

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION
Civil Action No. 1:13-CV-00949

DAVID HARRIS, CHRISTINE)
BOWSER, and SAMUEL LOVE,)
))
Plaintiffs,)
))
v.)
))
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.)

**REPLY MEMORANDUM IN
FURTHER SUPPORT OF
DEFENDANTS’ MOTION TO STAY,
DEFER, OR ABSTAIN**

ARGUMENT

I. The deferral doctrine outlined in *Germano* and *Growe* is not limited to situations in which the state court invalidates maps drawn by the state legislature

In their Memorandum in Opposition to Defendants’ Motion to Stay, Defer, or Abstain, Plaintiffs contend that because the three-judge panel in the *State Redistricting Cases* dismissed the same claims they seek to bring here regarding the First and Twelfth Districts and the North Carolina Supreme Court has not yet ruled on an appeal of their dismissal, deferral to the North Carolina state courts under *Germano* and *Growe* is improper. (See D.E. 47, pp.1-2, 9-11.) In other words, according to Plaintiffs, unless the challenger of a redistricting plan prevails in state court, *Germano* and *Growe* do not apply. These decisions do not support such a contention.

To the contrary, in *Germano*, the United States Supreme Court specifically stated that “[t]he 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. 407, 409 (1965). While Plaintiffs are correct that in *Germano* the Illinois Supreme Court found that the districts at issue there were invalid, the Court never held that such a finding by the state court was required before a federal court must “stay[] its hand” to permit a state to first address a redistricting dispute. *Id.*

Similarly, in *Grove*, the United States Supreme Court announced that “[t]oday we renew our adherence to the principles expressed in *Germano*, which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.” 507 U.S. 25, 34 (1993). The *Grove* Court further stated that “[i]n the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch has begun to address that highly political task itself.” *Id.* at 33. Or, in the words of one federal court, “in the reapportionment context, when parallel State proceedings exist, the decision to refrain from hearing the litigant’s claims should be the routine course.” *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (citations omitted). Nothing in *Germano* or *Grove* requires a state court to have invalidated a contested redistricting plan before deferral to pending state court proceedings is appropriate.

Plaintiffs argue that deferral is not warranted under *Germano* and *Grove* here because the State of North Carolina has not acted in a “timely” manner to adopt a redistricting plan for the 2014 elections and urge that “time is running out to remedy the congressional redistricting before the next election.” (D.E. 47, p. 6.) In support of this argument, Plaintiffs complain that “no order has been issued staying the 2014 elections or adopting an interim map while the legality of the redistricting plan is being decided.” (*Id.*) But Plaintiffs have not cited a single case in which a court has preliminarily enjoined an election on the ground that the district was a racial gerrymander as the Plaintiffs claim here with respect to the First and Twelfth Districts. The lack of any such authority further supports Defendants’ request to stay or defer proceedings in this matter until the *State Redistricting Cases* are resolved.

Additionally, the same districts Plaintiffs seek to challenge in this action were precleared by the United States Department of Justice (“USDOJ”) after they were enacted by the North Carolina General Assembly in 2011 and have already been used in the 2012 elections. These circumstances alone are enough to distinguish the two cases cited by Plaintiffs in support of their position that deferral under *Germano* and *Grove* is not appropriate here. Plaintiffs rely upon the United States Supreme Court’s decision in *Harmon v. Forssenius*, 380 U.S. 528 (1965), handed down about six weeks before *Germano*, for the blanket proposition that “deferral is inappropriate” in cases where “the right to vote is at stake.” (D.E. 47, p. 11.) If Plaintiffs’ sweeping contention that deferral is never appropriate in voting rights cases were accurate, it is difficult to see how the

United States Supreme Court could have later endorsed deferral in redistricting matters as it did in *Germano* and *Grove*.

In *Harmon*, the court was confronted with two federal challenges to a Virginia statute that required Virginia citizens to pay a poll tax or file a witnessed or notarized certificate of residence to vote in federal elections. 380 U.S. at 529. The challenges were brought following ratification of the Twenty-Fourth Amendment to the United States Constitution that prohibits the use of any poll tax in federal elections. *Id.* at 529-30. The *Harmon* Court affirmed the Virginia federal court's refusal to stay proceedings in the case "until the courts of Virginia had been afforded a reasonable opportunity to pass on underlying issues of state law and to construe the statute involved." *Id.* at 534. The Court found that "[g]iven the importance and immediacy of the problem, and the delay inherent in referring questions of state law to state tribunals, it is evident the District Court did not abuse its discretion in refusing to abstain." *Id.* at 537. Critically, in *Harmon*, there were no pending state court actions challenging the statute at issue as is the case here. Moreover, the federal court plaintiffs in *Harmon* challenging the Virginia law sought to enjoin its use in the 1964 elections, the first elections to occur following the ratification of the Twenty-Fourth Amendment in January 1964.

