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VIA ELECTRONIC MAIL

August 23, 2017

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Senate Committee on Redistricting
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North Carolina General Assembly
16 West Jones Street
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Re: 2017 Proposed Remedial Maps – House and Senate

Dear Counsel and Members of the Redistricting Committees,

On behalf of Plaintiffs in *Covington v. North Carolina,* we write you today to offer alternative plans for the North Carolina State House and State Senate that remedy the constitutional violations identified by the three-judge court in *Covington* and also comply with the state and federal constitution in all other regards. Additionally, based on our initial analysis, your proposed plans do not offer an adequate remedy and do not represent appropriate remedies free from other state and federal constitutional flaws. We would like to take this opportunity to highlight some of those flaws for you.

Constitutional Flaws in the State House and Senate Remedial Plans

First, it is plain that in several areas of both the House and Senate proposed maps, the constitutional violations are not cured and, indeed, the racially gerrymandering continues. For example, proposed Senate District 21 retains the same odd shape as invalidated Senate District 21, with the edges of the protrusion into Cumberland County only slightly smoothed out. Dr. Hofeller obviously does not need access to racial data to know that if he draws the district in approximately the same way the racially gerrymandered district was drawn, it would achieve the same effect—the illegal separation of black from white voters in Cumberland County and the packing of black voters into the district, thus limiting their political impact.

In the House, we observe the same phenomenon in Guilford County, where House Districts 57, 58 and 60 are centered right over their locations in the 2011 map—Dr. Hofeller again does not need access to racial data to know that he if he puts the new district in exactly the same location as it was in their unconstitutional form, they will have the same effect. Likewise,

while House District 21 is now in only two counties, as opposed to three, it is still very non-compact and appears to us to be drawn in a way to capture black populations in those two counties.

We anticipate there may be other examples of this problem that we may determine with some additional time to review the proposed maps. What is clear is that these districts do not fully correct the constitutional violations identified by the three-judge panel, whose findings were unanimously affirmed by the United States Supreme Court. We request that these errors be remedied immediately and in full. Absent such action, we believe the court will have to draw a plan itself that fully remedies the violations, as it will not be able to approve these districts as an appropriate remedy.

Additionally, analyses performed by the Campaign Legal Center ("CLC") and submitted to the Committees on August 22, 2017, confirm that these proposed remedial plans are in fact, grossly unconstitutional partisan gerrymanders. Redistricting plans are unconstitutional where they treat voters unequally, diluting the electoral influence of one party's supporters in violation of the Equal Protection Clause. CLC performed an efficiency gap analysis of the committee's proposed plans after the data was releasted late Monday morning (August 21, 2017). The efficiency gap analysis employed by CLC has: (1) been endorsed by federal courts, *see, e.g., Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. Nov. 21, 2016); (2) is a peer-reviewed methodology, *see* Eric McGhee, *Measuring Efficiency in Redistricting*, 16 ELECTION L.J. (forthcoming 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=30 07401; and (3) can be used prospectively (and accurately) to predict the efficiency gap in proposed plans. *Compare LWVNC v. Rucho*, 1:16-cv-01164, ECF No. 1 at ¶9 (M.D.N.C. Sept. 22, 2016) (Complaint) *with* Plaintiffs' Response in Opposition to Motion to Dismiss, *LWVCNC v. Rucho*, ECF No. 34 at 4 (M.D.N.C. Dec. 19, 2016). The legislature may not remedy constitutional violations by enacted plans with new constitutional violations.

State Constitutional Flaws in the House Remedial Plan

Our initial analysis also reveals that several areas in the State House proposed remedial map additionally violate the North Carolina state constitution—both its plain language and as it has been interpreted by the North Carolina Supreme Court.

First, the configurations of House districts in Wake and Mecklenburg County violate the state constitutional prohibition on mid-decade redistricting. Article II, Sections 3 and 5 prohibits the legislature from redrawing districts, once enacted, until after the next decennial census. This prohibition controls unless a district has been invalidated by a court. House Districts 36, 37, 40 and 41 in Wake County were not declared unconstitutional, and do not touch a district that was ruled unconstitutional. The same is true for House District 105 in Mecklenburg County. These districts are modified in the proposed remedial House maps in those counties, but it is not necessary to alter those districts in order to correct the two districts in Wake County (33 and 38) and the three districts in Mecklenburg County (99, 102 and 107) that were declared

unconstitutional. Plaintiffs have demonstrated that with a remedial map introduced at the public hearing on August 22, 2017. Thus, the proposed Wake and Mecklenburg County House district configurations violate the state constitution and cannot be enacted or approved by the *Covington* court.

Second, Article II, Sections 3(3) and 5(3) state that "[n]o county shall be divided in the formation of a senate district" and "[n]o county shall be divided in the formation of a representative district," respectively. These prohibitions are collectively referred to as state's Whole County Provision [WCP]. At least two areas in the House map violate the North Carolina Supreme Court's interpretation of the WCP.

