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

SANDRA LITTLE COVINGTON, *et al.*, PLAINTIFFS, V. THE STATE OF NORTH CAROLINA, *et al*, DEFENDANTS.	**PLAINTIFFS' POST-TRIAL BRIEF**

NOW COME Plaintiffs, by and through their undersigned counsel, and pursuant to the Court's request of the parties and minute entry dated April 15, 2016, submit the following post-trial brief. This brief is a supplement to the trial brief Plaintiffs submitted on March 21, 2016 (ECF No. 83) and is focused only on issues that arose during trial or in closing arguments, or that may have arisen post-trial, that were not fully briefed in the opening trial brief.

I. The Proper Use of Race in Redistricting

Defendants attempt to portray their situation as no-win: they either violate the Voting Rights Act or they violate the Fourteenth Amendment. This is simply not true. Most states managed to balance compliance with both the VRA and the Fourteenth Amendment in the 2011 and previous redistricting cycles. The legal and proper use of race in redistricting is as follows:

A. A Primer on the Use of Race

The most straightforward and safest way of understanding how a jurisdiction can and should consider race legally in redistricting is to look to the judges' and Justices' own words. According to Justice O'Connor's controlling position: "[S]o long as they do not subordinate traditional district criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration without coming under strict scrutiny." *Bush v. Vera*, 517 U.S. 952, 993 (1996) (O'Connor, J., concurring).

Similarly, in *Miller v. Johnson* the Court stated:

> A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "When members of a racial group *live together in one community*, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes."

515 U.S. 900, 920 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (emphasis added). What the state may not do is apply mechanical racial targets across the state without respect for local conditions, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267 (2015) ("*ALBC*"), or use racial data directly to manipulate the political makeup of a district—i.e., use race as a proxy for partisanship. *Vera*, at 961-63.

All states, including North Carolina, may constitutionally use and consider race in redistricting so long as their primary allegiance is to traditional redistricting criteria, "such as compactness [and] contiguity, as well as a state interest in maintaining the

integrity of political subdivisions, [and] a competitive balance among political parties" *Harris v. Ariz. Ind. Redistricting Comm'n*, 578 U.S. __, No. 14-232 (Apr. 20, 2016) (slip op., at 4). If the states draw legislative districts with a commitment to respecting such traditional redistricting criteria, with a concomitant recognition of race, they act consistent with the Constitution.

As an example, Plaintiffs did not challenge House District 27, which is a majority-black district, because it is comprised of two whole counties: Northampton and Halifax. It is a naturally-occurring majority black district. Even if those two counties were grouped together intentionally in order to create a majority black district, the compactnesss and respect for county lines of the district preclude an argument that race was the predominant factor in the construction of the district, thereby avoiding strict scrutiny of the district.

Additionally, although this was not the path taken by Defendants, the African-American population in some urban counties in North Carolina, like Mecklenburg and Guilford Counties, is substantial enough that it would be difficult, absent intentional cracking and non-compact district-drawing, not to draw naturally occurring majority-black or near-majority-black districts Defendants, of course took a different path in Mecklenburg, Guilford, and other urban counties. Applying their proportionality rule and their 50% plus one rule in tandem, they made 2 of 5 Senate districts and 5 of 12 House districts in Mecklenburg majority black and 3 of 6 House Districts in Guilford majority black. As Sen. Clodfelter explained at trial, this required "meticulous surgery" in

Mecklenburg county. Sen. Clodfelter Trial Tr. vol. II, 63:24. As he further explained, that surgery was unnecessary. Compact districts honoring communities of interest that provided for both political and racial balance were available but were rejected by Defendants. Sen. Clodfelter Trial Tr. vol. II, 50:16 to 51:14. Some majority-black districts will occur when a map-drawer draws compact districts in these counties, although it will not be 5 out of 12 districts in Mecklenburg or 3 out of 6 districts in Guilford. When drawing compact districts that reflect naturally-occurring majority-black districts, race has not predominated, strict scrutiny does not apply, and Defendants do not need to demonstrate that the preconditions for a Section 2 violation are present.

Furthermore, Defendants may take race into consideration in order to further their professed desire to create "fair districts" for "all citizens of North Carolina, including minority communities," J1005, so long as the state does not subordinate traditional redistricting criteria to those considerations. The Supreme Court explicitly endorsed the voluntary creation of crossover districts in *Bartlett v. Strickland*, 556 U.S. 1 (2009), with this goal in mind, further demonstrating that the use of race in redistricting can be proper. The Court stated:

> Our holding that § 2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative choice or discretion. Assuming a majority-minority district with a substantial minority population, a legislative determination, based on proper factors, to create crossover districts may serve to diminish the significance and influence of race by encouraging minority and majority voters to work together toward a common goal. The option to draw such districts gives legislatures a choice that can lead to less racial

> isolation, not more…. States that wish to draw crossover districts are free to do so where no other prohibition exists.

