

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
COUNTY OF WAKE SUPERIOR COURT DIVISION

2018 FEB 12 A 7 46

MARGARET DICKSON, *et al.*,)
Plaintiffs,)

v.)

11 CVS 16896

ROBERT RUCHO, *et al.*,)
Defendants.)

NORTH CAROLINA STATE)
CONFERENCE OF BRANCHES OF)
THE NAACP *et al.*,)
Plaintiffs,)

v.)

11 CVS 16940

THE STATE OF NORTH CAROLINA,)
et al.,)
Defendants.)

(Consolidated)

**ORDER ON JOINT PLAINTIFFS' EMERGENCY
MOTION FOR RELIEF**

THIS MATTER comes before the undersigned three-judge panel upon the Joint Plaintiffs' Emergency Motion for Relief filed February 7, 2018. In their motion, Plaintiffs request that the Court declare 2017 Enacted House Districts 36, 37, 40, 41 (all in Wake County) and 105 (Mecklenburg County) to be in violation of the state constitutional prohibition of mid-decade redistricting,¹ enjoin Defendants from conducting elections under the 2017 Enacted House Plan's configurations of

¹ The North Carolina Constitution provides that "[w]hen established the [House and] [S]enate districts and the apportionment of [Representatives and] Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress." *Id.* art. II, §§ 3(4), 5(4).

the Wake and Mecklenburg districts, and order that the configurations of the Wake and Mecklenburg County House districts designed by the Special Master in *Covington v. North Carolina*, 1:15-CV-399 (M.D.N.C.) be put into effect for the 2018 election cycle. For three reasons, the relief sought by the Plaintiffs must be denied.

I. The issue raised by the Plaintiffs is pending in the late stages of litigation in federal court and, because the United States Supreme Court has issued a stay, commencing parallel litigation in state court raises an unjustifiable risk of inconsistent and irreconcilable outcomes.

The precise issue that Plaintiffs seek to litigate before this state court three-judge panel is pending in the federal courts. On August 11, 2016, a federal court three-judge panel ordered the General Assembly draw remedial districts in its next legislative session to correct the constitutional deficiencies in the 2011 Enacted Plans. *See Covington*, 316 F.R.D. at 176. On August 31, 2017, the General Assembly, pursuant to the *Covington* district court's order, enacted new legislative plans. *See* N.C. Sess. Laws 2017-207, 2017-208 [hereinafter the "2017 Enacted Plans"].

The 2017 Enacted Plans were then challenged by the *Covington* plaintiffs as not curing all of the racial gerrymandering identified by the federal court. *See generally, Covington*, Memoranda Opinion and Order (Amended), January 21, 2018. With respect to House Districts 36, 37, 40, 41 and 105 (i.e. the same Districts at issue in Plaintiffs' current Motion for Emergency Relief before this court), the objection to the 2017 Enacted Plans raised by Plaintiffs to the federal court three-judge panel was that those five districts, as drawn by the General Assembly in the

2017 Enacted Plans, violated the North Carolina Constitution's prohibition on mid-decade redistricting. *Id.* at 12. Plaintiffs contended revising the boundaries of these five districts was not necessary to comply with the federal court three-judge panel's order of August 11, 2016. On October 26, 2017, the federal court three-judge panel appointed a Special Master, Dr. Nathaniel Persily, to assist the court in redrawing nine district configurations in the 2017 Enacted Plans. *Id.* at 5. With respect to Wake and Mecklenburg Counties, Dr. Persily was instructed that "no 2011 Enacted House Districts which do not adjoin those districts shall be redrawn unless it is necessary to do so to meet the mandatory requirements [of the court's order]." *Id.* at 14. The Special Master's recommended remedial plan was provided to the Court on December 1, 2017, and in that plan, the boundaries of House Districts 36, 37, 40, 41 and 105 were not redrawn and hence restored to their original state as in the 2011 Enacted House Plan. *Id.* at 2.

Following a hearing on January 5, 2018, the federal court three-judge panel concluded, among other things, that the redrawing of the district lines of House Districts 36, 37, 40, 41 and 105 by the General Assembly in its 2017 Enacted Plans was in violation of the North Carolina Constitution's prohibition of mid-decade redistricting, and that the Special Master's recommended remedial plan demonstrated that the "one can remedy the racial gerrymander" in Wake and Mecklenburg Counties "without redrawing districts untainted by constitutional violations." *Id.* at 64. On January 19, 2018, the federal court three-judge panel ordered that the 2017 Enacted Plans, as modified by the Special Master's

Recommended Plan, be used in future North Carolina legislative elections.² *Id.* at 92.

