

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-00399**

SANDRA LITTLE COVINGTON, et al.,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, et al.,

Defendants.

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION TO STAY, DEFER, OR
ABSTAIN**

Defendants are asking this Court to abandon its responsibility to enforce Plaintiffs' rights protected by the United States Constitution simply because a similar lawsuit by different plaintiffs is pending in state court. For all of the reasons that follow, Defendants' Motion should be denied.

STATEMENT OF THE FACTS

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of State Senate and House districts enacted by the North Carolina General Assembly in 2011. None of the Plaintiffs in this case are parties to the previously-filed state case, which is currently pending at the North Carolina Supreme Court. *Dickson v. Rucho*, No. 201PA 12-3, 11-cvs-16896, 11-cvs-16940 (N.C.). Each individual plaintiff in this case asserts that his or personal right to equal protection under the laws is violated by assignment to a segregated election district.

A. Status of the State Court Proceeding

In November 2011, two sets of entirely different plaintiffs filed lawsuits in state court, challenging some of the same state legislative districts and several congressional districts that were challenged in this case. In 2013, after the 2012 elections, the trial court found that all but one legislative district challenged as a racial gerrymander in both *Dickson* and this case were subject to strict scrutiny but, as a matter of law, those gerrymandered districts survived strict scrutiny. The plaintiffs appealed, and eleven months after oral argument, and after the 2014 elections, the North Carolina Supreme Court assumed strict scrutiny applied and affirmed that the challenged districts passed strict scrutiny. The *Dickson* plaintiffs filed a petition for writ of certiorari to the United States Supreme Court seeking review.

On March 25, 2015, the United States Supreme Court issued its opinion in *Alabama Legislative Black Caucus v. Alabama*, ordering reconsideration of the plaintiffs' challenge to legislative districts that the Alabama legislature had drawn using "mechanical racial targets." 135 S. Ct. 1257, 1267. Rather than employing "a particular numerical minority percentage," the Court held legislators must consider "a minority's ability to elect a preferred candidate of choice." *Id.* at 1272. Thereafter, on April 20, 2015, the United States Supreme Court granted certiorari in the *Dickson* case, vacated the North Carolina Supreme Court's decision, and remanded for further proceedings in light of the Alabama case. The North Carolina Supreme Court heard arguments on remand on

August 31, 2015, and a decision is pending. The next potential opinion release date for the North Carolina Supreme Court is December 18, 2015.

B. Factual Basis of Plaintiffs' Claims in this Case

In response to the Supreme Court's ruling in *Alabama*, Plaintiffs in this case filed their Complaint in May 2015, alleging that Defendants here, as in *Alabama*, employed mechanical racial targets in creating the challenged districts in violation of the Constitution and gave no consideration to minority voters' demonstrated ability to elect their preferred candidates of choice in those districts. The challenged maps were drawn by Dr. Thomas Hofeller, an out-of-state consultant hired by the law firm for the legislature. (D.E. # 23-2, Ex A at 1896, 1903.). The chairs of the House and Senate redistricting committees orally gave their instructions to Dr. Hofeller, but the substance of those instructions was later reduced to writing in the form of public statements released by the chairs. (D.E. # 23-2, Ex. A at 1921-22; D.E. #23-3, Ex. B at 3078-79, 3184-85; D.E. #23-4, Ex. C at 2306.). Dr. Hofeller was instructed to draw House and Senate plans that would provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." (D.E. #23-5, Ex. D at 1216; D.E. #23-4, Ex. C, at 2363-64; D.E. # 23-3, Ex. B at 3087-89, 3167.) In order to meet this goal, the redistricting chairs told Dr. Hofeller to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so" and to draw the majority black districts in numbers proportional to the number of African-

American citizens in the state. (D.E. #23-4, Ex. C at 2451; D.E. # 23-3, Ex. B at 3087-89, 3167).

Partial maps containing what were described as “VRA districts” were drawn and released to the public first. Citizens from around the state testified at public redistricting hearings that the proposed VRA districts went beyond what was required by the Voting Rights Act. (D.E. # 23-18, Ex. Q). However, the districts remained mostly unchanged. No African-American Senator or Representative voted in favor of the plans that were eventually enacted by the General Assembly. On July 27, 2011 the General Assembly passed the State Senate Redistricting Plan, 2011 S.L. 404, and on July 28, 2011, the General Assembly passed the State House Redistricting Plan, 2011 S.L. 402.

On September 24, 2015, with litigation pending in state and federal court, the General Assembly enacted 2015 N.C. Sess. Laws 258, which moved up the primary elections for state legislative districts from May to March 15, 2015, and the opening of filing for those offices to December 1, 2015. The Governor signed this bill on September 30, 2015.

