

Elections Law

There has never been a hotter moment in elections law in North Carolina.

In legislative and congressional redistricting, there are four cases currently active. One of them had a hearing on the merits last week and one of them is currently in the middle of a hearing on the merits. A third one rests with the U.S. Supreme Court. The fourth one was heard in the N.C. Supreme Court in August and remanded to the superior court.

In a case dealing with major changes to voting laws enacted in 2013, the U.S. Supreme Court in May 2017 denied certiorari, apparently dooming the imposition of a photo ID requirement, the elimination of same day registration and voting, the elimination of out-of-precinct provisional voting, and the shortening of the early voting period.

In a case challenging fundamental legislative changes to the methods of administering elections at the state and county levels in North Carolina, the N.C. Supreme Court has, for the moment at least, blocked implementation and has remanded the matter to the superior court for a ruling by the end of October.

And the General Assembly just a week and half ago did away with primary elections in judicial races in the 2018 elections. The governor just last week exercised his veto. The General Assembly will, it appears, override the veto *today*.

Redistricting Cases

In 2011, after the most recent census, the North Carolina General Assembly redrew, as it was required to do, the districts for elections to the North Carolina House of Representatives, the North Carolina Senate, and the United States House of Representatives. A set of lawsuits challenged all the districting enactments as *racial* gerrymanders. One of the *racial* gerrymander cases has evolved to include, potentially, claims of *partisan* gerrymander, and one of the lawsuits is a straightforward *partisan* gerrymander claim.

After consolidation of the various matters, four independent redistricting cases are currently active.

One of the four, *Harris v. Cooper*, currently rests with the United States Supreme Court on legal issues related to a potential *partisan* gerrymander claim. That Court in May 2017 upheld a 2016 ruling by a federal three-judge panel that the 2011 Congressional districting legislation amounted to an unconstitutional *racial* gerrymander.

The second of the four, *Covington v. North Carolina*, was heard last week by a federal 3-judge panel reviewing new State House and State Senate districting legislation enacted by the General Assembly after the United States Supreme Court affirmed a finding that the 2011 districts amounted to an unconstitutional *racial* gerrymander.

In the third of the four, *Dickenson v. Rucho*, the North Carolina Supreme Court heard arguments in August after the matter was remanded by the United States Supreme Court in light of its *Harris v. Cooper* ruling. In this case, the North Carolina Supreme Court has twice upheld as constitutional against *racial* gerrymander claims the 2011 legislation for State House, State Senate, and U.S. House.

A hearing is underway at the moment in the fourth of the four, *Common Cause v. Rucho*. That lawsuit is a challenge to the Congressional districts drawn by the General Assembly in 2016. Those new districts were drawn as a result of the federal three-judge ruling that the 2011 districts amounted to a *racial* gerrymander. The challenge is on the grounds that the new districts amount to a *partisan* gerrymander.

Here are the four lawsuits:

1.

Harris v. Cooper

Highest court decision: US Supreme Court
137 S.Ct. 1455 (May 22, 2017)

Most recent decision: US Supreme Court
137 S.Ct. 1455 (May 22, 2017)

At issue: Congressional districts

Current status: Awaiting US Supreme Court ruling on two issues

February 2016, a federal 3-judge panel held that Congressional Districts 1 and 12 were unconstitutional *racial* gerrymanders.

That same month, the General Assembly drew new districts, and those districts were used in the 2016 elections. The 3-judge panel ordered the parties to file any objections they had to the new districts. The plaintiffs objected that the new districts were unconstitutional *partisan* gerrymanders.

June 2016, the federal 3-judge panel held that, based on US Supreme Court precedent, it could not give relief on the grounds of *partisan* gerrymander. The plaintiffs appealed.

May 2017, the US Supreme Court upheld the finding that the old districts were unconstitutional *racial* gerrymanders (but of course, those old districts were no longer in use). With respect to the appeal of the plaintiffs on the grounds that the new districts amount to unconstitutional *partisan* gerrymanders, the US Supreme Court asked for briefs on two questions:

- Do the plaintiffs have standing to challenge the new districts as *partisan* gerrymanders, given that their lawsuit began as a *racial* gerrymander case?
- Is the action of the 3-judge panel in denying the objection appealable at all?

The parties filed their briefs and that is where the matter now stands.

2.

