# CONSTITUTIONAL LAW– RACIALLY MOTIVATED REDISTRICTING FOUND TO BE IN VIOLATION OF THE VOTING RIGHTS ACT OF 1965

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On Thursday, August 11, 2016, a panel of three judges[2] declared North Carolina's 2011 State House and Senate redistricting plans ("The 2011 Plans") constituted racial gerrymandering and violated the Equal Protection Clause[3] of the U.S. Constitution.[4] The 2011 Plans were created in compliance with North Carolina's constitutional mandate that the North Carolina House and Senate conduct statewide redistricting every ten years.[5] The redistricting process began in early 2011, when Senator Robert Rucho ("Rucho") and Representative David Lewis ("Lewis") were appointed chairs of the Senate and House Redistricting Committees.[6] Throughout the year Rucho and Lewis worked with local counsel[7] to draft new district maps. In late July of 2011, the proposed House and Senate redistricting plans became law.[8]

The 2011 Plans created nine state senate districts that were composed of a majority of members of the black voting age population ("BVAP").[9] Prior to The 2011 Plans, none of the state's senate districts held a majority of African American voters.[10] The 2011 Plans also established twenty–three state house districts where a majority of the population was African American.[11] By contrast, the previous district maps only held ten districts where a majority of the members were African American.[12] The alleged motivation behind these newly established

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[2] Convening a three judge panel was in compliance with 28 U.S.C. §2284(a), which states:

> A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

28 U.S.C. §2284(a).

[3] The Equal Protection Clause states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, §1.

[4] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 166 (M.D.N.C. Aug. 11, 2016).

[5] N.C. Cost. Art. II, §§3, 5.

[6] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 8 (M.D.N.C. Aug. 11, 2016).

[7] "Although [Rucho and Lewis] led the redistricting, they did not actually draw the maps. That work was done by Dr. Thomas Hofeller, whom the General Assembly's private counsel engaged to design the 2011 redistricting plans." Covington v. North Carolina, No. 1:15-cv-399, slip op. at 9 (M.D.N.C. Aug. 11, 2016) (alteration not in original).

[8] *See* Covington v. North Carolina, No. 1:15-cv-399, slip op. at 11 (M.D.N.C. Aug. 11, 2016); North Carolina Session Law 2011-402 (July 27, 2011) (also known as "Rucho Senate 3"); North Carolina Session Law 2011-404 (July 28, 2011) (also known as "Lewis-Dollar-Dockham 4"). Plaintiffs noted in their complaint that, "No African-American Senator or Representative voted in favor of any of the plans proposed by Defendants Rucho and Representative Lewis." Complaint at 14, Covington v. North Carolina, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016).

[9] Complaint at 3, *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016).

[10] Complaint at 3, *Covington v. North Carolina*, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016).

[11] *Id.*

[12] *Id.*

districts, was a desire to achieve racial proportionality.[13] Prior to the creation of the plans, the North Carolina General Assembly found that African Americans constituted 21.2% of the State's voting age population.[14] Based on that statistic, the General Assembly concluded that ten of the fifty senate districts and twenty–four of the states one–hundred–and–twenty house districts should contain a majority of African American voters.[15] These districts would be referred to as the "VRA Districts" as the General Assembly understood such districts to be necessary for compliance with the Voting Rights Act.[16]

On May 19, 2015, thirty–one registered voters in North Carolina ("Plaintiffs")[17], brought suit against the State of North Carolina, the Redistricting Chairs, the North Carolina Board of Elections, as well as other state officials ("Defendants").[18] Plaintiffs sought a judgment declaring the challenged districts to be unconstitutional and requested a permanent injunction blocking the use of the challenged districts.[19] Plaintiffs argued race was a predominant factor in the creation of the new districts outlined in The 2011 Plans.[20] In support of their claim, Plaintiffs relied on instructions that Rucho and Lewis gave when drawing The 2011 Plans. The instructions stated that each "VRA District" should be drawn so that African American citizens would compose at least a majority of the voting age population of the district and that the "VRA Districts" should be proportionally equal to North Carolina's African American population.[21] Plaintiffs argued that because African American candidates had not had difficulty being elected prior to The 2011 Plans,[22] the use of race as the predominant factor in drawing the plans did not serve a compelling state interest, and thus violated the Equal Protection Clause of the Fourteenth Amendment.[23]

