No. COA19-384 TENTH JUDICIAL DISTRICT

****
NORTH CAROLINA COURT OF APPEALS
****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, vs. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendants.	From Wake County 18-CVS-9806

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DEFENDANT-APPELLANTS' REPLY BRIEF
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Plaintiff argues that the North Carolina General Assembly was "warned" that, due to its members being elected from districts that had been found to violate the Equal Protection Clause of the federal Constitution, it might lack popular sovereignty and that its power to act was limited. (Appellee's Br. 3.) But neither Plaintiff nor the trial court cites any judicial precedent for this proposition. More to the point, the federal court in *Covington v. North Carolina*, 270 F. Supp. 3d. 881 (M.D.N.C. 2017), on which Plaintiff and the trial court expressly rely, *did not hold* that the General Assembly lacked

popular sovereignty after legislative districts were found to be unconstitutional; rather, it stated explicitly that it was not the duty of federal courts to make such a determination. Further, *Covington* placed no restrictions on what the General Assembly could enact. Reliance on *Covington* as the basis for holding that the General Assembly could not propose constitutional amendments is, therefore, misguided. Likewise, reference to portions of our State Constitution that articulate principle but do not establish distinct, justiciable rights or to state common law about usurpers provides insufficient support for Plaintiff's position.

I. PRECEDENT ESTABLISHES THAT THE ISSUE BEFORE THIS COURT IS A POLITICAL QUESTION.

Plaintiff frames the question before this Court as "whether a General Assembly that lacks the requisite claim to popular sovereignty can propose constitutional amendments." (Appellee's Br. 19). That question presupposes that the Legislature that proposed the constitutional amendments lacked popular sovereignty, a premise Defendants dispute. Determining whether the Legislature has popular sovereignty to pass an act is a question the Court is not equipped to answer and, therefore, constitutes a nonjusticiable political question.

A.

As noted by the United States Supreme Court just one month ago, there are indeed issues courts are not equipped to handle, and whether a legislative body enjoys popular sovereignty is one of them. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). In *Rucho*, the Court determined that partisan gerrymandering is a political question for federal courts. While it is the role of the Court to say what the law is, the Court noted that sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Id*. at 2494 (quotations omitted). That analysis applies here as well. In support of its decision, the Court cited *Pacific State Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), a case cited by Defendants in their Appellants' Brief. In *Pacific State*, the Court determined that the plaintiff was not attacking the constitutionality of the law directly but, rather, was collaterally attacking the veracity of the legislative body that passed it. The same is true here.

Here, the trial court focused on the lack of popular sovereignty of the body passing the session laws. It did not invalidate the constitutional amendments at issue because the amendments themselves violated individual rights under the Fourteenth Amendment or the Equal Protection Clause of the federal Constitution or the Law of the Land Clause of the State Constitution. Whether a session law violates an individual, constitutional right of a plaintiff

is a question the courts are adept at determining. Whether the General Assembly had or did not have popular sovereignty when it passed legislation is completely different.

B.

To try to distinguish *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939), in which our Supreme Court analyzed whether legislation passed by an improperly constituted legislature was a political question, Plaintiff argues that redistricting and apportionment cases prior to *Baker v. Carr,* 369 U.S. 186 (1962), lack precedential value. The apportionment challenge in *Baker*, which was based on a denial of equal protection, was found to be justiciable, but the *Baker* court confirmed that other challenges (like those questioning republican form of government under the Guaranty Clause[1] or those questioning validity of enactments[2]) remain political questions. *See id.* at 210, 214, 222-24. *Baker* relied on *Coleman v. Miller*, 305 U.S. 433 (1939), a case dealing with a constitutional challenge to a state's ratification of a proposed amendment to

[1] Under U.S.C.A. Const. Art. IV § 4, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." The Supreme Court "has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." *Baker*, 369 U.S. at 224.

[2] "The respect due to coequal and independent departments, and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, legislation complied with all requisite formalities." *Id.* at 214.

the federal Constitution and not apportionment, in analyzing the scope of what constitutes a political question. *See Baker,* 369 U.S. at 210. In *Leonard*, our Supreme Court cited *Coleman* for the point that courts "do not cruise in nonjusticiable waters." *Leonard*, 3 S.E.2d at 324. *Leonard*, therefore, is not a case to be tossed aside simply because it was decided before *Baker*. After all, despite courts ruling on apportionment and redistricting since the 1962 *Baker* decision, Plaintiff, the trial court, and the amici have failed to identify a case in which a law was found invalid due to passage by an improperly constituted legislature.