Strickland, 556 U.S. at 23-34. That is, given the Court's recognition of the benefit of crossover districts, the state can consider race, pre-existing cross-racial coalitions, and where there might be potential to create new cross-racial coalitions, in constructing districts. This is an entirely legitimate use of race.

Thus, it is clear that the use of race in districting does not alone trigger strict scrutiny, and race-based districts that otherwise comply with traditional districting criteria will escape strict scrutiny. While traditional redistricting criteria are not constitutionally compelled themselves, they provide a clear path for North Carolina to draw valid districts that at the same time protect minority citizens As the Supreme Court observed in 1993, traditional redistricting criteria "are important to evaluate in a racial gerrymander claim because they are objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw I*, 509 U.S. at 647.

II. Where in the State Might a Section 2 Violation Exist?

In closing argument, members of the panel asked Plaintiffs to identify where in the state there may be the potential for a Section 2 violation. Plaintiffs address that topic more fully here.

Based on the record before this Court, in all of the geographic areas in which Plaintiffs challenge districts as racial gerrymanders, the candidates of choice of black voters have been winning handily in the challenged districts. On that record, no Section 2 plaintiff would prevail in litigation, because that plaintiff would be unable to satisfy the

third prong of *Gingles*: proving that the candidate of choice of black voters is usually defeated. Thus, there can be no Section 2 districts in those areas.

To explore an example, Cumberland County, in particular, came up in closing argument. The Court asked whether Cumberland County is a Section 2 county, and whether it would be a Section 2 violation to draw SD 21 as a 31% BVAP district. Trial Tr. vol. V, 221:14-25, 224:6-12. While Section 2 applies in Cumberland County as it does all counties in the country, there is no evidence that black voters in Cumberland County do not presently enjoy equal opportunity to elect their candidates of choice to the state legislature. In fact, all the evidence in record is to the contrary. An African-American preferred candidate could lose in a 31% BVAP district, but Section 2 is not a guarantee of electoral success for black voters. Perhaps if those hypothetical losses persisted, a viable Section 2 claim might emerge in time. But there was no reasonable basis in evidence for Defendants to conclude in 2011 that the state would violate Section 2 had it not drawn SD 21 and HD 42 and 43 in Cumberland county to encompass a majority of African-American citizens of voting age.

III. Separating White and Non-Hispanic White Does Not Affect the Third Prong of the *Gingles* Analysis

The inclusion or exclusion of white Hispanics in the population of voters does not affect the outcome of an analysis of the third prong of *Gingles* in this case. The third *Gingles* prong requires a showing that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles v. Thornburg*, 478 U.S. 30, 51 (1986). Defendants assert that Plaintiffs' expert witnesses erred in

failing to separate white Hispanics from non-white Hispanics while engaging in their analyses, and that figures relating to white crossover voting that include white Hispanics are "probably an overestimate of the support of whites for the black candidate" due to the likelihood that Hispanics will vote for a democrat. Dr. Brunell, Trial Tr. vol. IV, 166:1-2.

However, *Gingles* tells us that the reasons black and white voters vote differently are wholly irrelevant to a Section 2 inquiry. *Gingles*, 478 U.S. at 63. Especially in a circumstance where race is the predominant factor used to draw districts, racially polarized voting analyses are unchanged by ethnicity, as race and ethnicity are, as pointed out by Defendants' witness, "two separate variables." Frey, Trial Tr. vol. IV, 62:19-25. The ethnicity of these white voters is therefore irrelevant, and "[t]he addition of irrelevant variables distorts the equation and yields results that are indisputably incorrect under § 2." *Gingles*, 478 U.S. at 64.

The relevant inquiry, then, is into the past electoral success of the candidate of choice of African-American voters within any given district, and the degree to which white bloc voting prevents this success. Plaintiffs presented an abundance of evidence at trial to demonstrate that the candidates of choice of African-American voters had enjoyed consistent success in districts in which Defendants needlessly and mechanically increased the black voting age population to greater than fifty percent black voting age population.