Defendants acknowledged that their redistricting was race-based, but asserted that complying with §2[24] and §5[25] of the Voting Rights Act[26] was a compelling state interest which

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[13] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 10 (M.D.N.C. Aug. 11, 2016).
[14] Complaint at 11, Covington v. North Carolina, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016).
[15] *Id.*
[16] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 11 (M.D.N.C. Aug. 11, 2016).
[17] Plaintiffs collectively reside in each of the challenged districts. Covington v. North Carolina, No. 1:15-cv-399, slip op. at 14 (M.D.N.C. Aug. 11, 2016).
[18] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 14 (M.D.N.C. Aug. 11, 2016).
[19] *Id.* at 15.
[20] Complaint at 90, Covington v. North Carolina, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016).
[21] *Id.* at 13.
[22] *See* Complaint at 17, Covington v. North Carolina, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016) (listing the electoral success of the candidates of choice of black voters generally in the challenged districts).
[23] Complaint at 90, Covington v. North Carolina, No. 1:15-cv-399 (M.D.N.C. Aug. 11, 2016)
[24] §2 of the Voting Rights Act of 1965 prohibits redistricting plans that result in vote dilution. Such dilution occurs when:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class of citizens] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b) (alteration not in original).
[25] §5 of the Voting Rights Act of 1965 prohibits:

> Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice . . . .

52 U.S.C. §10304(b).

necessitated their actions.[27] In addition, Defendants cited recent cases concerning the Voting Rights Act, arguing the new district maps should be upheld. Defendants first relied on the North Carolina Supreme Court's decision in *Stephenson v. Bartlett*.[28] Defendants interpreted the court's decision to mean that because federal law takes precedent over state law the first step in any redistricting process should be creating legislative districts required by the Voting Rights Act.[29] The creators of The 2011 Plans then relied on the U.S. Supreme Court's holding in *Bartlett v. Strickland*.[30] The North Carolina General Assembly believed that *Strickland* required all of the VRA districts to be drawn to have a majority population of voting age African Americans.[31] Rucho and Lewis looked next to the Supreme Court's holding in *Johnson v. De Grandy*.[32] They believed that creating VRA districts with a majority of African American voters, as the first step in the redistricting process would further North Carolina's obligation to comply with §2 and §5 of the Voting Rights Act.[33]

The U.S. District Court for the Middle District of North Carolina relied on the three–prong test from *Thornburg v. Gingles*[34] in determining whether a violation of §2 of the Voting Rights Act was an imminent threat so as to qualify as a compelling state interest and justify the use of race–based redistricting.[35] In *Gingles* the Supreme Court established that a violation of §2 of the Voting Rights Act exists if three elements are met: the minority group is sufficiently large and geographically compact; the minority group is politically cohesive; and the majority votes in a bloc to enable it to *usually defeat the minority's preferred candidate.*[36] In the instant case, the U.S. District Court found that Defendants misunderstood the final element to equate to the existence of any racially polarized voting.[37] Based on the voting records of the North Carolina General Assembly elections, the court did not find any evidence of bloc voting that usually resulted in the minority's preferred candidates being defeated.[38] Because the third element of the

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[26] The Supreme Court has not yet decided whether compliance with the Voting Rights Act may constitute a compelling state interest. However, for the sake of its analysis, both the U.S. Supreme Court and the U.S. District Court for the Middle District of North Carolina assume *arguendo* that compliance constitutes a compelling state interest. Covington v. North Carolina, No. 1:15-cv-399, slip op. at 129 (M.D.N.C. Aug. 11, 2016).

[27] *See* Covington v. North Carolina, No. 1:15-cv-399, slip op. at 128 (M.D.N.C. Aug. 11, 2016) (stating Defendants' assertion that their race-based districting furthered two compelling state interests).

[28] *See* Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); Stephenson v. Bartlett (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003) (North Carolina citizens brought a suit against the North Carolina Board of Elections officials and state officers, challenging the redistricting plans adopted by the General Assembly in 2002).

[29] *Stephenson II* held that, "legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson II*, 582 S.E.2d at 250. The U.S. District Court did not comment on whether the *Stephens II* holding requires that VRA Districts actually be drawn first both in priority as well as in time. Covington v. North Carolina, No. 1:15-cv-399, slip op. at 26 n.12 (M.D.N.C. Aug. 11, 2016).

[30] *See* Bartlett v. Strickland, 566 U.S. 1 (2009) (North Carolina county commissioners brought suit against the Governor, State Board of Elections, and other state officials, alleging that the legislative redistricting violated the "Whole County Provision" of North Carolina's state constitution). North Carolina's "Whole County Provision" prohibits the General Assembly from splitting counties when drawing legislative districts. *Id.*

[31] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 20 (M.D.N.C. Aug. 11, 2016).

[32] *See* Johnson v. De Grandy, 512 U.S. 997 (1994) (action brought challenging Florida's legislative redistricting plan).

[33] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 28 (M.D.N.C. Aug. 11, 2016).

[34] *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

[35] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 130 (M.D.N.C. Aug. 11, 2016).

[36] *Id.* (emphasis added).

[37] *Id.* at 135.

[38] *Id.* at 7.

*Gingles* test was not met, the court held that avoiding a violation of §2 of the Voting Rights Act was not a compelling state interest and therefore did not justify race–based districting.[39]

The court also found that race–based districting was not needed to avoid a violation of §5 of the Voting Rights Act.[40] In *Alabama Legislative Black Caucus v. Alabama*[41] the U.S. Supreme Court held that race–based redistricting is necessary for compliance with §5 only if it prevents "retrogression in respect to racial minorities' ability . . . to elect their preferred candidate of choice."[42] In the instant case, the three judge panel did not find that North Carolina was at risk of regressing or denying racial minorities the ability to elect their preferred candidates.[43] Because violations of §2 and §5 of the Voting Rights Act were not imminent threats in North Carolina, such did not constitute compelling state interests.[44] Thus, race–based districting in reliance on such possibilities was unconstitutional.[45] The court found in favor of Plaintiffs and invalidated The 2011 Plans.[46]

For more information on the Voting Rights Act and its application in American case law, please see the second installment of Volume 45 of the *Cumberland Law Review.*

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[39] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 137 (M.D.N.C. Aug. 11, 2016).
[40] *Id.* at 154.
[41] *See* Alabama Legislative Black Caucus v. Alabama (Alabama), 135 S. Ct. 1257 (2015).
[42] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 155 (M.D.N.C. Aug. 11, 2016) (quoting *Alabama*, 135 S. Ct. at 1263).
[43] Covington v. North Carolina, No. 1:15-cv-399, slip op. at 159 (M.D.N.C. Aug. 11, 2016).
[44] *Id.* at 160.
[45] *Id.*
[46] *Id.* However, the District Court relied on the Supreme Court's ruling in *Upham v. Seamon*, 456 U.S. 37, 44 (1982) in permitting North Carolina's 2016 November General Elections to be held pursuant to the unconstitutional apportionment plans. The court concluded that postponing North Carolina's 2016 General Election would cause disruption to the election process. The court ordered the North Carolina General Assembly to redraw the districts in its next legislative session. *Covington v. North Carolina*, No. 1:15-cv-399, slip op. at 163 (M.D.N.C. Aug. 11, 2016).