II. THE JUDICIARY HAS NO MANAGEABLE STANDARDS FOR DETERMINING GAINS OR LOSSES IN POPULAR SOVEREIGNTY.

Whether a state legislature with members from improperly drawn districts is empowered to act is not a question that should be left to a court without clear guideposts. The sections of our Constitution cited by the trial court create nonjusticiable rights that do not provide necessary guideposts.

Plaintiff's and the trial court's reliance on Article I, Sections 2 and 3 and Article XIII, Section 4 of our State Constitution for the proposition that the General Assembly has the "authority to submit proposed amendment to the Constitution only insofar as it has been bestowed with popular sovereignty," (R p 190-91), does not provide the manageable standards needed to create a justiciable question. That "[p]opular sovereignty is the basis of American

democracy" is undisputed. John V. Orth and Paul M. Newby, *The North Carolina Constitution* 48 (2d ed. 2013). But, like the Supreme Court in *Rucho* found, this foundational, republican principle does not render an individual right that can be easily adjudicated. Although Plaintiff argues that "[t]here can be no more important role for our courts than safeguarding both our Constitution, and our system of representative democracy," (Appellee's Br. 30), Article I, Sections 2 and 3 have not been interpreted to grant justiciable rights.

> Since the state's first constitution lacked a preamble proclaiming the constituting authority as "We, the people," these sections originally served to declare the revolutionary faith in popular sovereignty. Displaced in 1868, when a conventional preamble was added, they now serve as a fuller theoretical statement of that principle. *Because of their abstractness, they have not yet given rise to justiciable rights*; the details of democracy—which officials are elected, for what terms, and by whom—are reserved for later articles of the constitution.

Orth, *supra*, at 48 (emphasis added). Thus, Plaintiff's reliance on Article I, Sections 2 and 3—which simply set forth the abstract principle that all power resides in the people—to strike down a session law proposing a constitutional amendment is misplaced. Rather, these Sections are similar to the Guaranty Clause of the federal Constitution.

Article XIII, Section 4 requires a three-fifths vote of both houses of the Legislature to propose an amendment but contains no standard regarding popular sovereignty. Although Plaintiff implies that the session laws

proposing the amendments at issue might not have passed had districts been drawn differently, Plaintiff acknowledges that the session laws *did* pass with the requisite majorities. It is not for the courts to go behind a vote[3] of the Legislature and question whether it is rooted in popular sovereignty.[4]

Plaintiff also argues that the trial court's decision relied on manageable standards because it found only two amendments were void and did not try to apply its logic to all laws passed by the General Assembly. But that is a result-driven decision rather than a manageable standard. An inescapable basis of

[3] Plaintiff and the trial court essentially argue that legislators were not qualified to vote on legislation because of how district lines for the districts in which they were elected had been drawn. (*See* R p. 191) ("Thus the unconstitutional racial gerrymander tainted the three-fifths majorities required . . . breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives."). But, because elections and qualifications of members of the Legislature are textually committed to the Legislature, this issue is beyond the Court's purview. Each house of the General Assembly, not the Court, "shall be the judge of the qualifications and elections of its own members[.]" N.C. Const. Art. II, Sec. 20. "[T]he judicial branch has determined that this power is exclusive, so the courts lack jurisdiction over such questions." Orth, *supra*, at 104 (citing *Alexander v. Pharr*, 179 N.C. 699, 103 S.E. 8 (1920)).

[4] In *Baker*, the Supreme Court acknowledged that, in certain circumstances (like if the enrolled statute lacked an effective date), a court could look at a legislature's records (like legislative journals) in order to preserve the enactment but noted judicial reluctance to inquire whether legislation complied with all requisite formalities. 369 U.S. at 214-15; *see also State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 48, 165 S.E.2d 201, 205–06 (1969) (examining certificates and legislative journals as conclusive evidence of proper enactment).

the trial court's decision was that the General Assembly lacked popular sovereignty due to redistricting violations. But the session laws at issue here were two of hundreds passed by the same Legislature. Why treat Session Laws 2018-119 and 2018-128 differently than other session laws? Plaintiff argues the session laws can be treated differently because the resulting constitutional amendments cannot be undone by the vote of the General Assembly. (*See* Appellee's Br. p. 25-26). Indeed, the ratification of the proposed amendments by voters in a statewide election cannot be undone by a future General Assembly alone, but a session law can. Arguably, that affirmative, statewide vote by the people provides a better reason for sustaining the constitutional amendments above other laws that were not able to be reviewed directly by the people. The people rejected two of the allegedly tainted amendment proposals from a supermajority of the Legislature, but numerous laws created by the same supermajority are allegedly not at issue.