On January 24, 2018, the Legislative Defendants filed an emergency stay application with the United States Supreme Court, asking the Supreme Court to halt the implementation of the Special Master's Recommended Plan as ordered by the federal court three-judge panel. On February 6, 2018, the United States Supreme Court issued the following order:

The application for a stay presented to the Chief Justice and by him referred to the Court is granted in part and denied in part. The District Court's order of January 21, 2018, insofar as it directs the revision of House districts in Wake County and Mecklenburg County, is stayed pending the timely filing and disposition of an appeal in this Court.

Order in Pending Case, North Carolina et al. v. Covington, 17A790 (February 6, 2018).

The Plaintiffs' Emergency Motion for Relief now seeks to raise the same issue before this state court three-judge panel: whether House Districts 36, 37, 40, 41 and 105, as drawn by the General Assembly in its 2017 Enacted Plans, violate the North Carolina Constitution's prohibition of mid-decade redistricting. However, given the posture of this issue in the federal courts -- that it has been fully litigated and is now ordered stayed by the United States Supreme Court pending further filing and disposition of the appeal before that Court -- this state court three-judge panel is

² The federal court three-judge panel vacated its January 19, 2018 Order and Opinion and replaced it with an amended version on January 21, 2018. All cites in this Order refer to the January 21, 2018 Amended Order and Opinion.

reluctant to commence parallel proceedings on an expedited basis out of deference to the highest court and because of significant concerns about the risk of inconsistent and irreconcilable outcomes.

The Plaintiffs suggest that the Supreme Court, in issuing its partial stay, was concerned only whether the federal court three-judge panel had authority under its pendent jurisdiction to consider this state constitutional claim, or perhaps was concerned that the *Covington* plaintiffs did not have standing to assert complaints with respect to remedies in Wake and Mecklenburg House districts. This may be so, and had the United States Supreme Court stated either of these grounds as the rationale for its partial stay, then the state court would have greater confidence in the utility and propriety of addressing the issue. But the Supreme Court did not state its reasons. As such, the North Carolina state courts cannot, while speculating on the Supreme Court's rationale, and in the final hours before filing for office commences, place the State and its voting public in the untenable situation of having to reconcile diametrically inconsistent outcomes – namely a state court decree, as urged by the Plaintiffs, ordering the use of the Special Master's Recommended Plan for Wake and Mecklenburg Counties in the 2018 elections, against an order of the United States Supreme Court staying the use of the Special Master's Recommended Plan for those very same counties.

II. The federal court is in the best position to determine whether the 2017 Enacted Plans unconstitutionally exceeded the authority of that court's own 2016 order, and the issue of mid-decade redistricting is inextricably intertwined with the subject matter of that order.

Mid-decade redistricting is prohibited by the North Carolina Constitution – except when redistricting is ordered mid-decade by a court to cure constitutional defects. *See generally, Covington*, Memoranda Opinion and Order (Amended), January 21, 2018 at 32 and cases cited therein. Hence, the real issue raised by the Plaintiffs' Emergency Motion is whether the General Assembly, in its 2017 Enacted Plan House Districts 36, 37, 40, 41 and 105, "exceeded its authority under [the federal court three-judge panel's August 11, 2016] order by redrawing districts allegedly untainted by the identified constitutional violation." *Id.* at 30-31.

The federal court three-judge panel is in the best position to determine whether the General Assembly complied with its own order of August 11, 2016. Indeed, the panel said the issue of mid-decade restricting was "inextricably intertwined" with the other claims before it, and that:

[H]aving considered the factors of judicial economy, convenience, fairness to the litigants, and comity, the Court finds that the exercise of pendent jurisdiction over Plaintiffs' objections premised on Legislative Defendants' alleged failure to comply the North Carolina Constitution's prohibition on mid-decade redistricting is particularly appropriate here. Indeed, declining to exercise such jurisdiction would cause significant problems. As further explained below, this Court's order invalidating the lines surrounding the twenty-eight districts provided the sole authority for the General Assembly to ignore the North Carolina Constitution's prohibition on mid-decade redistricting. Because this Court's order governed the scope of the General Assembly's redistricting authority, this Court is in the

best position to determine whether the General Assembly exceeded its authority under that order by redrawing districts allegedly untainted by the identified constitutional violation.

