IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-CV-00399

SANDRA LITTLE COVINGTON, *et al.*,	)	
Plaintiffs,	)	**LEGISLATIVE DEFENDANTS' OPPOSITION TO APPOINTMENT OF NATHANIEL PERSILY AS SPECIAL MASTER**
v.	)	
STATE OF NORTH CAROLINA, *et al.*	)	
Defendants.	)	

I. INTRODUCTION

Legislative defendants object to the Court's proposed appointment of Nathaniel Persily ("Prof. Persily") to serve as special master in this matter. First, any such appointment deprives the State and its legislature of due process and meaningful notice and opportunity to object as required by Rule 53, Fed. R. Civ. P. The appointment is at best premature until this Court has found legal violations in the Subject Districts. Compounding the lack of notice is that the Court has not described the special master's proposed responsibilities. Therefore, appointing a special master at this time under these circumstances is inappropriate. In addition, if the Court finds that any of the Subject Districts are illegal, the elected representatives of the People of North Carolina are entitled to correct these alleged new deficiencies or seek appropriate appellate relief. There is no precedent for a court to preempt the State's right to cure such districts this early in an election cycle and when there is no evidence that the legislature is deadlocked

or otherwise cannot enact new districts to remedy new violations now found by the Court based upon new evidence and new standards. Finally, legislative defendants are concerned that Prof. Persily has a history of commenting negatively on North Carolina districting matters and working on districting matters in conjunction with organizations who are allied with the plaintiffs in this case. Therefore, legislative defendants object to his appointment to serve as a special master in this matter.

II. ARGUMENT

A. The Court's intended appointment violates Rule 53, Fed. R. Civ. P., and fundamental due process.

The Court's intended appointment of Prof. Persily prior to a liability finding or a legislative impasse deprives the legislative defendants of basic due process and a meaningful opportunity to assess Prof. Persily as a special master in this matter. For the reasons stated below, legislative defendants request that the Court refrain from appointing any special master, including Prof. Persily, until the Court has (1) provided the defendants with specific notice of any deficiencies in the Subject Districts and allowed the State through its legislature an opportunity to correct those deficiencies and (2) in the event a special master is still necessary, provided defendants notice and an opportunity to object to the specific tasks the Court intends to delegate to any special master, including Prof. Persily, which should include an opportunity to conduct a deposition or voir dire of any proposed special master.

The Court has described the work it intends Prof. Persily to perform in only the vaguest of terms. The order states that Prof. Persily will "assist" the Court in "evaluating

the Subject Districts" and "developing an appropriate plan remedying any problem with a Subject District". (Doc. 202 at 3) It is not clear from this whether Prof. Persily will be asked to make factual findings and, if so, based upon what evidence. To the extent that Prof. Persily will assist the Court in "evaluating" districts it implies that Prof. Persily will be making legal judgments about the Subject Districts.[1]

Rule 53, Fed. R. Civ. P., places clear limitations on the appointment of a special master, especially where no trial has been held such as is the case regarding the new districts here. The rule provides for a special master to be appointed to perform duties consented to by the parties or to hold trial proceedings and make recommended findings of fact to be decided without a jury if appointment is warranted by some exceptional condition. Rule 53(a)(1), Fed. R. Civ. P. Moreover, there is no provision for the Court to appoint a special master to make conclusions of law or which excuses the Court from making conclusions of law. The advisory committee comments to Rule 53 state:

> A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in

[1] This Court asserted that "[t]he parties have had an opportunity to be heard on the appointment of a Special Master, as it was suggested in Plaintiff's' objections" and that "[t]he Court thereafter offered parties an additional opportunity to be heard as to persons who would be appropriate for appointment as a Special Master but they were unable to agree my list of qualified persons." (Doc. 202 at 2) Legislative Defendants respectfully disagree that such opportunities comport with due process required in the appointment of a special master. Under "fundamental" notions of due process "the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Being offered an opportunity to consent to a special master's appointment is in no sense an opportunity to be heard, nor is it enough to simply be presented with an adversary's suggestion of a special master. Meaningful due process cannot be afforded without notice of the alleged legal issues with the Subject Districts and notice and opportunity specific to the issue of a special master's appointment and all of the issues material thereto.

> cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

Fed. R. Civ. P. Rule 53 Advisory Comm. Note (2003 Amendments). Those comments also note that the parties should be given notice and an opportunity to be heard on not only whether a special master should be appointed, but also "the terms of the appointment." *Id.* In prior cases, including those in which Prof. Persily has served, the terms of the appointment were clear, and the special master was not asked to make legal judgments about districts. For instance, in *Larios v. Cox*, 305 F.Supp.2d 1335 (N.D. Ga. 2004), the court did not appoint a special master until after (1) the court found legal violations in the challenged plan, and (2) the legislature deadlocked and could not adopt a new plan. Order, *Larios v. Cox*, No. 03-cv-693 (N.D. Ga. Feb. 10, 2004) (Doc. 170); Text Entry, *Larios v. Cox*, No. 03-cv-693 (N.D. Ga. Feb. 19, 2004) (Doc. 177); Text Entry, *Larios v. Cox*, No. 03-cv-693 (N.D. Ga. Feb. 25, 2004) (Doc. 185); Order, *Larios v. Cox*, No. 03-cv-693 (N.D. Ga. Mar. 1, 2004) (Doc. 189). In other cases, the legislature was unable to agree on a new plan and a special master was retained to draw a plan in that event. *Favors v. Cuomo*, No. 11-cv-5632, 2012 WL 928223, *1 (E.D.N.Y. Mar. 19, 2012); *Rodriguez v. Pataki*, No. 02-cv-618, 2002 WL 1058054, *1 (S.D.N.Y. May 24, 2002). This is consistent with another three-judge federal court's use of a special master in a recent case. *Personhuballah v. Alcorn*, 155 F.Supp.3d, 552, 555-56 (E.D. Va. 2016). Rule 53 thus demands, at a minimum, that the Court disclose to the parties what it specifically is asking Prof. Persily to do and then provide the parties a meaningful

opportunity to object based on Prof. Persily's background and ability to perform those duties.

Moreover, as in *Larios*, at a minimum, this Court should not appoint any special master until the Court has issued a ruling explaining why any of the Subject Districts continue to be racially gerrymandered or "are otherwise legally unacceptable." Legislative defendants object to Prof. Persily (or anyone for that matter) as a special master without knowing what wrong has allegedly been committed in the Subject Districts as a special master is unnecessary at this time to resolve any liability issues, and it is premature to appoint a special master for any remedy where no liability has been found.

If the Court has not yet determined whether any wrong has been committed in those districts, then legislative defendants object to Prof. Persily as a special master without knowing what role, if any, the Court will ask Prof. Persily to play in finding any alleged violations. Rule 53 limits the role of a special master to make or recommend findings of fact. Rule 53(a)(1)(B)(i), Fed. R. Civ. P. The Court's order, however, does not disclose the scope of the findings it will ask Prof. Persily to make or recommend. Here, none of the evidence the Court relied upon to find the 2011 districts illegal is present for the Subject Districts. In drawing the Subject Districts, the State did not use race as a criteria, did not draw districts to any racial target, did not use racial proportionality as a guide, and followed precinct and municipal lines to a much greater extent than in the prior districts. In making any new findings that the Subject Districts are racially gerrymandered, the Court will have to use new standards and new evidence

completely different from the standards and evidence previously used by the Court in its August 2016 decision. As to the Subject Districts to which plaintiffs objected as violating their novel and untested theory regarding the North Carolina Constitution's provision on decennial redistricting, any finding would amount to a legal conclusion, and one which neither this Court nor the special master would have jurisdiction to entertain. *See Pennhurst Sate Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) ("a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself."); *see also Alabama Legislative Black Caucus v. Alabama*, No. 12-cv-691 (July 27, 2015) (Doc. 265) (reaffirming holding that the court lacked subject matter jurisdiction to decide whether a state complied with its own state constitution in creating a redistricting plan) (three-judge court).

Instead, all of the evidence regarding the Subject Districts is already before the Court in the form of the legislative record. The Court gave the plaintiffs an opportunity to present additional evidence at the hearing in this matter and plaintiffs did not do so. Thus, the only thing left to do is for the Court to render its judgment regarding the Subject Districts and then allow the State to exercise its sovereign right to fix any problems the Court identifies. Accordingly, without a liability finding from the Court and, at a minimum, additional information about what work the Court intends Prof. Persily to perform, legislative defendants object to his appointment as a special master.

B. The Court's intended appointment is not necessary as the State has time to remedy any legal violations ultimately found by the Court in the Subject Districts.

