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

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	**PLAINTIFFS' RESPONSE TO MOTION TO QUASH**

NOW COME SANDRA LITTLE COVINGTON, *et al.,* Plaintiffs herein, and respond to the Legislative Defendants' Motion to Quash or Modify Subpoena as follows:

1. This Court invited the parties to address four specific issues in connection with Plaintiffs' motions a) to establish a timeline for the adoption of remedial districts and b) to order special elections in the affected districts. Notice 3-4 (Doc. 153, June 9, 2017). Of particular relevance here, those issues included:

- Describing what steps, if any, the State of North Carolina has taken to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order; and
- If the State has failed to take any meaningful steps to satisfy its remedial obligations under this Court's August 15, 2016, Memorandum Opinion and Order, addressing whether the State is entitled to any additional time to comply with the Court's August 15, 2016, Memorandum Opinion and Order.

Id. at 4.

2. The Legislative Defendants ignored the Court's request in June, and instead opposed Plaintiffs' request to the U.S. Supreme Court to expedite the issuance of a certified copy of its opinion and judgment, asserting that they needed the full twenty-five days accorded by the Supreme Court Rules to determine if they intended to file a motion for reconsideration of the Court's unanimous summary affirmance of the trial court's judgment in this case. *See* Response to Application for Issuance of Mandate Forthwith, at 8, North Carolina v. Covington, No. 16A1202, 16A1203 (Doc. 156-1, June 13, 2017). No such motion for reconsideration was filed. Defendants' opposition was intended only to delay this Court resuming jurisdiction and to thereby further delay consideration of Plaintiffs' motions for additional relief.

3. In their statement filed on July 6, 2017, the Legislative Defendants indicate that they have appointed new redistricting committees and envision "completing the redistricting process no later than November 15, 2017." Leg. Defs. Position Statement 2 (Doc. 161). However, there is evidence in the record in this case to suggest that the Legislative Defendants have already drawn remedial districts and are using the ability to delay making those districts public to obtain a political advantage.

4. On October 28, 2016, a Declaration of Thomas B. Hofeller, Ph.D. [hereinafter "Hofeller Decl."was filed with the Court, containing a "Map 3 Comparison of 2011 Enacted to Optimum Senate County Groups" and a "Map 6 Comparison of 2011 Enacted to Optimum House County Groups". Hofeller Decl. 18, 21 (Doc. 136-1, Oct. 28, 2016). (Copies attached hereto as Exhibit 1). Map 3 shows the whole county groupings "which must be used to conform to the Optimum WCG structure" divided into three

classes: those colored green "will remain unchanged", those colored yellow "will also remain unchanged but the districts within them must be redrafted" and those colored white are changed groupings "requiring that all the districts within them must be redrafted". Hofeller Decl. 6-7. In short, according to Dr. Hofeller, these are the county groupings that must be used in order to comply with the Whole County Provisions of the North Carolina Constitution. All that remains to be done is to subdivide those counties and groupings that contain more than one district.

5. Plaintiffs subpoenaed Representative Lewis to ask him to describe the 2016 redistricting process for drawing remedial congressional districts that was completed in two weeks, and to inform the court, based on his personal knowledge, about the extent to which Dr. Hofeller has already subdivided the county groupings containing multiple districts in the two maps that Defendants submitted to this court last October. The answers to those questions are relevant to both of the issues referenced above from the Court's Notice. That is, if Dr. Hofeller has already drawn the remedial districts in the multi-district groupings shown in Map 3 and Map 6, it indicates what steps have been taken to comply with the Defendants' remedial obligations and it is relevant to determining what additional time is needed to comply with a remedial order. Representative Lewis and the other legislative leaders in control of the redistricting process are, to the best of Plaintiffs' knowledge, the only people who have this information.

6. Rather than a "blatant fishing expedition" designed to "chill the policymaking rights of Rep. Lewis and other legislators", Plaintiffs sought information relevant to the issues currently before the court that only those legislators would know.

