

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2019 FEB 22 PM 4: 01

WAKE CO., C.S.C.

18 CVS 9806

NORTH CAROLINA STATE)
CONFERENCE OF THE NATIONAL)
ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE)
and CLEAN AIR CAROLINA,)

Plaintiffs,)

v.)

TIM MOORE, in his official capacity, PHILIP)
BERGER, in his official capacity,)

Defendants.)

ORDER

THIS MATTER came to be heard and was heard by the undersigned Judge of Superior Court of Wake County pursuant to Plaintiffs' Motion for Partial Summary Judgment filed by the North Carolina State Conference of the NAACP ("NC NAACP") and Clean Air Carolina ("CAC") and Defendants' Motion to Dismiss filed by Defendants Tim Moore and Philip Berger. Based upon the complaint, the motions, the memoranda in support with affidavits and attachments, the Court makes the following:

FINDINGS OF FACT

1. In 2011, following the decennial census, the General Assembly redrew the legislative districts for both the North Carolina Senate and House of Representatives. These new districts were enacted in July 2011. 2011 N.C. Sess. L. 402 and 2011 N.C. Sess. L. 404.

2. The General Assembly unconstitutionally and impermissibly considered race in drawing the 2011 legislative maps. *See Covington v. North Carolina*, 316 F.R.D. 117, 124, 176 (M.D.N.C. 2016), *aff'd*, 581 U.S. ---, 137 S.Ct. 2211 (2017) (per curiam).

3. On November 4, 2011, the NC NAACP, joined by three organizations and forty-six individual plaintiffs, filed a state court action, *NC NAACP v. North Carolina*, 11 CVS 1 6940 (Wake Cty. Super. Ct. filed Nov. 4, 2011), that raised state and federal claims challenging the districts as unconstitutional based on race. That case was consolidated for all purposes with *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.), *remanded to* 781 S.E.2d 404 (N.C. 2015); *vacated and remanded*, 198 L. Ed. 2d 252 (U.S. 2017) (mem.), *remanded* 813 S.E.3d 230 (N.C. 2017).

4. On May 19, 2015, plaintiffs Sandra Little Covington and others filed a parallel challenge in federal court alleging that twenty-eight districts, nine Senate districts and nineteen House of Representatives districts were unlawful racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 581 U.S. ---, 137 S.Ct. 2211 (2017) (per curiam).

5. In August 2016, a three-judge federal district court panel in *Covington v. North Carolina* unanimously ruled for plaintiffs, holding that “race was the predominant factor motivating the drawing of all challenged districts,” and struck down the twenty-eight challenged districts as the result of an unconstitutional racial gerrymander. *See Covington v. North Carolina*, 316 F.R.D. 117, 124, 176 (M.D.N.C. 2016), *aff'd*, 581 U.S. —, 137 S.Ct. 2211 (2017) (per curiam).

6. On June 5, 2017, the United States Supreme Court summarily affirmed the lower court's ruling that the twenty-eight challenged districts were the result of an unconstitutional racial gerrymander. *Covington v. North Carolina*, 581 U.S. —, 137 S.Ct. 2211 (2017) (per curiam).

7. On June 30, 2017, mandate issued as to the U.S. Supreme Court's order affirming the lower court's judgment. *Covington v. North Carolina*, 15-cv-03399-TDS-JEP.

8. The United States Supreme Court, however, vacated and remanded the lower court's remedial order for a special election, ordering the lower court to provide for the U.S. Supreme Court's review a fuller explanation of its reasoning, *North Carolina v. Covington*, — U.S. —, 137 S.Ct. 1624 (2017) (per curiam).

9. On remand, the three-judge panel granted the General Assembly an opportunity to propose a new redistricting plan to remedy the unconstitutional racial gerrymander. *Covington v. North Carolina*, 283 F.Supp.3d 410, 417–18 (M.D.N.C. 2018). In August 2017, the General Assembly submitted a proposed remedial map drawn by the same mapmaker the General Assembly hired to draw the invalidated 2011 maps. The General Assembly's proposed remedy redrew 117 of the 170 state House and Senate districts from the 2011 unconstitutionally racially-gerrymandered maps.

10. After reviewing the General Assembly's remedial plan, the three-judge panel determined that a number of the new districts put forward by the General Assembly in its 2017 remedial plan were similar to the old, racially gerrymandered districts that had been previously rejected as unconstitutional and either failed to remedy the unconstitutional racial gerrymander or violated provisions of the North Carolina Constitution. *Id.* at 447-58. For those defective

districts, the three-judge panel adopted remedial districts proposed by a court-appointed special master. *Id.* at 447-58.

11. The U.S. Supreme Court affirmed the districts adopted by the three-judge panel, except for those districts in Wake and Mecklenburg Counties that had not been found to be tainted by racial gerrymanders, but rather were alleged to have been drawn in violation of the state constitutional prohibition against mid-decade redistricting. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018). The remedial maps that were adopted to cure the 2011 unconstitutional racial gerrymander contained 117 redrawn legislative districts, more than two-thirds of the districts in both the House (81 or 68%) and Senate (36 or 72%).