That is because, here, Plaintiff argues that setting aside session laws should be limited to proposed constitutional amendments, but, to the federal court, Plaintiff argued that nearly every session law created by a veto override would be invalid, (Appellant's Appx pp.19-20). In its brief, Plaintiff argues that the General Assembly lacked popular sovereignty from the issuance of the Supreme Court's June 2017 mandate, (Appellee's Brief p 24), but also argues that "North Carolinians were governed for six years by an unconstitutional

body that did not reflect the will of the people," (Appellee's Br. p.11). The trial court found that the "General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty." (R p. 191.) But what could the General Assembly enact without popular sovereignty? How was popular sovereignty bestowed in the first place? The number of districts redrawn following the *Covington* decision exceeded 80 in the House and 35 in the Senate. (R. p. 184, 191). Are all legislators elected in districts that were redrawn usurpers or just the ones elected from the 28 districts found to be unconstitutional? Is popular sovereignty tainted if fewer than a majority of legislators come from tainted districts? The legislators from untouched districts would not constitute a majority (and certainly not a supermajority) of the General Assembly. Is the law still unconstitutional if enough untainted votes could have been cast in favor of the action?[5]

There are no manageable standards to determine the scope of popular sovereignty such that the concept is fully enveloped within the political question doctrine. *See Rucho*, 139 S. Ct. at 2505. (In determining how much

[5] In *NAACP v. Lewis*, Wake County Superior Court Case No. 18 CVS 2322, the three-judge panel's decision that four 2017 Wake County districts were unconstitutional due to mid-decade redistricting is now final, and Wake County districts (for which there are sitting legislators) have been redrawn for the next election.

partisanship is too much, "[t]he dissent's answer says it all: 'This much is too much.' That is not even trying to articulate a standard or rule.")

III. MEMBERS OF THE GENERAL ASSEMBLY ARE *DE JURE* OR *DE FACTO* OFFICERS, NOT USURPERS.

Assuming *arguendo* that the issues before the trial court were justiciable, which, for the reasons set forth above, Defendants dispute, the court erred in determining that members of the General Assembly were usurpers and that, therefore, the amendments are void. To support its argument that the General Assembly lacked popular sovereignty and could not propose amendments, Plaintiff attempts to set the Supreme Court's decision in *Covington*[6] (finding districts unconstitutional) as the point at which the General Assembly lost its *de facto* status under state law. But an examination of *Covington* and state law shows that the General Assembly never lacked the authority to pass the proposed constitutional amendments at issue.

As referenced above, in *Covington*, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), the District Court determined that 28 legislative districts violated the Equal Protection Clause; a decision that was summarily affirmed, 137 S. Ct. 2211. At the time of its decision, the District Court did not

[6] Notably, despite chastising Defendants for citing federal cases of relevance on a matter of state law, Plaintiff looks solely to a federal decision that did not interpret any state law on point to determine that redistricting violations affect legislative sovereignty. (*See* Appellant's Br. pp.11-14; 30-32.)

structure a remedy for the violation, and neither the District Court nor the Supreme Court enjoined the General Assembly from passing laws or held that the General Assembly lacked the popular sovereignty required to pass legislation. When the District Court later ordered a special election, that decision was appealed to the Supreme Court, which vacated the order and remanded the issue to the District Court for a more thorough review of what remedy was necessary. *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). Based on its own precedent, in vacating the District Court order for a special election, the Supreme Court presumably believed the existing General Assembly retained sovereignty. *See Baker*, 369 U.S. at 250 n. 5 (Douglas, J., concurring) ("a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act.").

On remand, the District Court opined that a redistricting violation "intrudes on popular sovereignty," *Covington*, 270 F. Supp. 3d at 897, because it violates the *republic principle* that the people should choose who governs them and that "the districting plans interfered with the very mechanism by which the people confer their sovereignty on the General Assembly," *id.* But, in referencing available remedies associated with districts found to violate the Equal Protection Clause, the District Court did not reference the ability to strike down laws of the state legislature (other than the districting laws at issue). *See id.* at 896. Instead, the District Court specifically recognized that

the legislators elected in 2016 would continue to govern, *id*. at 884; denied a special election, *id*. at 901; noted that no court had held legislators elected from improperly drawn districts could not pass legislation; and, found that the question of whether redistricting has an impact on the ability to govern is a question of state law, *id*. The trial court's February 2019 order was the first time a state court found against the *de facto* status of a state legislature.

