IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE,	)	
Plaintiffs,	)	
v.	)	1:13CV949
PATRICK MCCRORY, in his capacity as Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, and JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,	)	
Defendants.	)	

MEMORANDUM ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Stay, Defer, or Abstain (Doc. Nos. 18, 43). Plaintiffs are North Carolina voters seeking declaratory and injunctive relief on the ground that two of the State's congressional districts are the result of racial gerrymandering in violation of the Equal Protection Clause. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials presently before the Court, and argument would not aid in our decision. See M.D. Loc. R. 7.3(c). For the reasons discussed below, both motions are DENIED WITHOUT PREJUDICE.

I.

The North Carolina congressional districts at issue — Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12") — were redrawn in 1997 following litigation in the United States Supreme Court challenging both districts as illegal racial gerrymanders.[1] See Shaw v. Hunt, 517 U.S. 899 (1996) ("Shaw II"); Shaw v. Reno, 509 U.S. 630 (1993) ("Shaw I"). Neither district was redrawn as a majority African-American district, that is, one in which African-Americans constitute more than 50 percent of the population, and both districts survived subsequent constitutional challenges. See Easley v. Cromartie, 532 U.S. 234 (2001) ("Cromartie II"); Hunt v. Cromartie, 526 U.S. 541 (1999) ("Cromartie I"). North Carolina again redrew CD 1 and CD 12 after the 2000 Census, and although the State increased the Black Voting Age Population ("BVAP") of both districts, neither became a majority African-American district. However, the districts were again redrawn after the 2010 Census, in 2011, and CD 1 and CD 12 are now both majority African-American districts by voting age population.

Plaintiffs have sued Governor Patrick McCrory in his official capacity, the North Carolina State Board of Elections,

[1] The facts and legal conclusions contained herein are found based on this preliminary record, without prejudice to the parties' presentation of such facts and argument as may be appropriate following discovery and further briefing.

and its Chairman, Joshua Howard, in his official capacity, asserting that North Carolina has "packed" African-American voters into CD 1 and CD 12, that race was the predominant factor in the redistricting plan, and that Defendants had no compelling interest in doing so. In support of their claims, Plaintiffs cite, inter alia: statements from the officials responsible for developing the redistricting plan about their purpose in redrawing the districts; the unusual geographic shape of the districts; and the fact that African-American voters consistently had been able to elect their preferred candidate even when CD 1 and CD 12 were not majority African-American districts. In response, Defendants argue that they redrew CD 1 not on the basis of race, but rather because CD 1 was under-populated and because they sought to avoid liability under Sections 2 and 5 of the Voting Rights Act[2] by redrawing CD 1 as a majority African-American district. With respect to CD 12, Defendants argue that they redrew the district boundaries in

[2] Section 2 prohibits any voting practices that "result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color," or membership in a particular language group. 42 U.S.C. § 1973(a). Section 5 requires covered jurisdictions to obtain preclearance before changing their districting plans, granting preclearance only when the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." Riley v. Kennedy, 553 U.S. 406, 412 (2008). Recently, the Supreme Court struck down the formula used to determine which jurisdictions are covered as unconstitutional, but without holding that Section 5 itself is unconstitutional. See Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).

order to obtain a partisan advantage by making the surrounding districts more competitive for Republican candidates, and also to avoid liability under Section 5 of the Voting Rights Act.

In a separate state court action, Margaret Dickson and the North Carolina National Association for the Advancement of Colored People ("NAACP") have also challenged the constitutionality of the 2011 redistricting plan, including a challenge to CD 1 and CD 12. Dickson v. Rucho, Nos. 11CVS 16896, 11 CVS 16940, 2013 WL 3376658 (N.C. Sup. 2013). On July 8, 2013, the North Carolina trial court upheld the 2011 redistricting plan, finding that the State had a strong evidentiary basis to conclude that it was reasonably necessary to redraw CD 1 as it did in order to avoid liability under the Voting Rights Act, and that the district was narrowly tailored to this purpose. The court also found that the State's predominant motive in redrawing CD 12 was to establish a Democratic stronghold and that race was not a predominant factor. Dickson and the North Carolina NAACP appealed the trial court's ruling, and the North Carolina Supreme Court heard oral argument on January 6, 2014. As of the present date, the North Carolina Supreme Court has yet to rule.

Plaintiffs in this matter seek a preliminary injunction enjoining Defendants from holding elections under the 2011 redistricting plan, whereas Defendants urge the Court to stay,

defer, or abstain in light of the pending appeal before the North Carolina Supreme Court.

II.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008) (internal citations omitted). "[I]njunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Id. (internal citations omitted). See Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991) ("Federal decisions have uniformly characterized the grant of interim relief as an extraordinary remedy involving the exercise of a very far-reaching power which is to be applied 'only in [the] limited circumstances' which clearly demand it.")