7. Plaintiffs' most recent brief includes the legal authority for their contention that Representative Lewis cannot waive his legislative privilege concerning this matter in order to offer evidence defending the districts drawn by the legislature but then assert it when issues regarding an appropriate remedy arise. *See* Pls. Supplemental Br. on Remedy 8-9 (Doc. 173, July 21, 2017). Alternatively, these are circumstances in which the privilege should give way to the court's need for the information. *Id.*

8. Given that Representative Lewis has asserted legislative privilege regarding what steps the legislature has taken to date and whether new districts have, in fact, already been drawn by Dr. Hofeller, thus denying this Court information relevant to the balancing test it is charged with performing, the court should draw the inference that completing those maps in two weeks is entirely possible. Indeed, given the fact that Map 3 and Map 6 demonstrate that the clusters for the remedial maps are already drawn, it would also be a reasonable inference to draw that the remedial maps are already completely drawn. Even if the Court grants the motion to quash, the Court is entitled to make any necessary inferences on the issue in question in favor of the party seeking disclosure. "[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see also Dist. 65, Distributive Workers of Am. v.*

NLRB, 593 F.2d 1155, 1163-64, 1164 n.21 (D.C. Cir. 1978) (affirming an adverse inference against an employer alleged to have committed discriminatory discharge where the employer failed to put on testimony of the discharged employees' supervisors to bolster its defense that the discharges were the result of non-discriminatory performance issues). "[P]rivilege cannot be used both as a sword and as a shield." *Navajo Nation v. Peabody Holding Co.*, 255 F.R.D. 37, 44 (D.D.C. 2009) (citation omitted); *Recycling Solutions, Inc. v. District of Columbia*, 175 F.R.D. 407, 408 (D.D.C. 1997); *see also United States v. Rylander*, 460 U.S. 752, 758 (1983). This rule derives from concerns for fundamental fairness and just judicial outcomes.

9. The assertion of privilege to shield information from discovery "poses substantial problems for an adverse party who is deprived of a source of information that might conceivably be determinative in a search for the truth." *United States v. 4003-4005 5th Ave, Brooklyn NY*, 55 F.3d 78, 82 (2d Cir. 1995) (quoting *SEC v. Greystone Nash. Inc.*, 25 F.3d 187, 190 (3d Cir. 1994)). Thus, because privilege assertions hinder courts' truth-seeking goal, courts have prevented litigants from using privilege assertions as "a tool for selective disclosure"—that is, allowing in evidence from a resisting party that may be "helpful to his cause" but then allowing that resisting party to assert "privilege as a shield" to prevent meaningful inquiry on the subject matter in question to assess the truthfulness of the party's limited public explanations. *Computer Network Corp. v. Spohler*, 95 F.R.D. 500, 502 (D.D.C. 1982).

10. While not required to do so, a court can properly draw an adverse inference against a party claiming a privilege to resist producing relevant evidence. For instance,

an inference will be drawn against a party to a civil suit that invokes the Fifth Amendment privilege against self-incrimination. *See Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976); *see also Int'l Chemical Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 497 (5th Cir. 2003). Thus, the Court here would be well within its discretion to draw an adverse inference from Rep. Lewis' invocation of legislative privilege, particularly where it impedes this Court's investigation of any potential burden on the state relating to special elections.

11. While Plaintiffs' subpoena is well-grounded in the facts and seeks highly relevant information, this Court still has ample evidence in the record before it that the legislature would not be unduly burdened by being required to produce remedial maps promptly.

Respectfully submitted this the 26th day of July, 2017.

POYNER SPRUILL LLP

By: s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Counsel for Plaintiffs

SOUTHERN COALITION FOR SOCIAL JUSTICE

By: s/ Anita S. Earls

Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
State Bar No. 40028
allisonriggs@southerncoalition.org
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' RESPONSE TO MOTION TO QUASH** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

Alexander M. Peters
Special Deputy Attorney General
Office of the Attorney General
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
Counsel for Defendants

Thomas A. Farr
Phillip J. Strach
Michael D. McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27602
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
Counsel for Defendants

