

Panel Blocks Gerrymandered NC Map, Demands Redo

By **RJ Vogt**

Law360, Los Angeles (January 10, 2018, 12:55 AM EST) -- A federal congressional map has been blocked due to partisan gerrymandering for the first time in U.S. history, as a panel of federal judges on Tuesday ordered North Carolina's Republican-controlled General Assembly to redraw district lines before this year's midterm elections because its current plan is unconstitutional.

The decision comes while the U.S. Supreme Court considers *Gill v. Whitford*, the appeal of a similar ruling in Wisconsin that found state-level voting maps to be unacceptably partisan by using a standard known as the "efficiency gap" to break down the degree to which map makers of one party packed voters of other parties into specific districts in order to diminish their electoral power.

On Tuesday, the three-judge panel used the same test, among others, to determine North Carolina's 2016 congressional redistricting plan was unfairly designed to benefit the Republican party, ruling in favor of the League of Women Voters of North Carolina and D.C. watchdog group Common Cause in their cases against North Carolina, the state board of elections and Republican assembly leaders.

"Legislative defendants also do not argue — and have never argued — that the 2016 Plan's intentional disfavoring of supporters of non-Republican candidates advances any democratic, constitutional, or public interest," Fourth Circuit Judge James Wynn wrote in the majority opinion. "Nor could they. Partisan gerrymandering runs contrary to numerous fundamental democratic principles and individual rights enshrined in the Constitution."

The ruling comes on two cases that were filed separately: one by Common Cause in August 2016 and the other by the League of Women Voters of North Carolina in September 2016. Consolidated in February, the litigation alleged that North Carolina's partisan map plan violated the First Amendment and the 14th Amendment's equal protection clause, as well as the election clause.

Tuesday's decision is not the first time North Carolina's Republican majority has been ordered to redraw its districts, as a district court found an unconstitutional racial gerrymander in February 2016 after an all-Republican redistricting committee tried to "create as many districts as possible in which GOP candidates would be able to successfully compete." That case was appealed to the Supreme Court, which voted in May to uphold the lower court's decision.

Upon being told to redo the maps, Tuesday's ruling said North Carolina's legislators once again directed their team to use precinct-level election results to maintain the existing partisan makeup of the state's

congressional delegation, even testifying that “to the extent [we] are going to use political data in drawing this map, it is to gain partisan advantage.”

Rep. David Lewis, R-Dunn, chair of the state’s House Redistricting Committee, even acknowledged freely that “this would be a political gerrymander” but maintained it was “not against the law,” the panel wrote.

U.S. Rep. G.K. Butterfield, D-N.C., said in a statement Tuesday that the Republicans' admitted intent to maintain political advantage made this case "relatively simple."

“Republicans comprise 30 percent of registered voters in North Carolina, yet they crafted a congressional map that would ensure Republican success in ten of thirteen districts, or 76 percent,” Butterfield said. “I urge the Republican dominated General Assembly to promptly comply with the court’s order by developing a fair congressional map that doesn’t disadvantage Democratic voters.”

Despite the fact that Tuesday’s decision marks the second time North Carolina has been told to draw its districts more fairly, Judge Wynn said the state’s General Assembly is entitled to another opportunity to do it right because the court had not established a legal standard for adjudicating partisan gerrymandering claims at the time legislators drew up the 2016 plan.

“In providing the General Assembly with such an opportunity, we also recognize that North Carolina voters have been deprived of a constitutional congressional districting plan for the better part of the decade,” the judge wrote, adding that the state has until Jan. 24 to enact a remedial districting plan.

In case the legislature does not obey its order, the panel said it intends to appoint a “special master” to assist the court in drawing up an alternative remedial plan. Both parties were directed to suggest three qualified candidates to serve as special master by Jan. 16.

Allison Riggs of the Southern Coalition for Social Justice, who represents the League of Women Voters and other plaintiffs, told Law360 late Tuesday that she thinks the opinion is incredibly well-written.

“We couldn’t have asked for a better crafted decision below when it comes time for Supreme Court review,” Riggs said, adding that the state has already indicated it will appeal.

In a partial dissent, U.S. District Judge William L. Osteen Jr. rejected claims that the partisan districts infringed on Democratic voters' First Amendment rights to free speech. He wrote that the plaintiffs are free under the 2016 plan to field candidates for office or otherwise advance their political beliefs, saying that he could not find a constitutional requirement for the removal of partisan considerations from the redistricting process.

North Carolina GOP Executive Director Dallas Woodhouse took to Facebook to voice his anger at the panel's decision.

"It is incredibly disappointing that activist Federal Judge Jim Wynn is waging a personal, partisan war on North Carolina Republican voters," he wrote in a post Tuesday. "It is now very clear that Judge Wynn has decided that [the GOP] should not be allowed to draw election districts under any circumstances under any set of rules. ... The unprecedented usurping of legislative authority by Judge Wynn will most certainly be stayed by the US Supreme Court."

Now attention will turn to the high court, which heard the Gill v. Whitford oral arguments in October and could eventually hear the appeal of Tuesday's decision. In the Whitford case, some justices questioned if the efficiency gap is a well-tested method for determining the partisanship of a state's district.

Questions over determining a clear standard date back to the 1986 Davis v. Bandemer decision, in which the Supreme Court agreed that claims of partisan gerrymandering were justiciable but failed to decide on a means for evaluating them.

Nick Stephanopoulos, a law professor at the University of Chicago Law School who represented the League of Women Voters in the North Carolina case, is credited with creating the efficiency gap measurement. Having also served on the legal team that challenged Wisconsin's state district lines in Whitford v. Gill, Stephanopoulos told Law360 that the North Carolina court's decision to invoke his standard is further evidence that the efficiency gap could become the Supreme Court's go-to test for partisanship.

"Two federal courts have now been able to apply the test and to find maps unconstitutional under it," he said. "This should reassure the Supreme Court that the test is eminently manageable."

Counsel for North Carolina did not immediately respond to questions about appealing the decision, but any state appeal will head straight to the Supreme Court in accordance with the Three-Judge Court Act, which specifies that constitutional challenges to state or federal districts are to be considered first by a three-judge district court panel and on appeal by the high court.

U.S. Circuit Judge James A. Wynn and U.S. District Judges William L. Osteen Jr. and William Earl Britt served on the panel.

The League of Women Voters of North Carolina is represented by Allison Jean Riggs and Emily E. Seawell of the Southern Coalition for Social Justice; Nick Stephanopoulos; and J. Gerald Hebert, Paul M. Smith, Ruth M. Greenwood, Anna E. Bodi, Danielle M. Lang and Annabelle E. Harless of Campaign Legal Center.

Common Cause is represented by Benjamin W. Thorpe, Emmet J. Bondurant and Jason J. Carter of Bondurant Mixson & Elmore LLP; Caroline P. Mackie, Edwin M. Speas and Steven B. Epstein of Poyner Spruill LLP; and Gregory L. Diskant and Peter A. Nelson of Patterson Belknap Webb & Tyler.

The defendants are represented by Alexander McClure Peters and James Bernier Jr. of the North Carolina Department of Justice, and Michael Douglas McKnight, Phillip John Strach and Thomas A. Farr of Ogletree Deakins Nash Smoak & Stewart PC.

The cases are League of Women Voters of North Carolina et al. v. Rucho et al., number 1:16-01164, and Common Cause et al. v. Rucho et al., number 1:16-cv-01026, both in the U.S. District Court for the Middle District of North Carolina.

--Editing by Breda Lund.