We review a state's redistricting plan under strict scrutiny if the plaintiff shows "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

particular district." Miller v. Johnson, 515 U.S. 900, 916 (1995). "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id. We otherwise review the state's redistricting plan under rational basis review. If the plaintiff meets the burden for strict scrutiny, however, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." Id. at 920. When the state maintains that its race-based districting plan was done in order to achieve its interest in complying with federal anti-discrimination laws, the state must establish that it has a "strong basis in evidence . . . for concluding that creation of a majority-minority district is reasonably necessary to comply with [the Voting Rights Act], and the districting that is based on race substantially addresses the [Voting Rights Act] violation." Bush v. Vera, 116 S.Ct. 1941, 1960 (1996) (internal quotation marks and citations omitted).

Plaintiffs have marshaled both circumstantial and direct evidence that race was the predominant factor in North Carolina's redistricting plan, but "courts [are required] to exercise extraordinary caution in adjudicating claims that a

State has drawn district lines on the basis of race" in light of "the sensitive nature of redistricting," "the presumption of good faith that must be accorded to legislative enactments," and the fact that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." Miller, 515 U.S. at 916. Assuming, without deciding, that strict scrutiny applies, Plaintiffs' burden in establishing a likelihood of success on the merits is made heavier by the evidentiary support for Defendants' claim that they reasonably feared that failing to redraw CD 1 and CD 12 as majority-minority districts would subject the State to liability under the Voting Rights Act, coupled with the race-neutral interests of addressing under-population and obtaining partisan advantage.

Plaintiffs have articulated the harms that they will likely suffer in the absence of preliminary relief should the Court ultimately find that they prevail on the merits. However, this factor must also be weighed against the harms to Defendants upon the issuance of an order enjoining them from proceeding with the upcoming elections under the present districting plan, along with the public's interest in having elections proceed in a timely manner with minimal voter confusion. Plaintiffs' burden is quite a heavy one, and weighing all four of the factors considered when granting or denying preliminary relief, the Court finds that Plaintiffs have failed to make the clear

showing required for this extraordinary remedy. Accordingly, Plaintiffs' motion is denied without prejudice.

III.

Defendants ask us to stay, defer, or abstain from this action because of parallel state litigation. They argue that the state case presents substantially similar claims as the instant case, and that the plaintiffs should not be permitted a "second bite at the apple" by litigating in federal court. Defendants' primary argument for a stay or deferral derives from Scott v. Germano, 381 U.S. 407 (1965), and Growe v. Emison, 507 U.S. 25, 34 (1993). They also seek abstention under Younger v. Harris, 401 U.S. 37 (1971), or Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

Ordinarily, federal courts, when possessed of jurisdiction, should not refrain from exercising that jurisdiction. See Sprint Communications v. Jacobs, 134 S. Ct. 584, 590-91 (2013). However, in Germano, the Supreme Court observed that "the power of the judiciary of a state to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the states in such cases has been specifically encouraged." 381 U.S. at 409. In Growe, the Court reiterated that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state

reapportionment nor permit federal litigation to be used to impede it." 507 U.S. at 34; see also Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.").

In light of the Supreme Court's pronouncements on this subject, we acknowledge that stays or deferrals of federal litigation are often appropriate when the state – through either its legislature or its judiciary – is contemporaneously engaged in the process of redrawing its congressional map. However, it is not entirely clear that Growe requires us to defer to a pending state court case that is merely reviewing the validity of a current map, as opposed to actually redrawing a map that has already been deemed invalid. See Growe, 507 U.S. at 27-32 (reversing the district court's decision to enjoin a state court engaged in the process of redrawing the state's map). But see Rice v. Smith, 988 F. Supp. 1437, 1438 (M.D. Ala. 1997) (dismissing federal case where review of a challenge to a state map was pending before the state's highest court). In any event, we need not decide this question today because we are not convinced that the North Carolina Supreme Court will issue a decision in the state litigation in a timely manner. See Growe, 507 U.S. at 34 (noting deferral is not required when the state

fails to undertake its redistricting duty in a timely fashion). Given this concern, we are not constrained to stay our hand under Growe, and we decline to exercise our discretion to do so. Accordingly, we will deny the motion without prejudice.

Defendants' alternative arguments for abstention under Younger, which ordinarily only applies in the criminal context, and under Colorado River, which requires exceptional circumstances, have been considered and are deemed meritless. We therefore will deny Defendants' motion on those grounds as well.

IV.

For the aforementioned reasons, it is therefore ordered that Plaintiffs' Motion for Preliminary Injunction (Doc. 18) is **DENIED WITHOUT PREJUDICE** and that Defendants' Motion to Stay, Defer, or Abstain (Doc. 43) is **DENIED WITHOUT PREJUDICE.**

This the 22nd day of May, 2014.

For the Court

/s/ William L. Osteen, Jr.
Chief United States District Judge