Defendants' experts failed to provide any testimony demonstrating that the ethnicity of white voters in a district adversely impacted the success of black candidates in such a way as to require majority-minority districts. In fact, their testimony indicated

the contrary. Looking at the past voting behavior of Hispanic whites, Defendants' experts concluded that these individuals are more likely to support the minority candidate of choice and thereby increase the white crossover voting. Dr. Brunell, Trial Tr. vol. IV, 167:23 to 168:16; Dr. Hood, Trial Tr. vol. IV, 195:19 to 197:3; Dr. Hofeller, Trial Tr. vol. V, 67:25 to 71:10. By showing that white voters do not defeat the candidates of choice of black voters, Defendants essentially highlighted for the court each instance in which the white majority did not vote sufficiently as a bloc to defeat the minority's preferred candidate of choice, and should not be expected to. The likelihood that white members of an ethnic minority who are eligible to vote will vote for the candidate of choice of the African-American community within a certain district strengthens the effectiveness of these districts. Dr. Lichtman, Trial Tr. vol. V, 162:5 to 163:15. "The actual results of elections, the fact that African-Americans overall voting-age population dominate the Democratic primaries, the fact that the Democratic candidates invariably win these districts—take into account the entire demography of the district," and the ultimate conclusion remains unchanged when one makes ethnic distinctions. Dr. Lichtman, Trial Tr. vol. V, 163:16-21. Based on past voting behaviors and candidate success, the third *Gingles* prong was not met in 2011, and the drawing of the VRA districts was not justified.

IV. The Decision in *Harris v. Arizona Independent Redistricting Commission* Does Not Materially Affect this Court's Analysis

Following trial in this case, the Supreme Court issued an opinion in *Harris v. Arizona Independent Redistricting Commission* ("*AIRC*"), in which a group of Arizona

voters unsuccessfully challenged a legislative redistricting plan on grounds that it violated the Fourteenth Amendment's "one person, one vote" guarantee. *See AIRC*, 578 U.S. __, No. 14-232 (Apr. 20, 2016) (slip op., at 1). The Supreme Court found that population deviations in the enacted plan were a result of Arizona's efforts, under the state's proper interpretation of Section 5, to comply with the Voting Rights Act and were not, as the challengers alleged, impermissibly motivated by partisanship. *Id.* (slip op., at 5). The Arizona plaintiffs' one person, one vote challenge and that state's proper application of Section 5 are readily distinguishable from the racial gerrymandering challenge presented here.

First, the legal frameworks applicable to one person, one vote and racial gerrymandering claims are substantially different. In the Arizona case, the plaintiffs' burden was to establish that impermissible partisan considerations motivated deviations from mathematical population equality in the enacted plan. *Id.* (slip op., at 9). In *ALBC*, the Supreme Court distinguished this burden from the "special" burden of plaintiffs in racial gerrymandering cases:

> "[P]redominance" in the context of a racial gerrymandering claim is special. It is not about whether a legislature believes that the need for equal population takes ultimate priority. Rather, it is . . . whether the legislature "placed" race "above traditional districting considerations in determining *which* persons were placed *in appropriately apportioned districts*." In other words, if the legislature must place 1,000 or so additional voters in a particular district in order to achieve an equal population goal, the "predominance" question concerns *which* voters the legislature decides to choose, and specifically whether the legislature predominantly uses race as opposed to other, "traditional" factors when doing so.

ALBC, 135 S. Ct. at 1270-71 (internal citations omitted) (emphasis in original). Thus, Plaintiffs' claim here—that race predominated over traditional redistricting criteria in deciding which residents to assign to the challenged districts—is both legally and factually distinct from the Arizona plaintiffs' claim—that partisanship drove a violation of the "background rule" of maintaining mathematical population equality among all districts. *See id.* at 1271 ("[T]he requirement that districts have approximately equal populations is a background rule against which redistricting takes place. It is not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries.").

Under the one-person, one-vote framework, the Supreme Court found that Arizona's proper application of Section 5 of the Voting Rights Act, not partisanship as the challengers alleged, led to an increase in the overall population deviation between the initially published draft of Arizona's redistricting plan and the enacted version. *AIRC*, 578 U.S. __ (slip op., at 9). Although the underlying legal claim in the Arizona case is distinct from the racial gerrymandering claim at issue here, a closer look at the map-drawing process Arizona employed to achieve Voting Rights Act compliance is instructive.

