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. STATE OF NORTH CAROLINA, *et al.*, Defendants.	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE**

INTRODUCTION AND STATEMENT OF FACTS

Six current and former legislators are witnesses for the Plaintiffs in this racial gerrymander case. By virtue of their representation of their constituents and their work in their districts, they are especially knowledgeable regarding the predominance of race in the construction of the challenged districts and the absence of any justification for those gerrymandered districts under any proper interpretation of the Voting Rights Act. These legislators will testify from their personal knowledge and experience about the geography and demographics of the districts, the history of elections in those districts, and the ability of voters to form cross-racial coalitions in supporting candidates for House and Senate districts.

On the eve of trial, Defendants have moved the Court that these six legislators "should not be allowed to testify" at trial. (Defs' Mem. p. 1, D.E. # 99). They present two grounds for this extraordinary request: (1) that there "is strong precedent mandating that no weight be given to testimonial statements made by opponents of legislation," *id.*,

and (2) that if the Court sustains Plaintiffs' relevance objections to certain of Defendants' exhibits, "equity requires" the Court to also sustain relevance objections to Plaintiffs' witnesses. (*Id*. p. 3.).

Senator Rucho and Representative Lewis are on Defendants' trial witness list. Defendants' position must be that legislators who seek to uphold the constitutionality of a redistricting plan they supported are inherently less interested in the outcome of the litigation and thus more credible, therefore entitling them to testify about the justifications for the plan they enacted, but that legislators opposing the plan are to be excluded from testifying about evidence before the General Assembly at the time of enactment because they are per se unreliable and not credible. This notion is offensive to principles of equal justice under the law. The plaintiffs are entitled to present the testimony of witnesses who have relevant evidence. The Court can judge the credibility of those witnesses and assign what weight to give their testimony.

The grounds for Defendants' motion are unfounded and feckless. The motion should be denied.

ARGUMENT

I. <u>The testimony of persons involved in the legislative process is relevant and often highly probative in racial gerrymander cases.</u>

Those most knowledgeable about the racial, demographic and electoral characteristics of legislative districts are those who have campaigned for election in those districts. This is precisely the type of experience that would best enable a person to inform the Court about the two essential questions the Court must answer here: 1) did

race predominate as a factor when the legislature drew the boundaries of the challenged districts, and 2) if so were those districts narrowly tailored to achieve a compelling interest. *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1267, 1272 (2015) (hereinafter "*ALBC*").

The importance of this type of testimony in resolving these issues was noted in *Harris v. McCrory*, No. 1:13-CV-949, 2016 U.S. Dist. LEXIS 14581 (M.D.N.C. Feb. 5, 2016), decided just sixty days ago. There the court observed that "public statements, submissions, and sworn testimony by the individuals involved in the redistricting process are not only relevant, but often highly probative." *Id.* at *19 (citing, for example, *Bush v. Vera*, 51765 952, 960-61 (1996)). Among the forms of "relevant" and "often highly probative" evidence relied on by the *Harris* court was the testimony of Senator Dan Blue, one of the six legislators whose testimony Defendants now seek to exclude. *Harris*, 2016 U.S. Dist. LEXIS at *25 (cataloging evidence proving predominance including the trial testimony of Senator Blue "describing conversation with Senator Rucho in which Senator Rucho explained 'his understanding and his belief that he had to take [districts of less than 50 percent BVAP] all beyond 50 percent because Strickland informed him that's what he's supposed to do."). *See also id.* at *36 (again citing Blue testimony) and *ALBC*, 135 S. Ct. at 1271 (relying on trial testimony of Senator Quinton Ross, the African-

American Senator who represented SD 26 and who opposed the plan adopted by the Alabama legislature).[1]

In addition to describing the predominance of race in boundaries of the challenged districts, these six legislators will testify that they and all African-American members of the General Assembly voted against the challenged districts. The Supreme Court has described such testimony as "significant" in the context of voting litigation. *Georgia v. Ashcroft*, 539 U.S. 461, 484 (2003).