Covington v. North Carolina

Highest court decision: US Supreme Court

2017 WL 2407467 (June 5, 2017)

Most recent decision: Federal 3-judge panel

2017 WL 4162335 (September 19, 2017)

At issue: State House and Senate districts

Current status: Federal 3-judge panel has heard arguments on plaintiffs' challenge to redrawn districts; it has ordered the parties to name to the court acceptable people to draw new maps

August 2016, a federal 3-judge panel held that 28 state legislative districts were unconstitutional racial gerrymanders. It ruled that the 2016 regularly-scheduled elections were so close that no remedial order could be put into place.

November 2016, the federal 3-judge panel ordered that new districts be drawn and that elections under the new districts be accelerated to 2017, truncating terms in the affected districts by one year.

January 2017, the US Supreme Court stayed the order for new districts and accelerated elections.

June 2017, the US Supreme Court affirmed the finding of racial gerrymander and remanded for further consideration on relief.

July and September 2017, the federal 3-judge panel ordered the General Assembly to enact new districts and denied the plaintiff's request that elections be advanced to March 2018.

September 2017, the General Assembly draws new districts and submits them to the court.

Three-judge panel denies plaintiffs' request for accelerated elections.

October 2017, 3-judge panel hears arguments on plaintiffs' objections to the new districts; orders parties to name acceptable map-drawers

3.

Dickenson v. Rucho

Highest court decision: US Supreme Court

2017 WL 2322831 (May 30, 2017)

Most recent decision: US Supreme Court

2017 WL 2322831 (May 30, 2017)

At issue: Congressional districts, State House districts, State Senate districts

Current status: NC Supreme Court has heard oral argument on remand and has further remanded the matter to the superior court.

June 2013, state 3-judge panel upholds the districts.

December 2014, NC Supreme Court affirms, 367 N.C. 542

April 2015, US Supreme Court remands, 135 S.Ct. 1843

December 2015, NC Supreme Court again upholds districts, 368 N.C. 481 and 368 N.C. 673

May 2017, US Supreme Court vacates and remands “in light of Cooper v. Harris.”

August 2017, matter is heard in NC Supreme Court on remand.

September 2017, NC Supreme Court remands the matter to the 3-judge panel to consider whether a controversy exists or the matter is moot, whether there are other remaining state or federal issues to be resolved, and whether other relief may be proper.

4.

Common Cause v. Rucho

(Consolidated with League of Women Voters v. Rucho)

Highest court decision: Federal 3-judge panel

2017 WL 876307 (March 3, 2017)

Most recent decision: Federal 3-judge panel

2017 WL _____ (September 8, 2017)

At issue: Congressional districts as partisan gerrymanders

Current status: Hearing underway before federal 3-judge panel

March 2017, federal 3-judge panel denies motion to dismiss, holding that “partisan gerrymandering claims are justiciable.”

September 2017, federal 3-judge panel denies motion to continue until after decision in US Supreme Court Wisconsin partisan gerrymandering case.

Right now, hearing underway before 3-judge panel

2013 Voting Changes Case

In 2013, the North Carolina General Assembly enacted the Voter Information Verification Act (SL 2013-381). Four of its principal changes were challenged in lawsuits. Those four were:

- Required voter photo ID at the polls
- End of same-day registration and voting
- Shortening of the early voting period
- Eliminated out-of-precinct voting

The lawsuits challenging these changes were forward as *NAACP v. McCrory*. The federal district court denied preliminary injunctions as to these changes, but the Fourth Circuit granted preliminary injunctions as to the end of same-day registration and voting and the elimination of out-of-precinct voting. The US Supreme Court then stayed those injunctions.

On the merits, the federal district court upheld all the changes, but the Fourth Circuit permanently enjoined them all and, in May 2017, the US Supreme Court denied cert. The result is that all four are enjoined.

NAACP v. McCrory

Highest court decision: U.S. Fourth Circuit

831 F.3d 204 (July 29, 2016)

Most recent ruling: US Supreme Court, cert. denied

137 S.Ct. 1399 (May 15, 2017)

At issue: Photo ID at polls, same-day registration and voting, shortening the early voting period, eliminating out-of-precinct voting

Current status: Voting changes are enjoined

August 2014, US District Court hears challenges to photo ID, elimination of same-day registration and voting, elimination of out-of-precinct voting, and shortening the early voting period. It finds that plaintiffs have stated plausible claims and therefore denied defendants' motion for judgment on the pleadings. It denies plaintiffs' request for injunctions, however, finding as to some insufficient likelihood of success on the merits and as to others lack of irreparable harm.