Arizona's constitutionally-created independent redistricting commission, made up of two Republicans, two Democrats, and one politically unaffiliated member, follows a three-step process in redrawing legislative districts after each decennial census. *Id.* (slip op., at 2). First, the commission draws a statewide population grid, geographically

subdividing the state into baseline districts of equal population. *Id.* Second, the commission adjusts the baseline grid to maintain compactness, accommodate communities of interest, and keep municipalities intact, factoring in competitive balance among political parties only to the extent that doing so does not significantly interfere with any of those three goals. *Id.* Finally, working from the adjusted grid, the commission makes final adjustments to district boundaries as necessary to comply with the United States Constitution and Voting Rights Act. *Id.*

When Arizona's commission reached the third step of this process during the 2010 redistricting cycle, it analyzed the benchmark plan with the help of a bipartisan team of outside consultants[1] and concluded that the benchmark plan contained ten "ability-to-elect" districts, which provided minority voters a reasonable opportunity to elect the candidates of their choice. *Id.* (slip op., at 6). The commission initially drafted a plan that maintained the ten ability-to-elect districts, but after further consultation concluded that the ten districts as drawn might not provide a true ability to elect and as a result may not receive federal preclearance under Section 5 of the Voting Rights Act. *Id.* Therefore, the commission adjusted the boundaries of two of the ten districts to decrease the overall voting age population in those two districts, thereby increasing the percentage of Hispanic voting age population in the two districts. *Id.* (slip op., at 7-8). Additionally, at

[1] For the 2010 legislative redistricting cycle, the commission elected its unaffiliated member as its chairwoman and hired two outside counsel as advisors, one Democratic-leaning and one Republican-leaning. *Id.* (slip op., at 2). The commission also hired outside specialists in mapping, statistics, and the Voting Rights Act. *Id.*

the request of a Democratic commissioner to make an eleventh district more politically competitive, the commission increased the minority voting age population in that eleventh district, which the commission concluded would not result in a true ability-to-elect district but would nonetheless enhance the plan's case for preclearance under Section 5. *Id.* (slip op., at 9).

Where Arizona's plan serves as a model of responsible redistricting, the North Carolina plan challenged here serves to illustrate the perils of misinterpreting and improperly applying the Voting Rights Act. Where Arizona began its redistricting process by dividing the state into equal population grids and applying traditional redistricting criteria, *AIRC*, 578 U.S. __ (slip op., at 2), North Carolina began its redistricting process by adopting, and then mechanically applying, its 50 percent plus one and proportionality race-based rules. (J1005-2-3). Where Arizona's independent, bipartisan redistricting team analyzed past election results and group voting patterns to identify districts where minority voters may not continue to have an ability to elect their candidates of choice, *AIRC*, 578 U.S. __ (slip op., at 7), North Carolina's map drawer, working in isolation from the legislative redistricting committee members and the public, stepped into *Alabama Legislative Black Caucus*' "trap for an unwary legislature" by pre-determining "precisely what percent minority population" he believed would guarantee Voting Rights Act compliance, 135 S. Ct. at 1273-74, and "simply adding up census figures" to reach that quota with no further analysis of voter behavior or past election results, *AIRC*, 578 U.S. __ (slip op., at 7). *See* Second Stip. ¶ 4; Dr. Hofeller, Trial Tr.

vol. V, 81:4 to 82:5. Where Arizona adjusted the boundaries of only the two ability-to-elect districts where its investigation had shown that minority voters' ability to elect might be impaired, *AIRC*, 578 US. __ (slip op., at 7-8), North Carolina applied a one-size-fits-all approach to corral African-American residents statewide into majority-minority districts "wherever possible." Sen. Rucho, Trial Tr. vol. IV, 33:4-8; Rep. David Lewis, Trial Tr. vol. III, 186:19-21; 7/21 House Comm. 9:23 to 10:3 (J1018-9-10).

North Carolina's misapprehension of Voting Rights Act liability and what was constitutionally required of the state in drawing legislative districts provides ample evidence to support Plaintiffs' racial gerrymandering claim. Unlike in a one-person, one-vote claim, plaintiffs in racial gerrymandering cases are held to a legal standard of showing, "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant motivating factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *ALBC*, 135 S. Ct. at 1267 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). For the very reasons the Arizona plan received the Supreme Court's blessing, as outlined above, the North Carolina districts challenged here are unconstitutional.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court declare that Senate Districts 4, 5, 14, 20, 21, 28, 32, 38, and 40 and House Districts 5, 7, 12, 21, 24, 29, 31, 32, 33, 38, 48, 57, 58, 60, 99, 102, and 107 violate Plaintiffs' rights secured by the Fourteenth Amendment to the United States Constitution because each of those districts is a racial gerrymander not justified by any compelling governmental interest nor narrowly tailored to serve a compelling interest and enjoin Defendants from conducting further elections under these districts.

Respectfully submitted, this the 6th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' POST-TRIAL BRIEF** 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 the 6th day of May, 2016.

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