ARGUMENT

I. THIS COURT SHOULD NOT STAY FURTHER PROCEEDINGS

A. A three-judge panel in a similar redistricting case has already rejected Defendants’ arguments.

Defendants have unsuccessfully made these exact arguments in a similar case pending in this district. *Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C.), is a redistricting case involving Congressional Districts 1 and 12 that, like this case, was filed

after the state court case had been filed. Defendants twice filed the same motion to stay, defer, or abstain in that case, and they made the same arguments in support. The three-judge panel twice rejected their arguments and denied Defendants' motions. *See Harris* docket, 1:13-cv-949, at entries 43, 65, 105, and Minute Entry for 10/09/2015. In denying Defendants' first motion, the *Harris* panel observed that, ordinarily, federal courts should not refrain from exercising jurisdiction. (Order at *Harris* Dkt. 65 p. 8 (citing *Scott v. Germano*, 381 U.S. 407 (1965) and *Grove v. Emison*, 507 U.S. 25 (1993)) (copy attached as Appendix 1). The court found no requirement that a federal court “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.” *Id.* (emphasis in original). At the end of the day, the court remained unconvinced that the federal court's exercise of its jurisdiction to enforce federal rights should be put on hold while the North Carolina Supreme Court litigation was underway. *Id.* Later, Defendants' renewed motion was summarily denied by the *Harris* court without a written decision. (Copy of portion of *Harris* docket attached as Appendix 2). Because Defendants' arguments are identical to those in the *Harris* case, this Court should likewise deny Defendants' motion.

B. *Germano* and its progeny do not require this Court to stay, defer, or abstain from hearing this matter.

Defendants have presented the Court with no authority that requires this Court to abstain. None of the cases relied upon by Defendants require a Court to abstain simply because a parallel state case is proceeding. *Germano* and its progeny expressly recognize that “[o]f course federal courts and state courts often find themselves exercising

concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.*, dismiss the case before it) nor defer to the state proceedings (*i.e.*, withhold action until the state proceedings have concluded).” *Grove v. Emison*, 507 U.S. 25, 32 (1993). In *Grove*, the federal court actively prevented the state court from issuing a final remedy by enjoining enforcement of the state court’s orders. In contrast, Plaintiffs have not asked this Court to enjoin the state courts from deciding *Dickson*.

In fact, as the *Harris* court recognized, the limitations of the *Germano* cases only apply when a state court is itself drawing and enforcing a redistricting plan. *Grove* and *Germano* only require a federal court to defer when a state court is “actually drawing up and selecting a redistricting plan,” not when a state court is merely reviewing the same plan the federal court is reviewing. *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1180 (D. Colo. 2004) (interpreting *Grove*). “Once a plan has been duly adopted by state mechanisms, federal courts have authority equal to that of the state courts in evaluating that plan’s conformity with federal statutory and constitutional requirements[.]” *Id.* Similarly, the court in *Brown v. Kentucky*, Nos. 13-cv-68, 13-cv-25, 2013 U.S. Dist. LEXIS 90401, 2013 WL 3280003, at *12 (E.D. Ky. June 27, 2013) (copy attached as Appendix 3), held that “Supreme Court precedent...clearly permits the simultaneous operation of [state and federal] procedures to ensure constitutional legislative districts are in place in time for an election.” In *Brown*, while the Kentucky legislature struggled to enact a state legislative redistricting plan, a group of plaintiffs in federal court challenged

the state's legislative districts. *Id.* at *8-9. Concluding that deferral was not warranted, the court expressly distinguished *Grove*, noting that there the federal court adopted plans and permanently enjoined state interference with those plans, even though the state court had adopted its own map. *Id.* at *13. But in *Brown*, as here, there would be “no parallel state court proceeding that [the federal court] [was] taking affirmative steps to enjoin and overrule.” *Id.* at *15.

Defendants' reliance on *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997) is misplaced. There, the court dismissed the case “[b]ecause the State court [had] adjudicated the merits of [the same plaintiffs'] claims,” so “both res judicata and the *Rooker-Feldman* doctrine preclude this court's review of that decision.” *Id.* at 1440. Here, as discussed below, res judicata does not apply, and Defendants have advanced no argument under the *Rooker-Feldman* doctrine. Thus, Defendants have presented no authority requiring this Court to defer or abstain from determining this matter.

C. This Court has an obligation to decide matters involving Constitutional rights and voting rights.

This Court has an important role in deciding matters involving the federal Constitution. A primary responsibility of federal courts is to protect federal constitutional rights. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995); *United States v. Jefferson County Bd. of Education*, 372 F.2d 836, 873 (5th Cir. 1966). This case involves the protection of Plaintiffs' federal constitutional right to not be assigned to electoral districts based on the color of their skin. Abstention is the exception, not the rule. *See Badham v. United States Dist. Ct. for the Northern Dist. of Calif.*, 721 F.2d 1170, 1173

(9th Cir. 1983) (“The dangers posed by an abstention order are particularly evident in voting cases. . . . In a redistricting case such as this, for example, the courts’ failure to act before the next election forces voters to vote in an election which may be constitutionally defective.”). Given the important issues at stake, Defendants have shown no basis for this Court to defer or abstain.

