D. Ga. 2004) (appointing special master while the Georgia General Assembly was in session in the event that the legislature failed to act by court deadline or failed to adopt a plan that remedied constitutional violation).

V. Conclusion

Plaintiffs and the people of North Carolina have not had the opportunity to elect legislators from non-racially discriminatory districts since 2010. Since that time, the state's residents and democratic process have suffered immeasurable harm, and that damage cannot be remedied at law. Plaintiffs reiterate their requests that this Court expedite the remedial process and any further briefing, set immediate deadlines for the General Assembly to adopt a remedial plan and retain a special master to begin work on a court-ordered plan in the event the General Assembly fails to do so, and schedule an evidentiary hearing as soon as possible on the narrow question of whether special elections are feasible in 2017.

Respectfully submitted this 15th day of June, 2017.

POYNER SPRUILL LLP

By: s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: 919-783-6400
Facsimile: 919-783-1075

Counsel for Plaintiffs

SOUTHERN COALITION FOR SOCIAL JUSTICE

By: s/ Anita S. Earls

Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
N.C. State Bar No. 40028
allisonriggs@southerncoalition.org
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-794-4198
Facsimile: 919-323-3942

Counsel for Plaintiffs

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:

Alexander M. Peters
Special Deputy Attorney General
Office of the Attorney General
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov

Counsel for Defendants

Thomas A. Farr
Phillip J. Strach
Michael D. McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27602
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com

This 15th day of June, 2017.

s/ Anita S. Earls

EXHIBIT A

Response to Application for Issuance of Mandate Forthwith 1-2, *North Carolina v. Covington*, Nos. 16A1202 & 16A1203 (U.S. June 13, 2017)

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,

PAUL D. CLEMENT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Appellants-Respondents Philip E. Berger, David R. Lewis, Timothy K. Moore, and Robert A. Rucho, in their official capacities

June 13, 2017

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.

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:

ANITA S. EARLS
ALLISON J. RIGGS
EMILY SEAWELL
JACQUELINE MAFFETORE
Southern Coalition for Social Justice
1415 West NC Hwy. 54, Suite 101
Durham, NC 27707
anita@scsj.org

JESSICA RING AMUNSON
Jenner & Block LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
jamunson@jenner.com

EDWIN M. SPEAS, JR.
CAROLINE P. MACKIE
Poyner Spruill LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27601
espeas@poynerspruill.com
cmackie@poynerspruill.com

PAUL D. CLEMENT
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

EXHIBIT B

Response of State of N.C. and Bd. of Elections Ds to Appellees' Application for Issuance of Mandate Forthwith 2, *North Carolina v. Covington*, Nos. 16A1202 & 16A1203 (U.S. June 13, 2017)

App. No. 16A1202, Case Nos. 16-649 and 16-1023

In the
Supreme Court of the United States

NORTH CAROLINA, ET AL.,
Appellants,
v.

SANDRA LITTLE COVINGTON, ET AL.,
Appellees.

RESPONSE OF THE STATE OF NORTH CAROLINA AND THE BOARD OF ELECTIONS DEFENDANTS TO APPELLEES' APPLICATION FOR ISSUANCE OF THE MANDATE FORTHWITH

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

1. Appellants the State of North Carolina, the North Carolina State Board of Elections, and the former members of the State Board of Elections respectfully submit this response to Appellees' application for expedited issuance of the mandate in these consolidated appeals.

2. On June 5, 2017, this Court summarily affirmed a three-judge district court's decision that 28 North Carolina state legislative districts are unconstitutional racial gerrymanders. *See* 581 U.S. __ (2017) (slip op., at 1). The Court also vacated the three-judge court's remedial order, gave that court guidance on the factors that should shape a new remedial order, and remanded the case to that court for further proceedings. *Id.* (slip op., at 3).

3. The next day, Appellees submitted an application for this Court to issue its mandate forthwith. The Chief Justice requested responses to the application.

4. On June 9, the three-judge district court issued a notice that stated that the court "intends to act promptly on this matter upon obtaining jurisdiction from the Supreme Court." *Covington v. North Carolina*, No. 1:15-cv-399, slip. op. at 3 (M.D.N.C. June 9, 2017) [ECF No. 153].

5. The State of North Carolina consents to Appellees' application. The State believes that the public interest favors allowing the three-judge court to consider the proper remedy in this case as promptly as possible. The State does not plan to move for rehearing, and it is not aware that any other party plans to do so. The State therefore does not see any reason for the Court to delay issuing the mandate.

6. The State Board of Elections defendants take no position on the application.

Respectfully submitted,

JOSH STEIN
Attorney General

Alexander McC. Peters
Senior Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
(919) 716-6400
apeters@ncdoj.gov

June 13, 2017

CERTIFICATE OF SERVICE

I, Alexander McC. Peters, a member of the Supreme Court Bar, hereby certify that a copy of the attached response was served on counsel of record for appellees:

Anita S. Earls
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West NC Hwy. 54, Suite 101
Durham, NC 27707
(919) 794-4198
AnitaEarls@southerncoalition.org

Jessica Ring Amunson
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Edwin Speas, Jr.
POYNER SPRUILL LLP
301 Fayetteville Street, Suite 1900
Raleigh, NC 27602
(919) 783-6400
espeas@poynerspruill.com

I further certify that service was made on counsel for the legislative defendants:

Paul D. Clement
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Service was made by USPS Express Mail on June 13, 2017.

/s/ Alexander McC. Peters