No. 201PA12-4 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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MARGARET DICKSON, *et al.* *Plaintiffs*, v. ROBERT RUCHO, *et al.* *Defendants*. NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP; *et al.* *Plaintiffs*, v. THE STATE OF NORTH CAROLINA, *et al.* *Defendants*.	)	From Wake County

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BRIEF OF DEFENDANTS-APPELLEES THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS ON SECOND REMAND

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BRIEF OF DEFENDANTS-APPELLEES
THE STATE OF NORTH CAROLINA AND
THE NORTH CAROLINA STATE BOARD OF ELECTIONS
ON SECOND REMAND

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ISSUE PRESENTED

I. WHEN THE UNITED STATES SUPREME COURT HAS VACATED THE PRIOR OPINION OF THIS COURT AND HAS REMANDED THESE ACTIONS "FOR FURTHER CONSIDERATION IN LIGHT OF *COOPER V. HARRIS*, 581 U. S. ____ (2017)," SHOULD THIS COURT FURTHER REMAND THESE MATTERS TO THE TRIAL COURT FOR ENTRY OF JUDGMENT?

INTRODUCTION

The remand by the United States Supreme Court of these appeals presents a straightforward question: When the decisions of state courts turn upon a particular interpretation of the requirements of federal law, and when federal courts in parallel proceedings hold, in effect, that the state courts' interpretation of federal law was erroneous, what is the proper procedural effect on the still-pending state court cases? Should they be dismissed as moot because the federal cases have resolved the substantive disputes between the parties? Or should the cases be remanded to the trial court for entry of judgment that comports with the federal courts' interpretation of federal law?

The latter course appears to be correct. To hold otherwise would allow an erroneous judgment to stand. These cases are not rendered

moot by the decisions in the parallel federal cases. Rather, the parallel federal cases provide clarity on the federal law that must be applied to plaintiffs' claims. This Court, then, should remand these matters to the trial court for entry of judgment.

STATEMENT OF THE CASE

Pursuant to N.C. Gen. Stat. § 1-267.1, these challenges to the congressional and legislative redistricting plans enacted by the General Assembly in 2011 were heard by a three-judge panel of the Superior Court of Wake County. The trial court panel reviewed a voluminous record of maps, affidavits, depositions, statistics, and other evidence.

The trial court found that plaintiffs had challenged a total of thirty districts (nine Senate, eighteen House, and three Congressional) on the grounds of racial gerrymandering. (R p 1277) It further found that twenty-six of these districts were created for the purpose of avoiding claims under the Voting Rights Act ("VRA"), while the four other districts challenged by plaintiffs were not created for that purpose. (R p 1277)

Based upon the evidence presented at trial, the three-judge court concluded that the challenged VRA districts survived strict scrutiny.

The three-judge panel also concluded that race was not the predominant motive for the location of district lines established for four remaining districts. (R pp 1309-1312)

The trial court granted summary judgment to the defendants on all of plaintiffs' other claims, including their contention that the 2011 Senate and House Plans failed to comply with the Whole County Provisions ("WCP") of the North Carolina Constitution. *See* N.C. CONST. art II, §§ 3(3) and 5(3). (R pp 1312-1320)

On appeal, this Court affirmed the decision by the trial court. *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) ("*Dickson I*"). The Court affirmed the trial court's summary judgment, including its conclusion that the enacted Senate and House Plans complied with the county-grouping formula prescribed by *Stephenson v. Bartlett*, 357 N.C. 354, 562 S.E.2d 247 (2002), while plaintiffs' alternative Senate and House plans did not. *Dickson*, 367 N.C. at 572–73, 766 S.E.2d at 258–59.[1]

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[1] The holding with regard to the WCP turned on the proper way of grouping counties, specifically that after any counties that could form one or more districts wholly within the county, the maximum number of two county groupings must be drawn, then the maximum number of three-

On January 16, 2015, the plaintiffs petitioned the United States Supreme Court for a writ of certiorari. On April 20, 2015, the United States Supreme Court granted plaintiffs' petition, vacated this Court's prior judgment, and remanded these cases to this Court "for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. ___ (2015)." *Dickson v. Rucho*, 135 S. Ct. 1843, 1843 (2015).