2018 Constitutional Amendment Proposals

12. In the final two days of the 2018 regular legislative session, the General Assembly passed six bills that would place six constitutional amendments before the voters: Session Laws 2018-96 (Right to Hunt and Fish Amendment), 110 (Victim's Rights amendment), 117 (First Board of Elections Amendment), 118 (First Judicial Vacancies Amendment), 119 (Tax Cap Amendment), and 128 (Voter ID amendment).

13. Session Law 2018-128 (Voter ID amendment) passed the North Carolina House of Representatives by a vote of 74–43 and the North Carolina Senate by a vote of 33-12. In the House, the total number of aye votes was just two votes over three-fifths majority required for a constitutional amendment, and in the Senate the number was just three votes over the required margin.

14. Session Law 2018-119 (Tax Cap amendment) passed the North Carolina Senate by a vote of 34–13 and passed the North Carolina House of Representatives by a vote of 73–45. In the House, the number was just one vote over the three-fifths majority required for a

constitutional amendment, and in the Senate the number was just four votes over the required margin.

15. On August 6, 2018, the NC NAACP and CAC filed suit against the leadership of the North Carolina General Assembly in their official capacities (“Legislative Defendants”) and the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and all Board members in their official capacities (“State Board of Elections”) challenging four of the amendment proposals: the First Board of Elections Amendment, the First Judicial Vacancies Amendment, the Tax Cap Amendment, and the Voter ID Amendment. Plaintiffs simultaneously moved for preliminary injunctive relief to prevent Defendant State Board of Elections from placing the challenged amendments on the ballot. Compl., Aug. 6, 2018; Mot. for T.R.O. & Prelim. Inj., Aug. 6, 2018.

16. On August 13, 2018, Legislative Defendants moved to dismiss Plaintiffs’ complaint on the basis, among other grounds, that NC NAACP and CAC lacked standing.

17. On August 21, 2018, a three-judge panel of the Wake County Superior Court partially granted Plaintiffs’ motion for preliminary injunction and enjoined Defendant State Board of Elections from placing the First Judicial Vacancies and First Boards and Commissions Amendments on the November 2018 ballot, finding that key elements of those ballot questions would either mislead or not sufficiently inform voters about the proposed amendments. Order on Inj. Relief, Aug. 21, 2018. After the preliminary injunction ruling, the General Assembly convened to rewrite these amendments, which they enacted as Session Laws 2018-132 (Second Judicial Vacancies Amendment) and 2018-133 (Second Board of Elections Amendment).

18. In its preliminary injunction ruling, the three-judge panel ruled that it did not have jurisdiction to hear Plaintiffs' claim that an unlawfully constituted General Assembly cannot place constitutional amendments on the ballot.

19. The three-judge panel partially granted Defendants' motion to dismiss, concluding that CAC did not have standing to bring its claims.

20. On October 11, 2018, this Court granted Plaintiffs' motion for leave to amend their Complaint, accepting as filed Plaintiffs' Second Amended Complaint, which was amended to include a challenge to the two new amendments and to add allegations related to CAC's standing.

21. On November 2, 2018, Plaintiffs filed a motion for partial summary judgment only as to their claim that the illegally-constituted General Assembly lacks the authority to propose constitutional amendments.

22. On November 6, 2018, an election was held in North Carolina, and the four constitutional amendments challenged in the Second Amended Complaint were on the ballot.

23. The Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133, did not attain the required majority of votes to pass into law.

24. The Voter ID amendment, proposed in Session Law 2018-128, passed.

25. The Tax Cap amendment, proposed in Session Law 2018-119, passed.

26. The November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander.

Covington v. North Carolina, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (U.S. 2018).

27. On December 28, 2018, Plaintiffs voluntarily dismissed their claims against Defendant State Board of Elections. Plaintiffs also voluntarily dismissed as moot their claims related to the Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133.

28. On January 3, 2019, Legislative Defendants filed a brief with this Court containing both a Motion to Dismiss Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(2), and their opposition to Plaintiffs' Motion for Partial Summary Judgment. Legislative Defendants moved to dismiss on the basis of standing Plaintiff CAC only, raising no challenge as to Plaintiff NC NAACP's standing.

29. On January 15, 2019, the undersigned heard oral argument on Plaintiffs' Motion for Partial Summary Judgment and Legislative Defendants' Motion to Dismiss.

30. Plaintiff NC NAACP is a nonpartisan nonprofit civil rights organization founded in 1938, with its principal place of business located in Raleigh, North Carolina. With more than 90 active branches and over 20,000 individual members throughout the state of North Carolina, the NC NAACP is the largest NAACP conference in the South and second largest conference in the country. The NC NAACP's fundamental mission is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination.