Even though the trial court's order did little more than recite the *Covington* District Court's opinions on the subject, Plaintiff argues the order is supported by our state Constitution and common law on usurpers. That is not the case.

As discussed above, Plaintiff's reliance on Article I, Sections 2 and 3 of our State Constitution fails to provide necessary legal support for its position. Sections 2 and 3 of Article I contain abstract principles of popular sovereignty resting in the people, which provide a foundation for government but do not provide distinct, justiciable rights enforceable by the courts. Plaintiff also argues that Article I, Section 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty,") directly supports striking the legislation in question. Section 35 "is a salutary reminder that commentaries of all sorts, whether in judicial opinions or in academic treatises, no matter how helpful in explicating particular texts, are no substitute for the originals." Orth, *supra*, at 91. The plain text of Section

35, even when read with the other cited provisions of the Constitution, provides no support for Plaintiff's position that the General Assembly lacked authority to pass the challenged session laws.

North Carolina's common law—none of which was cited by the trial court—does not support the trial court's decision either. Plaintiff cites *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891) to support its argument that the General Assembly was a usurper legislature at the time the session laws in question were passed. In *Van Amringe*, an individual employed as a clerk to assist the registrar obtained the county registers on false pretenses and tried to hold himself out as the registrar on election day, all while the actual appointed registrar was demanding the books back and openly challenging the circumstances. *Id.* The Supreme Court noted the difference between a usurper (one who takes possession without any authority and whose acts are utterly void) and one with *de facto* authority (one who goes in under color of authority). *Id.* Later decisions by the Supreme Court cite *Van Amringe* for the proposition that "[a] usurper is one who undertakes to act officially without any actual or apparent authority. Since he is not an officer at all for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding." *In re Wingler*, 231 N.C. 560, 564, 58 S.E.2d 372, 375 (1950).

The General Assembly sitting in 2018 was not like the usurper registrar in *Van Arminge*. The members of the General Assembly were elected in 2016

before a final judgment regarding the validity or constitutionality of the districts from which they were elected; they were sworn into office; they served continually and openly; and they were recognized as members of the General Assembly until their terms expired at the end of 2018. *See* N.C. Gen. Stat. § 128-6 ("Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."); *see also Alexander*, 179 N.C. at 699.

If members of the General Assembly were usurpers, who were the rightful members? Under Plaintiff's theory, there were none; there were no other duly-elected legislators claiming that intruders had taken their seats. As such, the members of the General Assembly had at a minimum *de facto* status.

Neither Plaintiff nor the trial court attempts to argue that the General Assembly was not validly created in the Constitution; it is undisputed that there are legally existing offices to be filled within the General Assembly. Case law establishes that a *de facto* officer is one who has a supportable claim to a *de jure* office. *Compare Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313, 316 (1951) (act establishing joint city-county board deemed unconstitutional such that it created no *de jure* or *de facto* board) *with Smith v. Town of Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (although right to elect commissioners was

improperly limited to landowners, those elected were *de facto* members, and their acts entitled to the force of law).

Thus, the members of the General Assembly are either *de jure* or *de facto* officers who were elected as members of the constitutionally-created state legislature. Either way, at the time the challenged session laws were passed, they had not lost the authority to pass such laws. *See, e.g., United States v. Home Insurance Co.*, 89 U.S. 99 (1874) (analyzing the Georgia legislature following secession from the Union and holding "If not a legislature of the State *de jure*, it was at least a legislature *de facto*. It was the only lawmaking body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States.").

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's denial of Defendants' motion to dismiss on justiciability, or, in the alternative, reverse the trial court's judgment in favor of Plaintiff on summary judgment.

Respectfully submitted, this the 26th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Defendant-Appellants certifies that the foregoing reply brief, which is prepared using a proportional font, is no more than 3,750 words (excluding covers, captions, indexes, table of authorities, certificates of service, this certificate of compliance, counsels' signature block, and appendices), including footnotes and citations, as reported by the word-processing software.

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The undersigned hereby certifies that a true and correct copy of the foregoing Defendant-Appellants' Brief was served upon the persons indicated below via electronic mail and United States Mail, postage prepaid, addressed as follows:

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