On remand, this Court again affirmed the decision of the three-judge panel. *See Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015) ("*Dickson II*").

Plaintiffs again filed a petition for writ of certiorari in the United States Supreme Court. *See Dickson v. Rucho*, Petition for a Writ of Certiorari, at i (June 30, 2016).

While these actions were pending, two other lawsuits challenged the 2011 congressional and legislative redistricting plans in federal court. *See Covington v. State of North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2015). In *Harris*, a three-judge federal panel found that race predominated in the

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county groupings must be drawn, and so on. *Dickson I*, 367 N.C. at 572–73, 766 S.E.2d at 258–59.

drawing of Congressional Districts 1 and 12 in the 2011 plan; the court further found strict scrutiny applied to an analysis of constitutionality and that defendants had failed to establish that the race-based redistricting satisfies that standard. As a result, the court found that the 2011 congressional redistricting plan was unconstitutional and required the General Assembly to draw a new congressional district plan. *Harris*, 159 F. Supp. 3d at 627.[2] Defendants filed a Jurisdictional Statement in the United States Supreme Court on April 8, 2016.

In *Covington*, a three-judge federal panel found that race was the predominant factor motivating the drawing of twenty-eight state legislative districts challenged in that action. As in *Harris*, the court further found that strict scrutiny applied and that defendants had failed to show that their use of race to draw any of these districts was narrowly tailored to further a compelling state interest; specifically, the court found that defendants had failed to show that the use of race in drawing the challenged districts was necessary to comply with section 2 or section 5 of the Voting Rights Act or to avoid a legal challenge under section 2.

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[2] A new congressional districting map was enacted by the General Assembly on February 19, 2016. *See* 2016 N.C. SESS. LAWS 1. This new districting map was used for the 2016 congressional elections.

As a result, the court required that the General Assembly draw new legislative districts. *Covington*, 316 F.R.D. at 124. Defendants filed a Jurisdictional Statement in the United States Supreme Court on November 14, 2016.

On May 22, 2017, the United States Supreme Court issued its decision in *Harris*. *Cooper v. Harris*, 581 U.S. ___, 137 S. Ct. 1455 (2017). The Court affirmed the decision of the three-judge panel, holding that racial considerations predominated in the drawing of congressional Districts 1 and 12 and that the State's use of race in drawing these districts did not withstand strict scrutiny. *Harris*, 581 U.S. at ___, 137 S. Ct. at 1472, 1481–82. With regard to District 1, the Court held that the General Assembly's belief that it was required by section 2 of the VRA to draw majority-minority districts where possible was "a pure error of law." *Id*. at ___, 137 S. Ct. at 1472.

On May 30, 2017, eight days after issuing its decision in *Harris*, the United States Supreme Court granted certiorari in these cases, vacated the decision of this Court, and remanded these cases to this Court "for further consideration in light of *Cooper v. Harris*, 581 U.S. ____ (2017)." *Dickson v. Rucho*, 137 S. Ct. 2186 (2017).

On June 5, 2017, the United Supreme Court summarily affirmed the decision of the three-judge panel in *Covington*. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

GROUNDS FOR APPELLATE REVIEW

These appeals originally came before this Court on appeal from a three-judge panel of the Wake County Superior Court pursuant to N.C. Gen. Stat. § 120-2.5. These matters are currently before this Court on remand from the United States Supreme Court.

ARGUMENT

The challenges to the districting plans at issue in these two cases have been thoroughly litigated in state and federal trial courts, in this Court, and in the United States Supreme Court. Throughout these cases, defendants have zealously defended these districting plans. However, the United States Supreme Court, in *Harris* and *Covington*, has definitively decided the pivotal questions presented in both of these cases as well as in the federal cases: namely, (1) whether race predominated in the drawing of the challenged plans, and (2) whether section 2 of the VRA required the General Assembly to draw majority-minority districts

wherever possible, or whether the General Assembly had a compelling state interest in avoiding section 2-based challenges to the plans.