Id. at 30-31 (citations omitted).

Hence, what the Plaintiffs request of this state court three-judge panel is not simply whether, in a vacuum, a constitutional provision has been violated. Rather, plaintiffs ask this state court to step into the robes of the federal court three-judge panel and, without the benefit of the extensive record, briefing and arguments that the federal court three-judge panel relied upon in crafting and construing its order, determine on an expedited basis whether the General Assembly exceeded the scope of the federal court's August 11, 2016 order and whether, in so doing, the resulting Wake and Mecklenburg districts violate the North Carolina Constitution. And, even though the federal court three-judge panel, in interpreting its own order has concluded that the General Assembly did unconstitutionally exceed the scope of the court order, this state court three-judge panel could not simply adopt the federal court's conclusion because the United States Supreme Court has stayed that portion of the federal court's order. The mid-decade redistricting issue was "inextricably intertwined" with the federal court matter in 2016, and it remains so today.

III. The determination of whether the constitutional prohibition against mid-decade redistricting was violated is an inherently fact-intensive inquiry inappropriate for summary disposition by emergency motion.

This state court three-judge panel cannot grant the relief Plaintiffs seek on an expedited basis – namely in the five days between the date this motion was filed

and the opening of the filing period for the 2018 General election – because the determination of whether the General Assembly, in drawing the 2017 Enacted Plan House Districts 36, 37, 40, 41 and 105, unconstitutionally exceeded the federal court three-judge panel’s August 11, 2016 order is an inherently fact-intensive determination. If this issue is one that must be determined by the state court, as the Plaintiffs contend that the United States Supreme Court has insinuated in its Partial Stay Order, then it must be determined in a thoughtful and deliberate fashion, with each party being afforded the opportunity to make a factual record upon which the state court may base its decision.

With respect to House Districts 36, 37, 40, 41 and 105, the Legislative Defendants argued to the federal court three-judge panel that disallowing the General Assembly to redraw districts not directly impacted by the racial gerrymander – namely limiting redrawing only to those districts that “violate the Constitution, about a district violating the Constitution, or otherwise need to be altered in order to ensure compliance with federal law or state constitutional provisions” – was too limiting because such a standard would “perpetuate a racial gerrymander by ‘forcing a legislature to use the core of [a] racially gerrymandered district to draw the new district and those immediately surrounding it’” and would “reduce or eliminate the legislature’s ability to eliminate the hallmarks of gerrymanders by, for instance, eliminating split precincts, or changing surrounding districts to more closely follow municipal boundaries.” *Id* at 63, citing *Legislative Defendants’ Objections Resp. 52*. While the Plaintiffs have developed substantial

evidence rebutting this in their largely successful federal court action, the Defendants cannot be denied, merely for the sake of expediency, the opportunity to make their own record before the state court. That, the court concludes, would be impossible to complete within the remaining hours before the filing period opens.

Conclusion

For each of these reasons, this state court three-judge panel concludes that it is unable to declare, on an expedited basis, that the 2017 Enacted Plan House Districts 36, 37, 40, 41 and 105 violate the state constitutional prohibition on mid-decade redistricting, or to enjoin the State from conducting elections under the 2017 Enacted House Plan's configurations of the Wake and Mecklenburg County Districts, or order that the configurations of Wake and Mecklenburg County House districts designed by the Special Master in *Covington* be ordered into effect for the 2018 election cycle.

It is therefore ORDERED that the Joint Plaintiffs' Emergency Motion for Relief be DENIED.

This the 11th day of February, 2018.

/s/ Paul C. Ridgeway

Paul C. Ridgeway, Superior Court Judge

/s/ Joseph N. Crosswhite

Joseph N. Crosswhite, Superior Court Judge

/s/ Alma L. Hinton

Alma L. Hinton, Superior Court Judge

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by depositing the same in the custody of the United States Postal Service, first class postage prepaid, addressed as follows:

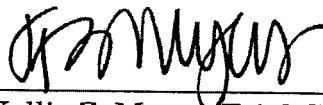
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This the 12th day of February, 2018.



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