Next, if the Court determines that legal problems exist with the Subject Districts, the appointment of Prof. Persily under the vague circumstances described by this Court's order will undermine the State's sovereign right, as long recognized by the Supreme Court, to fix any alleged unconstitutional districts upon proper notice by the Court of the nature of the violations. *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court"). Federalism concerns and minimizing intrusion on state sovereignty dictate that this Court may not take that task upon itself unless it is apparent that the State will "fail timely to perform that duty." *Growe v. Emison*, 507 U.S. 25, 34 (1993). The Supreme Court simply requires that a state adopt a constitutional plan "within ample time . . . to be utilized in the [upcoming] election." *Scott v. Germano*, 381 U.S. 407, 409 (1965). Where the State "is fully prepared to adopt a [new] plan in [a timely manner]" then the State must be given that opportunity. *Growe*, 507 U.S. at 37. Here, the State, through its duly elected legislature, is "fully prepared" to adopt new districts which address any new constitutional violations this Court identifies and there is ample time to do so with this Court's review before the filing period begins in February 2018 under the current election administration schedule in place.

The legislative defendants are concerned that the appointment of a special master as described by the Court will instead affirmatively obstruct the State's ability to exercise its sovereign right to redistrict in the first instance. The Court's order does not identify

any legal violation in the Subject Districts but merely expresses a "concern" that such violations may exist. If the Court timely identifies any legal violation in the Subject Districts, sufficient time exists for the State to remedy those violations and the Court to review before the filing period begins as currently scheduled. The longer the Court delays in announcing any legal problems with the Subject Districts, the more likely it becomes that the State will lack time to address those problems and take any appropriate appellate action. According to prior testimony in this matter, it will take approximately three weeks for state officials to assign voters to new districts in a statewide legislative redistricting plan. (Doc. 162-1, ¶ 3) Under these circumstances, new plans should be in place by December 15, 2017 to ensure sufficient time for review by the Court and implementation in time for the 2018 filing period under the current election administration schedule in place.[2] There is sufficient time for the Court to disclose any legal issues with the Subject Districts and the State to fix any such problems in accordance with its sovereign right to enact electoral districts for the State.

C. Concerns regarding Prof. Persily's comments and ties to North Carolina districting matters.

Finally, legislative defendants also have concerns about Prof. Persily's qualification to serve as a special master in this particular matter but have been limited in their ability to adequately review Prof. Persily's background and qualifications in the short two-business-day deadline imposed by the Court. Legislative defendants request

[2] On the other hand, it would not be an abuse of discretion to give the State the Court's new standards for assessing racial gerrymanders and an opportunity to cure any deficiencies in the Subject Districts by a specific date while also simultaneously appointing a special master to work on an interim court plan if the State failed to act.

that prior to the Court appointing Prof. Persily or anyone else to serve as a special master, the legislative defendants be given an opportunity to depose the proposed special master or conduct a voir dire in open court. Legislative defendants respectfully do not believe two business days is meaningful "notice and an opportunity to be heard" required by Rule 53(b)(1), Fed. R. Civ. P. Nonetheless, the information legislative defendants has been able to discover in two business days raises a concern whether Prof. Persily should be appointed a special master in this particular case.

Prof. Persily has many media appearances and published works relating to North Carolina redistricting which raise questions about his ability to fairly assess the plans before the Court. In addition, it appears that Prof. Persily has a number of professional and personal ties to plaintiffs' counsel and their allied *amici* filers and outside groups. Legislative defendants must have the time and the opportunity to question Prof. Persily about these ties and his publications in order to assess whether he is free of conflicts and has the ability to impartially assess the Subject Districts.

Prof. Persily appears to have had multiple encounters with plaintiffs' counsel and their allies, both in a personal and a professional context. For instance, in 2006, Prof. Persily appears to have been an invited speaker to the UNC Center on Civil Rights to speak on redistricting while plaintiffs' counsel Anita Earls was Director of Advocacy at the institution. Both appear as speakers in a program from the event as well.[3] Prof. Persily further presented on the use of experts in redistricting cases to plaintiffs' allied group

[3]Nonpartisanship, Competition and Minority Voting Rights, UNC Center for Civil Rights, Chapel Hill, NC, Feb. 3, 2006; *available at* http://www.law.unc.edu/documents/civilrights/conferences/whodrawsthelines.pdf.

before the beginning of the 2010 redistricting cycle.[4] With additional time and an opportunity to receive information from Prof. Persily, the legislative defendants could discover the contents and topic of this presentation as well as whether Prof. Persily was compensated for this presentation by groups allied with the plaintiffs.