The Court held that race did predominate in the drawing of the challenged districts and that North Carolina did not have a compelling state interest in considering race to the extent it did. With these decisions by the United States Supreme Court, no substantive issues remain to be decided in these cases. The only question remaining is what should happen next.[3]

Here, the trial court entered judgment for defendants, and this Court has twice affirmed that judgment. The United States Supreme Court, however, has in effect held that the decisions of the trial court and of this Court were predicated upon an error of federal law. For that

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[3] Plaintiffs in their New Brief suggest that these appeals must proceed "because this Court's error on the federal claims has the collateral consequence of establishing that the challenged districts were drawn in violation of this Court's test for measuring compliance with" the WCP. Pl's New Br. at 17. While this is correct, it is undisputed that the way counties were grouped in the 2011 legislative districting plans, and particularly any deviation from strict compliance with the *Stephenson* criteria, was driven by how VRA districts were drawn. With the United States Supreme Court's rejection in *Covington* of the VRA districts in the legislative plans, it follows automatically that those rejected districts cannot relieve the State of the state constitutional requirement to strictly comply with the *Stephenson* criteria. Thus, this issue requires no further analysis.

reason, the United States Supreme Court remanded these cases for further consideration in light of its holdings on the central question of federal law. Under these circumstances, the appropriate procedural result should be remand by this Court to the trial court for entry of judgment.

That was the result in *Swanson v. State*, 335 N.C. 674, 441 S.E.2d 537 (1994). There, the trial court entered summary judgment for plaintiffs. As with these cases, *Swanson* came before this Court twice; each time this Court reversed the decision of the trial court and remanded with instructions that judgment be entered for defendants and that the case be dismissed. The plaintiffs petitioned the United States Supreme Court for writ of certiorari. The United States Supreme Court, as in these cases, summarily granted certiorari, vacated this Court's decisions and remanded for further consideration in light of a subsequent United States Supreme Court decision. *See Swanson v. North Carolina*, 509 U.S. 916 (1993). On remand and reconsideration, this Court reversed the decision of the trial court and remanded for entry of judgment for defendants. *Swanson*, 335 N.C. at 693, 441 S.E.2d at 548.

The scenario presented here is different from a scenario where the underlying substantive facts have changed during the course of the litigation. That was the case in *Hoke County Board of Education v. State*, 367 N.C. 156, 749 S.E.2d 451 (2013). In *Hoke County*, the plaintiffs challenged changes to statutes that governed a prekindergarten program for at-risk four-year-old children. Approximately one year after the trial court issued an order in favor of plaintiffs, and while an appeal was pending in the North Carolina Court of Appeals, the General Assembly further amended the statutes at issue. The Court of Appeals subsequently affirmed the trial court in part and dismissed the appeal in part. *Hoke County Bd. of Educ. v. State*, 222 N.C. App. 406, 731 S.E.2d 691 (2012).

On discretionary review, this Court held that "the questions originally in controversy between the parties are no longer at issue." As a result, this Court determined that the plaintiffs' claims were indeed moot. *Hoke County*, 367 N.C. at 160, 749 S.E.2d at 455. The Court reached this conclusion, however, because the statute that the plaintiffs originally challenged no longer existed.

Here, in contrast, the statutes that underlie plaintiffs' claims largely remain in place. What has changed are the specific principles of federal law that govern those claims. The proper procedural course at this stage of litigation is to ensure that federal law is correctly applied to the trial court's earlier judgment.

Applying that law calls for this Court to remand to the trial court for entry of judgment.

CONCLUSION

For the foregoing reasons, this Court should remand these actions to the three-judge panel of the Superior Court of Wake County for entry of judgment.

Respectfully submitted this 18th day of August, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served this day by depositing a copy thereof in a depository under the exclusive care and custody of the United States Postal Service in a first-class postage-prepaid envelope properly addressed to the following:

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This 18th day of August, 2017.

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