October 2014, Fourth Circuit orders injunctions as to the elimination of same-day registration and voting and the elimination of out-of-precinct voting.

October 2014, US Supreme Court stays the injunctions.

January 2016, US District Court denies injunction on photo ID requirement.

April 2016, US District Court, ruling on the merits, upholds all the 2013 changes to the law.

July 29, 2016, Fourth Circuit reverses, finding that the changes were enacted with discriminatory intent and permanently enjoined all four—photo ID, elimination of same-day registration and voting, elimination of out-of-precinct voting, and shortening the early voting period.

August 2016, US Supreme Court denies application for stay.

May 2017, US Supreme Court denies cert. “Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that “[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”

2016 Election Administration Changes Case

In the Fourth Extra Session of 2016, the General Assembly enacted SL 2016-125. That statute worked significant changes in the administration of elections in North Carolina. In its two major changes it (1) combined the old state elections board, ethics board, and lobbying branch of the Secretary of State’s office into one State Bipartisan Board of Elections and Ethics Enforcement and (2) changed the number of members and party alignment of the state elections board and each county elections board. As a result of the changes, the state and county elections governing bodies would each be composed of even numbers of members, evenly divided between Democrats and Republicans. Governor-elect Cooper sued in North Carolina state court, arguing chiefly that the even split amounted to such a deprivation to him that it constituted a violation of the separation of powers provisions of the state constitution.

A three-judge court was impaneled and, given that the transition from the old state and county boards to the new one was imminent, it temporarily enjoined the changes. The General Assembly in early 2017 made revisions to the legislation but the three-judge panel enjoined enforcement of the changes. In June, however, the three-judge panel dismissed the action under Rule 12(b)(1), lack of jurisdiction over the subject matter.

The Supreme Court granted discretionary review, skipping the Court of Appeals. It ordered that the “status quo be maintained” and that no further implementation of the election administration changes go forward. As a result, the old State Board of Elections has been dissolved but the new Bipartisan State Board of Elections and Ethics enforcement has not been appointed. There is no state governing body. At the county level, the new law requiring memberships numbering four individuals, and quorums and majorities numbering three, has created stagnation, since no new county board members have been appointed to succeed the old three-member boards. As a result, the members of the old boards have held over, but action takes a unanimous vote of the three, and in some counties membership has dropped to two members because of vacancies, meaning no quorum has been possible.

On September 1, 2017, the Supreme Court remanded the matter to the three-judge panel with direction to enter a new order within 60 days that “(a) explains the basis for its earlier

determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff's complaint and (b) addresses the issues that plaintiff has raised on the merits." The order also contains this provision:

"Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements [under the amended new act]—may meet and conduct business [under the old statutes], with a quorum and unanimous assent of two members."

Cooper v. Berger

Highest court decision: N.C. Supreme Court

Citation unavailable (September 1, 2017)

Most recent ruling: NC Supreme Court

Citation unavailable (September 1, 2017)

At issue: restructuring of the State Board of Elections and county boards of elections

Current status: limbo

December 2016, Governor-elect challenges the 2016 changes to the administration of elections that (1) combined the old state elections board, ethics board, and lobbying branch of the Secretary of State's office into one State Bipartisan Board of Elections and Ethics Enforcement and (2) changed the number of members and party alignment of the state elections board and each county elections board.

December 2016, NC superior court grants a temporary restraining order against the changes.

January 2017, NC Chief Justice appoints three-judge panel. Three-judge panel grants preliminary injunction.

February 2017, NC Supreme Court grants temporary stay

March 2017, NC three-judge panel grants summary judgment to plaintiffs on challenges to the elections administration changes.

April 2017, General Assembly enacts revised version of the changes. The three-judge panel enjoins the elections administration changes in the revised version.

June 2017, NC three-judge panel grants motion to dismiss for want of subject matter jurisdiction.

July 2017, NC Supreme Court grants motion for discretionary review skipping the Court of Appeals. Supreme Court enters order that the "status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the [administrative changes act].

Likewise, the parties should not seek further enforcement" of the three-judge panel order of dismissal. The parties are order to take no further action with regard to the reorganization of the state boards.

September 2017, NC Supreme Court remands the matter to the three-judge panel to enter a new order “within 60 days that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff’s complaint and (b) addresses the issues that plaintiff has raised on the merits.” The order also contains this provision: “Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements [under the amended new act]—may meet and conduct business [under the old statutes], with a quorum and unanimous assent of two members.”