Never mentioning *Harris*, or any of the long line of cases cited in *Harris*, Defendants refer the Court to a series of inapposite cases in support of their motion. Those cases simply hold that the testimony of individual legislators, particularly those on the losing side in a legislative debate, is not authoritative or dispositive in a statutory construction case to determine the meaning of an ambiguous statute. *See Shell Oil Co. v. Iowa Dep't of Revenue*, 480 U.S. 15, 29 (1988) ("reliance on an isolated statement" by opposing legislator in determining the meaning of an ambiguous tax statute is "misplaced" and arguments of legislative opponents are not an "authoritative guide to the construction of legislation," but not excluding such testimony as completely irrelevant); *NLRB v. Packers and Warehousemen*, 377 U.S. 58, 66 (1964) ("we have cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents."); *Schwegmann v. Calvert Distillers*, 341 U.S. 384, 394 (1951) ("the fears and doubts of the opposition are no authoritative guide to the construction of

[1] Defendants in *Harris* were represented by the same counsel as represent the defendants here. They made no objection to Sen. Blue's testimony in *Harris*.

legislation."). This case, of course, raises no statutory construction issues. Therefore, those precedents are not applicable here.

Defendants also cite *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, No. 5:15-cv-156, 2016 U.S. Dist. LEXIS 35439 (Feb. 26, 2016) (hereinafter "RWCA"), in support of their position. There the Court heard but did not credit the testimony of an opposing legislator that a change in the method of election of a local school board "will not improve School Board representation." *Id.* at *97. In that case, in which the issue was whether deviation from the one-person, one-vote requirement was caused by arbitrary, capricious or discriminatory reasons, the plaintiffs offered the legislator's testimony to demonstrate pretext in proponents' arguments that the change in the method of electing the Wake County School Board was required to improve School Board representation, among other reasons.[2] Here, in stark contrast, Plaintiffs offer the testimony of legislators to demonstrate that there was not a sound basis in evidence before the legislature for concluding that the Voting Rights Act required the mechanical imposition of two racial criteria. There is no basis for excluding the testimony of any person with knowledge of what was before the legislature at the time these plans were considered and adopted.

Beyond the inapplicability of *RWCA* to the facts of the instant case, *RWCA* relied on *Veasey v. Abbott*, 796 F.3d 487, 502 (5th Cir. 2015), in support of its decision "not to

[2] On April 5, 2016, the Fourth Circuit Court of Appeals granted expedited review of that decision, with the merits brief being due on April 15, 2016, and oral argument set for May 9, 2016. *RWCA v. Wake Co. Bd. of Elections*, Case No. 16-1270, D.E. 35, 36,

credit" that testimony. The *Veasey* decision upon which the *RWCA* court relied was vacated on March 9, 2016, pending rehearing en banc, 2016 U.S. App. LEXIS 4419, and is no longer good law. Moreover, the *Veasey* decision held that "the speculations and accusations" of a few disgruntled opponents of certain legislation were entitled to little weigh to prove "racial animus." There is no racial animus issue in this case. *See Harris*, 2016 U.S. Dist. LEXIS at *3 (racially-gerrymandered districting schemes are unconstitutional, even when adopted for benign purposes).

II. The Application of the Federal Rules of Evidence is Not Determined by Equity.

As demonstrated above the evidence Defendants seek to exclude is plainly relevant to the central issues in this case. By contrast, the evidence Defendants ask the court to consider on "equitable" grounds is clearly irrelevant. Their effort to seek the introduction of this evidence in fact reflects the fundamental flaw in the redistricting scheme implemented by Rucho and Lewis and acquiesced in by the General Assembly.

For each challenged district that Plaintiffs prove was drawn predominantly on the basis of race, Defendants must prove that the General Assembly had "a strong basis in evidence" upon which to conclude that the district was required to meet the State's obligations under the VRA, and that the boundaries of the district were narrowly tailored to meet that obligation. Under the process established by Rucho and Lewis and memorialized in several contemporaneous written public statements, the need for 50% plus districts in numbers proportional to the State's black population was done on a mechanical, one-size-fits-all, across-the-state basis condemned by *ALBC* rather than on a

district-by-district specific basis as required by *ALBC*. Plaintiffs contend that the strong basis in evidence justifying the state's use of race must have existed at the time the plans were enacted. That provides no grounds for a blanket exclusion of Plaintiffs' evidence on "equitable" grounds.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court deny Defendants' motion in limine.

This the 7th day of April, 2016.

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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 the 7th day of April, 2016.

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