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.

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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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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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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ALABAMA LEGISLATIVE BLACK CAUCUS, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CASE NO. 2:12-CV-691 (Three-Judge Court)
ALABAMA DEMOCRATIC CONFERENCE, et al., Plaintiffs, v. THE STATE OF ALABAMA, et al., Defendants.	)	CASE NO. 2:12-CV-1081 (Three-Judge Court)

ORDER

The Alabama Legislative Black Caucus moves that we reconsider our decision to readopt our earlier orders on issues that were not addressed by the Supreme Court (Doc. 242), in the light of the recent decision of the Supreme Court in *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015). In that decision, the Supreme Court held that the Elections Clause, U.S. Const. Art. I § 4, permits the voters of Arizona to use a state constitutional referendum to provide for

redistricting by an independent commission instead of the state legislature. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2677. Because that decision has no bearing on the Caucus's claims, we deny the motion. The Caucus makes two arguments, and we explain each in turn.

First, the Caucus argues that we should reconsider our decision to dismiss count one of the amended complaint (Doc. 53: 5–10). In count one, the Caucus alleged Alabama violated the one-person, one-vote principle of the Fourteenth Amendment by "restricting allowable population deviations more than is practicable to comply with the whole-county provisions in the Alabama Constitution and by failing to comply with those whole-county provisions to the extent practicable." (Id. at 5). We dismissed that count because "[t]he odd complaint of the Black Caucus that the new districts are too equal in population fails to address a concern of the Fourteenth Amendment." (Id. at 6). The Caucus now argues that, in *Arizona Independent Redistricting Commission*, the Supreme Court ruled that state legislatures cannot "alter or amend" electoral requirements of the state constitution, (Doc. 261 at 3 (quoting *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2677)) and that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." (Id. at 2–3 (first alteration in original) (quoting *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2673)). According to the Caucus, *Arizona Independent Redistricting Commission* "holds that a state drawing

legislative districts to comply with the federal one-person, one-vote rule may not ignore [c]ore aspects of the electoral process regulated by [its] state constitution[]." (Id. at 4 (alterations in original) (internal quotation marks and citation omitted)).

The Caucus's argument fails. The Supreme Court did not hold that the Fourteenth Amendment requires state legislatures to obey their own constitutions, nor did it decide that we have subject matter jurisdiction to consider whether Alabama complied with its own state constitution in creating the redistricting plans. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117, 104 S. Ct. 900, 917 (1984) ("[A] federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has in impact directly on the State itself."). The Supreme Court instead held that the Elections Clause of the federal Constitution does not permit a state legislature to violate its state constitution when it formulates electoral rules. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2677. The Caucus would take that holding to imply that the Fourteenth Amendment *requires* a state to follow its own constitution, but no such inference is permissible. Whether one clause of the federal Constitution fails to empower a state legislature has no bearing on whether a separate Amendment restrains a state legislature. Accordingly, we still lack subject matter jurisdiction to decide this issue.

Second, the Caucus argues that we should reconsider our grant of summary judgment in favor of the defendants and against the Caucus on its claim of partisan gerrymandering. (Doc. 174 at 16–19). We rejected the Caucus's claim of partisan

gerrymandering because it failed to provide a "judicial standard by which we [could] adjudicate the claim." (Id. at 16 (internal quotation marks omitted)). *See Vieth v. Jubelirer*, 541 U.S. 267, 313, 124 S. Ct. 1769, 1796 (2004) (Kennedy, J., concurring in the judgment) (explaining that where "we have no standard by which to measure the burden [plaintiffs] claim has been imposed on their representational rights, [plaintiffs] cannot establish that the alleged political classifications burden those same rights"). The Caucus now argues that it has found such a standard, based on *Arizona Independent Redistricting Commission*. According to the Caucus, the Supreme Court held that "an initiative authorized by a state constitution was an exercise by the people of Arizona 'to curb the practice of gerrymandering' so as 'to restore "the core principle of republican government," namely, "that the voters should choose their representatives, not the other way around."'" (Doc. 261 at 6–7 (quoting *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. at 2677)). Though the Caucus admits that *Arizona Independent Redistricting Commission* involved the Elections Clause, it argues that "the necessary implication of that decision is that districts drawn for partisan purposes that disregard anti-gerrymandering provisos placed by the people in their state constitution violate the First and Fourteenth Amendments of the Constitution of the United States." (Id. at 7).

Again, the Caucus's argument fails. As an initial matter, the Supreme Court did not "hold" that "an initiative authorized by a state constitution was an exercise by the people of Arizona to curb the practice of gerrymandering." (Id. at 6 (internal

quotation marks and citation omitted)). The statement of the Court that "[t]he people of Arizona turned to the initiative to curb the practice of gerrymandering," *Ariz. Independ. Redistricting Comm'n*, 135 S. Ct. at 2677, was explanatory dicta. The Court then explained that "[t]he Elections Clause does not hinder that endeavor." *Id.* The Caucus again makes an unsupportable logical leap from a decision about the Elections Clause to its own preferred understanding of the Fourteenth Amendment. That the Elections Clause does not interfere with a state's own efforts to combat partisan gerrymandering says nothing about what the Fourteenth Amendment requires. Moreover, to adopt a standard that the Fourteenth Amendment requires a state to follow its own constitutional requirements would run an end-around the Eleventh Amendment. *See Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) ("The Eleventh Amendment acts as a jurisdictional bar for any such suit against the state . . . ."). The Caucus's claim of partisan gerrymandering fails.

Accordingly, it is ORDERED that the Caucus's Amended Motion for Reconsideration of Order Readopting Rulings Not Addressed by the Supreme Court (Doc. 261) is DENIED.

DONE this 27th day of July, 2015.

/s/ William H. Pryor Jr.
UNITED STATES CIRCUIT JUDGE
PRESIDING

/s/ W. Keith Watkins
CHIEF UNITED STATES DISTRICT JUDGE

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE