To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 10/17/2022

Case Briefing **[North Carolina]**

|  |  |
| --- | --- |
| **Citation** | * *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct., Wake Cnty. Oct. 28, 2019). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Superior Court Judge Paul C. Ridgeway (D) issued the opinion, joined by Judges Joseph N. Crosswhite (R) and Alma L. Hinton (D).[[1]](#footnote-1) |
| **Procedural History** | * On 9/27/2019, Plaintiffs filed a verified complaint in Superior Court, Wake County, seeking a declaration that the 2016 congressional districts violate the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14.   + Plaintiffs sought to enjoin the future use of the 2016 congressional districts. * On 9/30/2019, this action was assigned to the panel by the Chief Justice of the Supreme Court of North Carolina. * On 9/30/2019, Plaintiffs filed a motion for a preliminary injunction. * On 10/14/2019, the Legislative Defendants attempted to remove this case to the United States District Court for the Eastern District of North Carolina, and on 10/22/2019, the federal court remanded the case back to state court. * On 10/24/2019, the Court heard argument and granted the Congressional Representatives ("Intervenor-Defendants") permissive intervention. |
| **Disposition** | * Plaintiffs’ motion for preliminary injunction was granted.   + Legislative Defendants were enjoined from preparing for or administering the 2020 primary and general elections for congressional districts under the 2016 congressional districts established by S.L. 2016-1.   + (Note: On 12/2/2019, the Superior Court lifted its prior preliminary injunction after the General Assembly created a new congressional plan, S.L. 2019-249, allowing the 2020 congressional election to proceed.)[[2]](#footnote-2) |
| **Facts** | * On 2/19/2016, the current North Carolina congressional districts (hereinafter "2016 congressional districts") were established by an act of the General Assembly, S.L. 2016-1, as a result of litigation in federal court over the congressional districts originally drawn in 2011. |
| **Issue(s) or**  **Question(s)**  **Presented** | * Whether Plaintiffs’ motion for preliminary injunction is warranted in regard to the 2016 congressional districts. |
| **The Rule(s)** | * Declaration of Rights, N.C. Const. art. I, § 10 (Free Elections Clause).   + Declares that "[a]ll elections shall be free."   + The meaning of the Free Elections Clause is that elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.     - In contrast, extreme partisan gerrymandering—namely redistricting plans that entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others—is contrary to the fundamental right of NC citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. * N.C. Const. art. I, § 19 (Equal Protection Clause).   + Guarantees to all North Carolinians that "[n]o person shall be denied the equal protection of the laws."   + NC’s Equal Protection Clause protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson v. Bartlett*.   + Although the NC Constitution provides greater protection for voting rights than the federal Equal Protection Clause, our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis.     - (1) the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing district lines was to "entrench [their party] in power" by diluting the votes of citizens favoring their rival.     - (2) the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes.     - (3) if the plaintiffs make those showings, the State must provide a legitimate, non-partisan justification (i.e., that the impermissible intent did not cause the effect) to preserve its map.   + Partisan gerrymandering runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one political party less favorably than individuals who support candidates of another party. * N.C. Const. art. I, § 12 (Freedom of Assembly Clause).   + Provides, in relevant part, that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." * N.C. Const. art. I, § 14 (Freedom of Speech Clause).   + Provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained."   + When a legislature engages in extreme partisan gerrymandering, it identifies certain preferred speakers (e.g., Republican voters) while targeting certain disfavored speakers (e.g., Democratic voters) because of disagreement with the views they express when they vote.   + A legislature that engages in extreme partisan gerrymandering burdens the associational rights of disfavored voters to "instruct their representatives, and to apply to the General Assembly for redress of grievances." * Injunctive Relief Standard   + "The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits.   + A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiffs rights during the course of litigation."   + When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. |
