

**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' OPPOSITION
TO APPOINTMENT OF NATHANIEL PERSILY AS SPECIAL MASTER**

I. Defendants are not entitled to yet another opportunity to correct constitutional problems with the legislative districts.

While the Supreme Court has instructed that legislatures should in most cases be given a “reasonable opportunity” to remedy constitutional defects in their districting plans, there is no precedent for the proposition that a legislature’s opportunities should be unlimited or that legislatures should be given more than one chance to remedy constitutional violations. Indeed, *Reynolds v. Sims* is directly relevant on this point because there, the Supreme Court explicitly endorsed a court-drawn map after the legislature’s first proposed remedial maps failed to remedy the constitutional violation. *See* 377 U.S. 533, 585-87 (1963) *aff’g Sims v. Frink*, 208 F. Supp. 431, 437-42, (M.D. Ala 1962) (detailing the deficiencies in the legislature’s attempts to remedy the one-person, one-vote violation). The district court in *Larios v. Cox* referenced *Reynolds* as

binding federal precedent on this point in informing the Georgia Legislature that it would get only one chance to remedy the constitutional problem with its maps. *See* 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004).

Lower federal courts have interpreted the Supreme Court's guidance in *Reynolds* and *Wise v. Lipscomb*, 437 U.S. 535 (1978), as requiring only that the legislature be given the "first" opportunity to redraw districts that have been found unconstitutional, not multiple or unlimited opportunities. *See, e.g., LULAC v. Clements*, 986 F.2d 728 (5th Cir. 1993); *Harris v. Cooper*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016); *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2015 U.S. Dist. LEXIS 73514, *58 (E.D. Va. June 5, 2015); *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996). Therefore, appointing a special master in these circumstances is appropriate and consistent with prior redistricting cases where the remedial districts drawn by a legislature have failed to cure the constitutional violation found in the original districts.

II. The Court has given the parties a meaningful opportunity to object.

Rule 53 requires that "[b]efore appointing a master, the court must give the parties notice and an opportunity to be heard." Fed. R. Civ. P. 53(b)(1). The Court's order of October 26, 2017 did not in fact appoint a special master; rather, it indicated the Court's *intention* to appoint a master, named him, provided his credentials, and gave the parties a reasonable opportunity to object and propose an alternative candidate for appointment. Doc. 202 at 2-3, 4. For Defendants to use their opportunity for briefing on that point to complain that such an opportunity has not been made available is confounding.

Further, as the Court stated in its October 26 order, Doc. 202, the parties previously had notice and an opportunity to be heard on the issue of appointing a special master because that issue was raised in Plaintiffs' September 15 objection to the Subject Districts, Doc. 187, to which the Legislative Defendants responded on September 22, Doc. 192, and which was the subject of a hearing on October 12. The Court again provided notice of the possibility it would appoint a special master in its order of October 12, 2017, Doc. 200, to which the parties had an opportunity to respond on October 18, Doc. 201.

The parties have had multiple notices that a special master may be appointed in this case and multiple opportunities to be heard on that issue before any such appointment has been made.

III. The Court's Order Regarding the Scope of the Special Master's Responsibilities is Proper.

Legislative Defendants argue that neither the Court nor a Special Master has jurisdiction to "entertain" Plaintiffs' objections to the Subject Districts based on the State Constitution. *See* Leg. Defs.' Opp'n, Doc. 204, at 6. In addition to the authorities Plaintiffs have previously cited which establish that this Court has the responsibility to ensure that remedial districts comply with state and federal law, the trial court's opinion in *Sims v. Frink*, affirmed by the U.S. Supreme Court, is also relevant here. That court explained:

In addition, this Court recognizes that there are State constitutional standards to be applied and failure to apply those State constitutional standards by this Court, after it has already taken jurisdiction in this case,

will amount to a failure to recognize the principles laid down by the Supreme Court of the United States in *Louisville & Nashville Railroad Co. v. Garrett*, 231 U.S. 298, 34 S.Ct. 48, 58 L.Ed. 229, and followed in *Wofford Oil Co. v. Smith, D.C.*, 263 F. 396.

Sims v. Frink, 208 F. Supp. 431, 437 (M.D. Ala. 1962), *aff'd sub nom Reynolds v. Sims*, 377 U.S. 533 (1963). The *Sims* court went on to hold that the remedial districts at issue did not comply with the state constitution. *Id.* at 438.

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117 (1984), cited by Defendants for the contention that this Court does not have jurisdiction to ensure that remedial maps comply with state law, is wholly distinguishable from the case at hand. In *Pennhurst*, plaintiffs' initial complaint contained both state and federal claims against state officials in charge of state-run institutions for the mentally handicapped, and the Court of Appeals affirmed plaintiffs' victory on state law grounds alone, despite defendants' continued assertion that the Court did not have jurisdiction over them. The Supreme Court ultimately agreed that the federal courts below lacked jurisdiction to enjoin the conduct of state institutions on state law grounds alone, and remanded for consideration of the federal claims that were not reached. Here, the case has already been decided and affirmed by the Supreme Court on federal law claims only. Nothing in *Pennhurst* stands for the proposition that once a federal court has found violations of the constitution, it is powerless to craft a remedy consistent with state law.