II. YOUNGER ABSTENTION DOES NOT APPLY

Younger abstention would be inappropriate in this case. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that a federal court should abstain from exercising jurisdiction and interfering with a state *criminal* proceeding where three elements are met: (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; (2) that implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges. *Id.* at 51; *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). *Younger* generally applies to challenges that seek to interfere with state criminal or quasi-criminal proceedings but does not apply to federal judicial review of state legislative action. As the Supreme Court explained:

Although our concern for comity and federalism has led us to expand the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts’ ability to perform their judicial functions [*e.g.*, a] civil contempt order, it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action.

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 367-68 (1989) (internal citations omitted).

The Supreme Court recently reiterated the limitations of *Younger*, saying that it applies only “in three types of proceedings . . . criminal prosecutions . . . civil enforcement proceedings . . .” and cases “that implicate a State’s interest in enforcing the orders and judgments of its courts.” *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588, 591 (2013). “Divorced from [a] quasi-criminal context” the Court warned that *Younger* would extend to “virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest. That result is irreconcilable with our dominant instruction that, even in the presence of parallel state proceedings, abstention from the exercise of federal jurisdiction is the ‘exception, not the rule.’” *Id.* at 593 (quoting *Hawaii Housing Authority v. Midkiff*, , 467 U.S. 229, 236 (1984)). In fact, the three-judge panel in *Harris* agreed, holding that “Defendants’ alternative arguments for abstention under *Younger*, which ordinarily only applies in the criminal context...have been considered and are deemed meritless.” (Order at *Harris* Dkt. 65 p. 10). In this case, the state redistricting lawsuit is not criminal, quasi-criminal, or one dealing with the judiciary’s attempts to enforce its own power. Rather, it is precisely the kind of “proceeding reviewing legislative . . . action” that the Supreme Court warned was inappropriate for *Younger*. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368. Accordingly, this Court should not abstain from deciding this case under *Younger*.

III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

Defendants unabashedly argue this Court should defer proceeding in this case because one or more of the Plaintiffs “*may* be bound by the judgment in *Dickson* under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion).” (Defs’ Br. 12). First, Defendants are wrong that res judicata or claim preclusion applies to this case. Notably, Defendants do not list the elements of either doctrine. Under North Carolina law, collateral estoppel applies where in an earlier suit there was 1) a final judgment; 2) on the merits; 3) the issue in question was identical to an issue in the earlier suit; 4) that issue was actually and necessarily litigated; and 5) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier litigation. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552 (1986); *Sartin v. Macik*, 535 F.3d 284, 287-88 (4th Cir. 2008) (citing *McInnis*). Similarly, res judicata applies where a party can show 1) a final judgment; 2) on the merits; 3) the same cause of action is involved in both suits; and 4) the party against whom res judicata is asserted was a party, or was in privity with a party, to the earlier suit. *Id.*

Here, the parties are not the same as those in the *Dickson* case. Defendants argue without authority that if some Plaintiffs are members of organizations that were plaintiffs in *Dickson*, they may be bound. Importantly, they have offered no evidence of this alleged tenuous connection. Even if this Court could assume without factual basis that some Plaintiffs are members of organizations that were plaintiffs in *Dickson*, there is no

evidence in the record that the Plaintiffs here had any knowledge of, leadership role regarding, control over, or decision-making role in the state court litigation.

Under North Carolina law, “privity” does not mean, as Defendants apparently would have it, merely that one party’s interests are “align[ed] with and represented by,” a party to a separate litigation. (Defs’ Br. 13). “Privity is not established . . . from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts.” *State ex rel Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996); *see also Cnty. of Rutherford By & Through Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 394 S.E.2d 263, 266 (N.C. Ct. App. 1990) (no privity despite parties “interested in proving the same state of facts”). Thus, even if collateral estoppel or res judicata could apply, the elements would not be met in this case.

Second, Defendants cite no authority to support their contention that a court should defer considering a matter over which it has jurisdiction because one of these doctrines could *possibly* apply. Defendants have not shown that res judicata or collateral estoppel *does* apply; thus they have not made a sufficient showing that the case should be stayed. Third, even the potential application of one of these doctrines as to one or more plaintiffs in no way warrants deferral of the entire case. At most, assuming without conceding the applicability of res judicata or collateral estoppel, these doctrines would only affect those specific plaintiffs and the districts in which they live. Defendants have no grounds to argue the entire case should be stayed because res judicata or collateral

estoppel might apply to some plaintiffs. Indeed, Defendants have shown no basis whatsoever for this case to be stayed.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Stay, Defer, or Abstain with prejudice.

Respectfully submitted, this the 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, DEFER, OR ABSTAIN**, with service to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

This the 17th day of November, 2015.

/s/ Edwin M. Speas, Jr.
Edwin M. Speas, Jr.