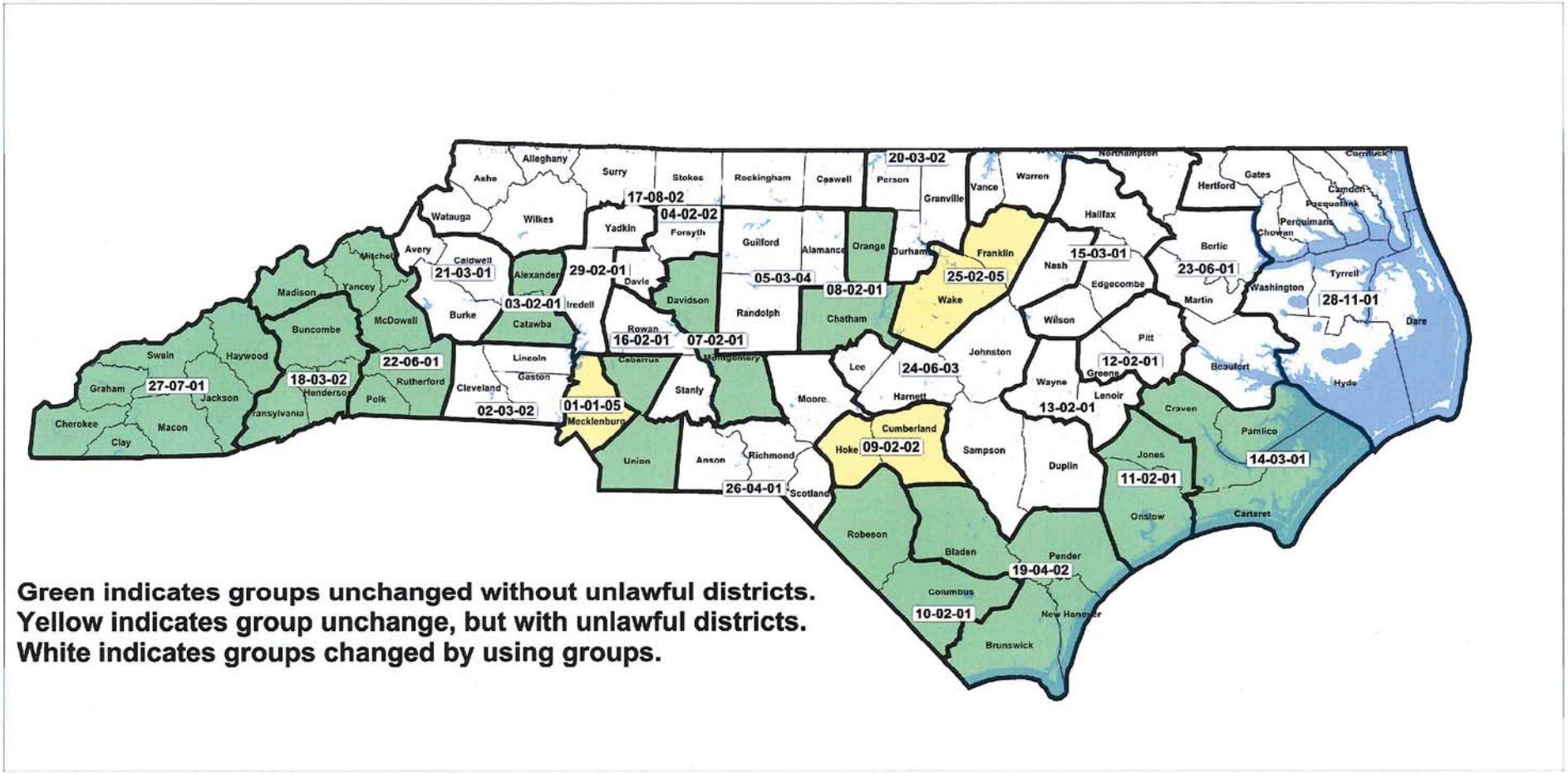
This the 26th day of July, 2017.

/s/ Anita S. Earls
Anita S. Earls

EXHIBIT 1

MAP 3

Comparison of 2011 Enacted to Optimum Senate County Groups



Green indicates groups unchanged without unlawful districts.
Yellow indicates group unchange, but with unlawful districts.
White indicates groups changed by using groups.

MAP 6

Comparison of 2011 Enacted to Optimum House County Groups