In 2002, the North Carolina Supreme Court explained how the legislature should draw state legislative districts to comply with the WCP. *Stephenson v. Bartlett*, 355 N.C. 354, 383-84, 562 S.E.2d 377, 396-97 (N.C. 2002) ("*Stephenson I*"). First, the Court noted the "long-standing tradition of respecting county lines during the redistricting process in this State," 355 N.C. at 366, 562 S.E.2d at 386. The Court went on to establish nine criteria for validly-constructed state legislative redistricting. Three of the criteria are particularly relevant here:

- When two or more non-VRA legislative districts may be created within a single county…single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

- […] Within any [] contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard."

- The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined.

355 N.C. at 383-84, 562 S.E.2d at 397.

In 2007, the Supreme Court further explained these rules in application when examining how a state house district in Pender County was drawn. *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (N.C. 2007). There, at that time, Pender County did not have the population to warrant an entire state house district, and New Hanover County had the population to warrant more than two state house districts, but not three. 361 N.C. at 494, 649 S.E.2d at 366. The two counties grouped together were assigned three state house districts. *Id.* The legislature drew a house district between Pender and New Hanover counties that did not keep either county whole (House District 18). *Id*. Because there was not Voting Rights Act justification for this drawing of House District 18, the Court held that the state was required to perfectly comply with the WCP, and that configuration of the district did not do so because it did not keep Pender County whole. 361 N.C. at 507, 649 S.E.2d at 374. Instead, the Court said "a voting district that includes Pender County must add population across a county line, but only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." 361 N.C. at 509, 649 S.E.2d at 376 (internal quotations omitted).

In Cabarrus County, the house district configuration plainly violates the *Stephenson I* criteria. That county has the population to justify more than two non-VRA districts. As such, two whole districts must be drawn in the county, with only enough population in a neighboring county added to the remainder of the Cabarrus County population to bring it to within plus or minus five percent of the ideal district population. What the proposed map does instead is draw only one district, House District 82, in Cabarrus, and then two additional districts are drawn in the county, but neither is contained wholly within the county. Specifically, HD 83 traverses the county line to include a portion of Rowan County with Cabarrus County, when it is possible to draw both HD 82 and HD 83 entirely within Cabarrus County. Even though doing so does create a traverse elsewhere in the county grouping, the failure to draw two districts entirely within Cabarrus County, even though the overall number of county traverses is unchanged, violates the Supreme Court's instructions from *Stephenson I* on maximum compliance with the WCP. Our version of this cluster keeps two counties wholly within Cabarrus County and does not increase the number of traverses when compared to your version of the cluster. As such, this portion of your proposed remedial House map is unconstitutional.

Likewise, the configuration of House District 10 also does not comply with the North Carolina Supreme Court's instructions from *Stephenson I*. House District 10 is at one end of a seven-county cluster. Greene County, where that district is based in the proposed remedial plan, does not have enough population to support a House District on its own. Enough population could be added from the adjacent and larger county, Wayne County, to satisfy the equal population requirement with only one county traverse. That construction would be consistent with the state constitutional commands as defined by the North Carolina Supreme Court and as Dr. Hofeller, the state's mapdrawer, explained in sworn testimony. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397 ("only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined); *see also*, Hofeller Testimony, *Covington* Trial Tr. Vol V, at 10:18-23 (Apr. 15, 2016) ("Also, if you have, for instance, a two-county group, the smaller county with the smallest population should be

left intact, and the larger county should make up the share that the smaller county needs to bring it to the proper population."). Instead of simply adding the population from Wayne County necessary to bring a Greene County-based district up to within plus or minus five percent of the ideal population, House District 10 traverses two counties—Wayne County and then stretches into Johnston County. This configuration is not permissible under the state constitution if it is possible to construct HD 10 comprised of only Greene and Wayne, which it is. Our version of the this county grouping has the same number of total county traverses, but constructs the Greene County-based district (House District 21 in our plan) as instructed by the North Carolina Supreme Court: adding population from a neighboring county to a county too small to warrant its own House district, but only adding as much as necessary from one neighboring county as necessary to achieve acceptable population in the district. Thus, this portion of your proposed remedial House map is also unconstitutional.

Plaintiffs' Alternative Map

Plaintiffs have developed alternative maps for House and Senate that correct the unconstitutional racially gerrymandered districts identified by the three-judge court, do not constitute unconstitutional partisan gerrymanders, and fully comply with the North Carolina state constitution.

We can immediately provide the block assignment files for these plans to counsel and chairs of the redistricting committees, and any other individuals you to whom you request that we send the files.

If you have any questions about these proposed alternative plans, please do not hesitate to contact us.

Sincerely,

/s/ Anita S. Earls
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