| **Holding(s)** | * Court held that the Plaintiffs’ motion for preliminary injunction was warranted in regard to the 2016 congressional districts because:   + (1) Court agrees with Plaintiffs and finds there is a substantial likelihood that Plaintiffs will prevail on the merits of this action by showing beyond a reasonable doubt that the 2016 congressional districts are extreme partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Art. I, § 10; Equal Protection Clause, Art. I, § 19; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14.   + (2) The loss to Plaintiffs' fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional elections are allowed to proceed under the 2016 congressional districts.   + (3) The risk that Plaintiffs' and all North Carolinians' fundamental rights guaranteed by the North Carolina Constitution will be irreparably lost outweighs the Legislative Defendants’ harm (i) that the General Assembly will be prevented from effectuating an act of the General Assembly, and (ii) the disruption, confusion, and uncertainty in the electoral process for them, candidates, election officials, and the voting public. |
| **Rationale** | * **Political Question Doctrine**   + Court rejected the Legislative Defendants’ claim that challenges to the validity of an act of the General Assembly that apportions or redistricts the congressional districts of this State present non-justiciable political questions.     - Such claims are within the statutorily-provided jurisdiction of this three-judge panel, N.C.G.S. § 1-267.1, and partisan gerrymandering claims specifically present justiciable issues—they fall within the broad, default category of constitutional cases our courts are empowered and obliged to decide on the merits, and not within the narrow category of exceptional cases covered by the political question doctrine. * **Standing of Plaintiffs**   + Court rejected the Legislative Defendants’ claim that plaintiffs lacked standing because the NC Constitution provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18.   + "[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our State's standing jurisprudence is broader than federal law."     - Although the NC Supreme Court "has declined to set out specific criteria necessary to show standing in every case, [it] has emphasized two factors in its cases examining standing:       * (1) the presence of a legally cognizable injury; and       * (2) a means by which the courts can remedy that injury."   + Plaintiffs in this case have standing to challenge the congressional districts at issue because Plaintiffs have shown a likelihood of "a personal stake in the outcome of the controversy," and a likelihood that the 2016 congressional districts cause them to "suffer harm[.]" * **Plaintiffs Are Likely to Succeed on the Merits**   + The 2016 congressional districts have already been the subject of years-long litigation in federal court arising from challenges to the districts on partisan gerrymandering grounds, and, as such, there is a detailed record of both the partisan intent and the intended partisan effects of the 2016 congressional districts drawn with the aid of Dr. Thomas Hofeller and enacted by the General Assembly. *See Rucho*.     - Dr. Hofeller was directed by legislators "to use political data . . . in drawing the remedial plan," and was further instructed to "use that political data to draw a map that would maintain the existing partisan makeup of the state's congressional delegation. . . .     - The redistricting committee approved several criteria for the map-drawing process, including the use of past election data (i.e., "Political Data") and another labeled "Partisan Advantage.”[[3]](#footnote-3)     - When drawing the 2016 congressional districts, Dr. Hofeller used "an aggregate variable he created to predict partisan performance" all while "constantly aware of the partisan characteristics of each county, precinct, and VTD."     - The redistricting committee, and ultimately the General Assembly as a whole, approved the 2016 congressional districts by party-line vote. * **Plaintiffs Will Suffer Irreparable Loss Unless the Injunction is Issued**   + Because Plaintiffs' have shown a likelihood of succeeding on the merits of their claims, Plaintiffs are likely to sustain irreparable loss to their fundamental rights guaranteed by the NC Constitution unless the injunction is issued, and likewise, issuance is necessary for the continued protection of Plaintiffs' fundamental rights guaranteed by during the course of the litigation. * **Balancing of Equities Weighs in Favor of Plaintiffs**   + While State Defendants would prefer not to move elections or otherwise change the current schedule for the 2020 congressional primary election, they recognize that proceeding under the 2016 congressional districts "would require the Board to administer an election that violates the constitutional rights of North Carolina voters" and acknowledge that the election schedule can be changed if necessary.   + While the timing of Plaintiffs' action does weigh against Plaintiffs (filing months after litigation concluded in the federal court), the Court does not find that the timing of Plaintiffs' filing of this action should bar them from seeking equitable relief. |
| **Notes/**  **Reactions** | * N/a. |

1. The political party designations of the judges were obtained via Google desktop searches, which may not be entirely accurate. [↑](#footnote-ref-1)
2. *See Harper v. Lewis*, Brennan Ctr. For Justice (Dec. 2, 2019), <https://www.brennancenter.org/our-work/court-cases/harper-v-lewis>. [↑](#footnote-ref-2)
3. The “Partisan Advantage” criterion was defined as follows: "The partisan makeup of the congressional delegation under the enacted plan is 10 Republicans and 3 Democrats. The Committee shall make reasonable efforts to construct districts in the 2016 Contingent Congressional Plan to maintain the current partisan makeup of North Carolina's congressional delegation." [↑](#footnote-ref-3)