Prof. Persily's extensive contacts with the plaintiffs' ally, the Campaign Legal Center, and its associated litigation arm are also concerning. The Campaign Legal Center is engaged in litigation against the legislative defendants regarding Congressional redistricting, and the Center and its employees have made extensive public comment against the 2017 legislative redistricting plans.[5] In addition to working as Associate Counsel for the Brennan Center—a funding source of the Campaign Legal Center[6]—between 1999 and 2001, Prof. Persily has apparent close personal ties to Campaign Legal Center employees currently engaged in litigation against the legislative defendants.[7] With additional time and an opportunity to receive information from Prof. Persily, the legislative defendants could discover the extent to which Prof. Persily has communicated with the Campaign Legal Center, its employees, the plaintiffs, or other outside allied groups about potential litigation against the Subject Districts. The two-business-day

[4] See Persily resume citing NAACP Legal Defense and Education Fund, Airlie Conference Center, Warrenton, VA Oct. 9, 2010.

[5] *See* http://www.campaignlegalcenter.org/document/campaign-legal-center-analysis-efficiency-gaps-proposed-north-carolina-house-and-senate. *See also* *https://twitter.com/search?l=&q=from%3Aruthgreenwood%20%40repdavidrlewis&src=typd&lang=en*.

[6] The Brennan Center has also recently submitted an amicus brief adverse to the Legislative Defendants in another elections case in North Carolina. https://www.brennancenter.org/press-release/amicus-brief-nc-general-assembly%E2%80%99s-attempt-entrench-one-party-power-unconstitutional.

[7] https://twitter.com/ruthgreenwood/status/851283940841209857

timeframe provided by the Court simply does not allow legislative defendants the time necessary to assess these and other potential personal and professional ties by Prof. Persily to the plaintiffs.

Also concerning to legislative defendants are Prof. Persily's public comments about North Carolina redistricting and the issues before the Court. In *Bartlett v. Strickland*, litigation concerning race in North Carolina legislative redistricting, Prof. Persily, along with several other law professors, filed an amicus brief which advocates using experts to define the exact racial balance necessary in certain jurisdictions to comply with the Voting Rights Act.[8] Additionally, in a finding that appears contrary to this Court's August 2016 decision, Professor Persily found that racially polarized voting *increased* between 2000 and 2012 in jurisdictions formerly covered by Section 5 of the Voting Rights Act.[9] Legislative defendants are concerned that Prof. Persily's prior writings support using race in the creation of any remedial districting plans without a district-by-district analysis of legally sufficient racially polarized voting. Moreover, Prof. Persily's specific comments about the legislative defendants are also concerning, such as when he told the *New York Times* that North Carolina election law changes were driven by a "mix of racial discrimination and partisan greed,"[10] that redistricting plans in North Carolina and Virginia were "motivated by the incumbents in order to screw their

[8] https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_07_689_NeutralAmCu5Profs.authcheckdam.pdf

[9] https://harvardlawreview.org/2013/04/regional-differences-in-racial-polarization-in-the-2012-presidential-election-implications-for-the-constitutionality-of-section-5-of-the-voting-rights-act/

[10] https://www.nytimes.com/2017/05/16/us/for-voting-rights-advocates-court-decision-is-temporary-victory.html

opponents,"[11] and publicly opining about the "high correlation between party and race" in North Carolina redistricting litigation.[12]

These are just a few examples of possible bias that legislative defendants have been able to assess within the limited time the Court has provided. Prof. Persily has a large number of additional media appearances, interviews, articles, quotes, and speeches about race and redistricting which legislative defendants have not been able to fully vet. Due to these constraints, it is impossible to determine whether, on balance, Prof. Persily should be disqualified from serving as special master in this case. Accordingly, while legislative defendants object to the appointment of any special master as premature, prior to the Court appointing Prof. Persily to serve as a special master, the legislative defendants request, at a minimum, an opportunity to depose Prof. Persily on these matters or conduct a voir dire in open court.

This, the 30th day of October, 2017.

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[11] http://www.npr.org/2016/12/05/504188630/questions-of-race-and-redistricting-return-to-the-supreme-court

[12] https://law.stanford.edu/press/gerrymandering-voter-suppression-spread-people-regain-control-elections/

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2017, I have served the foregoing **DEFENDANTS' OPPOSITION TO APPOINTMENT OF NATHANIEL PERSILY AS SPECIAL MASTER** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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