31. Members of the NC NAACP, who include African-American and Latino voters in North Carolina, and the NAACP itself are directly harmed by the proposed Voter ID constitutional amendment. Members will be effectively denied the right to vote or otherwise deprived of meaningful access to the political process as a result of the proposed Voter ID

requirement. The proposed Voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members.

32. The NC NAACP was the lead plaintiff in *NC NAACP v. McCrory*, which successfully challenged racially discriminatory restrictions on voting—including a voter ID requirement—enacted by the N.C.G.A. in 2013. In ruling for plaintiffs, the U.S. Court of Appeals for the Fourth Circuit found that this photo identification provision and other challenged provisions were passed with racially discriminatory intent and unlawfully targeted African-American voters “with almost surgical precision.” 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub nom.* 137 S. Ct. 1399 (2017) (striking down provisions in 2013 N.C. Sess. Laws 381). The Voter ID Amendment harms the NC NAACP because it circumvents the NC NAACP’s hard-fought legal victory against a racially discriminatory voter ID requirement and requires voters to present photo identification in order to access the ballot, which would have an irreparable impact on the right to vote of African Americans in North Carolina.

33. The income tax cap constitutional amendment harms the NC NAACP, its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt

public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy.

34. Plaintiff CAC is a not-for-profit corporation founded in 2002. CAC has approximately 3,400 members in North Carolina. Its mission is to ensure cleaner air quality for all North Carolinians through education and advocacy and by working with its partners to reduce sources of pollution, including Greenhouse Gases. Its primary goal is to improve health by achieving the cleanest air possible. CAC is based in Charlotte, North Carolina and works on regional and statewide issues.

35. Plaintiff CAC and its members will be harmed by the income tax cap amendment because the amendment limits the ability of CAC to advocate for its priority issues. CAC advocates for increased state spending on measures that will improve air quality and mitigate against global climate change. CAC encouraged its members to support the Governor's proposed 2018 budget which included increased spending for environmental protection. CAC's "Particle Falls" educational exhibits have received state funding, passed through the N. C. Department of Transportation and donated by the N.C. Clean Energy Technology Center at N.C. State University. CAC is concerned that the Department of Environmental Quality is already severely underfunded. Clear Air Carolina is also concerned that too little state money is spent on non-highway transportation solutions including bike and pedestrian improvements, buses, light, commuter, and heavy rail. Such spending helps reduce driving and improves air quality and minimizes impacts to climate change. If the income tax cap is lowered from 10% to 7%, CAC will be limited in its efforts advocating for more state spending on clean air and climate issues. As the climate continues to warm and global climate change becomes increasingly pressing, this limitation will become increasingly severe.

36. Defendant Philip Berger is the President *Pro Tempore* of the North Carolina Senate. Defendant Berger led the North Carolina Senate in its passage of Session Laws 2018-119, and 128.

37. Defendant Tim Moore is the Speaker of the North Carolina House of Representatives. Defendant Moore led the North Carolina House of Representatives in its passage of Session Laws 2018-119, and 128.

CONCLUSIONS OF LAW

1. Plaintiff NC NAACP has standing to bring this action and seek declaratory relief.
2. The facts set forth in the Second Amended Complaint, supported by affidavits, are not sufficient to establish the change of circumstances necessary for this Court to overrule the decision of the Three Judge Superior Court panel that has already dismissed the CAC's case for lack of standing.
3. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts.
4. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is a justiciable issue and not a political question.
5. N.C. Const. art I sec. 3 states that the people of North Carolina "have the *inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution* and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const. art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly

vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.

6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. At that time, following “the widespread, serious, and longstanding...constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—” the General Assembly lost its claim to popular sovereignty. *Covington*, 270 F. Supp. 3d at 884. The three-judge panel in *Covington* ruled that, under the illegal racial gerrymander, “a large swath of North Carolina citizens... lack a constitutionally adequate voice in the State’s legislature....” *Covington v. North Carolina*, 1:15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, *North Carolina v. Covington*, 137 S. Ct. 1624 (June 5, 2017)).

7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

8. Accordingly, the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, “[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of

the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable.” 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were “needed to return the people of North Carolina to their sovereignty.” *Id.*

9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid “chaos and confusion.” *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*.

10. An illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state’s Constitution.


11. N.C. Session Laws 2018-119 and 2018-128, and the ensuing constitutional amendments, are therefore void *ab initio*.

THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiff NC NAACP’s motion for partial summary judgment is granted.
2. Defendants’ Motion to Dismiss for lack of subject matter jurisdiction is denied.
3. Defendants’ Motion to Dismiss as to CAC for lack of standing is allowed.
4. N.C. Session Laws 2018-119 and 2018-128 are void *ab initio*.

5. The amendments to the N.C. Constitution effectuated by N.C. Session Laws 2018-117 and 2018-128 are hereby void.

This the 22nd day of February, 2019.



Honorable G. Bryan Collins, Jr.
Resident Superior Court Judge Presiding

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the persons indicated below via electronic mail and by United States Mail, postage prepaid, addressed as follows:

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This the 22nd day of February, 2019.



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