Further, in the Middle District of Alabama's Order that Defendants cite for the same contention, the Court was simply refusing to reconsider a previously dismissed claim asserted by the plaintiffs against the legislature's original districts, namely that the

state violated the Fourteenth Amendment of the U.S. Constitution by failing to comply with the state constitution's redistricting requirements. *Alabama Legislative Black Caucus v. Alabama*, No. 12-cv-691 (July 27, 2015) (Doc. 265) (copy attached hereto). The plaintiffs were asking the trial court to revisit its ruling on the merits of their original claims in light of the Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015). The Order does not involve the review of remedial districts nor does it address a Court's obligations in these circumstances.

IV. Professor Persily does not have a conflict of interest in this case.

“Since masters and experts are subject to the control of the court and since there is a need to hire individuals with expertise in particular subject matters, masters and experts have not been held to the strict standards of impartiality that are applied to judges.” *Morgan v. Kerrigan*, 530 F.2d 401, 426 (1st Cir. 1976). Nevertheless, Legislative Defendants' assertions concerning Professor Persily's qualifications to serve in this matter would fail to establish a conflict of interest even under the strict, judicial standards for disqualification which themselves do not “require a judge to recuse himself because of “unsupported, irrational, or highly tenuous speculation.”” *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (quoting *In re United States*, 666 F.2d 690, 694 (1st Cir. 1981)). Grounding a claim for conflict of interest on the mere presence on the same panel as Plaintiffs' counsel, or a presentation to an “allied group” well before the original districts at issue in this case were even drawn are exactly the sort of “unsupported,

irrational, or highly tenuous speculation” that the Fourth Circuit has explicitly rejected.

Id.

Similarly, Legislative Defendants’ contention that Professor Persily is somehow unfit to carry out the duties assigned to him by this court based on his employment nearly two decades ago with an organization that has financially supported another organization that is currently in active litigation against Legislative Defendants in a different case is too tenuous to entertain. Circuit Courts of Appeals have found recusal of judges unnecessary in circumstances far more questionable than present here. *See id.* at 287 (judge’s recusal not required where judge once represented a victim of defendant’s bankruptcy fraud); *In Re Beard*, 811 F.2d 818, 831 (4th Cir. 1987) (judge’s recusal unnecessary despite the fact that the judge and his wife were co-investors with local counsel for two groups of plaintiffs and had been previously represented by a firm acting as a creditor in the instant bankruptcy proceeding); *Morgan*, 530 F.2d at 426 (grounds of bias meritless where appointed master and expert were members of NAACP which, though not party to suit, had financially supported plaintiffs’ action, and had permitted its general counsel to serve as one of plaintiffs’ counsel).

Finally, that Professor Persily has published works or given comments that establish his general position on voting rights matters is insufficient to demonstrate a disqualifying bias. In *Tug Valley Recovery Center v. Watt*, 703 F.2d 796, 801 (4th Cir. 1983), the Fourth Circuit Court of Appeals found that plaintiff environmental organization’s due process rights were not violated simply because the individuals the

Governor of West Virginia appointed to a review board had demonstrated bias “against environmental interests,” noting that “[t]here is no due process right to have one’s claims heard before a court purged of ideology.” The Court further noted that “[a] prejudgment or point of view about a question of law or policy, even if so tenaciously held as to suggest a closed mind, is not, without more, a disqualification.” *Id.* at 802 n.10 (internal citations and quotations omitted). Professor Persily’s stated views on redistricting matters, therefore, do not constitute a disqualifying bias that would prevent him from serving as special master in this matter. Though Defendants have “amassed a string of objections, each of them when viewed with full knowledge of the facts is so weak that even taken together they amount, at best, to only a trivial risk of bias.” *DeTemple*, 162 F.3d at 288.

V. A special master’s role is not limited to making findings of fact.

Legislative Defendants argue that “Rule 53 limits the role of a special master to make or recommend findings of fact.” Leg. Defs.’ Opp’n, Doc. 204, at 5. Rule 53 contains no such limitation. In fact, the rule allows a special master to make or recommend conclusions of law, with the court reviewing those conclusions *de novo*. See Fed. R. Civ. P. 53(f)(1). More importantly, here, the merits of this case have already been determined by the Court. Rule 53 provides that the court may appoint a master to “address . . . posttrial matters that cannot be effectively and timely addressed.” Fed. R. Civ. P. 53(a)(1)(C). The Court has broad power to enlist the expertise of a special master in ensuring a constitutional remedy is put in place.

In addition, Rule 53 does not “modify the district court’s inherent equitable power to appoint a person...to assist it in administering a remedy. The power of a federal court to appoint an agent to supervise the implementation of its decrees has long been established.” *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982); *see also Armstrong v. O’Connell*, 416 F. Supp. 1325 (E.D. Wis. 1976) (contrasting a special master’s role in formulating a school desegregation remedy from the more limited special master that might be appointed in private civil litigation and observing that the court, in retaining a special master for the remedial phase of the case, was “seeking assistance in exploration of possible alternative courses in a difficult area” and was therefore not impermissibly delegating its judicial function).

VI. Conclusion

Therefore Plaintiffs respectfully request that this Court reject the Legislative Defendants’ objections to its appointment of a special master in this action.

Respectfully submitted this 31st day of October, 2017.

POYNER SPRUILL LLP

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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 31st day of October, 2017.

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CERTIFICATE OF WORD COUNT

I certify that the foregoing contains 1,994 words as counted by the word count feature of Microsoft Word 2016, and thereby complies with Local Rule 7.3(d)(1).

This 31st day of October, 2017.

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