As discussed below, however, the Plaintiffs in this action have not moved with such expediency—the districts at issue here have already been used in one election cycle before this suit was filed. Further, if the Court permits this action to move forward, it is difficult to understand how this Court would have an opportunity to consider and rule on the issues Plaintiffs have raised with respect to the First and Twelfth Districts before the

North Carolina Supreme Court issues its decision in the *State Redistricting Cases* since briefing and oral argument on the same issues was completed in those cases in January.¹

Plaintiffs also repeatedly cite *Branch v. Smith*, 538 U.S. 254 (2003) to support their argument that deferral is inappropriate here. In *Branch*, the United States Supreme Court held that a federal district court did not violate the principles of deference to state legislatures and state courts in the redistricting process required by *Grove* when the court adopted its own congressional districts for the state of Mississippi and enjoined the use of any plans drawn by the Mississippi state legislature or state courts. The Court in *Branch* found that the federal district court's intervention was appropriate in that case because the Mississippi state legislature failed to pass any new congressional redistricting plan after the 2000 census results were announced and, unlike the congressional plans challenged here, a congressional plan issued by a Mississippi state court had not been precleared and could not be precleared as required by the VRA in time for the 2002 election, the first election following the 2000 census. Thus, in these limited circumstances involving non-precleared districts, voters in Mississippi would not have *any* elections for Congress absent intervention by a federal court.

Here, Plaintiffs did not file this suit until October 24, 2013, nearly two years after the plans they challenge were enacted and precleared, nearly a year after the plans were

¹ Further, the harm to an ongoing election cycle resulting from an injunction against a poll tax is dramatically different than the consequences of the preliminary injunction sought by Plaintiffs. Not enforcing a poll tax does not otherwise disrupt the election cycle. Here, however, Plaintiffs seek to enjoin and change electoral districts when campaigns for these districts are already in progress. Candidates are already raising money, filing notices of candidacy, and spending money to communicate with voters in districts that are already established and known to both the voters and the candidates.

first used to elect members of the United States House of Representatives to the First and Twelfth Districts, and three months after a three-judge state court panel entered an order rejecting the very legal theories they purport to use to challenge these districts here. (D.E. 1.) Plaintiffs' procrastination in seeking relief from this Court does not warrant ignoring the key constitutional principle of federalism underpinning the United States Supreme Court's decisions in *Germano* and *Grove*: that state legislatures and state courts must be permitted an opportunity to adopt, evaluate, and, if necessary, correct any problems with the congressional and legislative districts within their borders before federal courts become involved. *See Grove*, 507 U.S. at 34 (“[T]he doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment.”). Indeed, “[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.” *Id.*

Plaintiffs cannot credibly contend that the North Carolina General Assembly failed to timely implement districts following the 2010 census or to have those districts precleared by the USDOJ and ready for use in the election cycle immediately following the census. Though they may disagree with the decision of the three-judge panel in the *State Redistricting Cases*, they also cannot credibly contend that the North Carolina courts have failed to timely weigh challenges to the First and Twelfth districts under the United States Constitution or the VRA. Were that the case, Plaintiffs should have filed this suit after the plans were enacted in July 2011 and well before the 2012 elections. Permitting this case to move forward here without allowing the North Carolina Supreme

Court to first issue its decision in the pending *State Redistricting Cases* is tantamount to granting an injunction or finding proposed districts being considered by the General Assembly invalid before they are enacted.

In addition, it is too late to enjoin the use of the plans at issue here for the First and Twelfth Districts and, in any event, Plaintiffs cannot show a likelihood of success on the merits of their claims in this action. (See D.E. 29, 41-1, and 50.) Plaintiffs' opposition to Defendants' motion repeats several critical mischaracterizations of fact and law. For example, Plaintiffs contend that the First and Twelfth Districts "have elected the candidate of choice for African-Americans in every Congressional election for 20 years" due to "White cross-over support for minority-preferred candidates." However, with the exception of the version of the Twelfth District used in the 1998 election, neither the First nor the Twelfth District has been a "majority white district." Accordingly, contrary to Plaintiffs' assertions, there was no "white majority" in either district that could engage in bloc voting to defeat the minority candidate of choice. (See D.E. 29, pp. 13-14.)

Plaintiffs contend that the First District has now become an illegal racial gerrymander because the current version of that district has a Total Black Voting Age Population ("TBVAP") that is less than 4 percentage points higher than the 2011 version of the district, even though the increase in TBVAP was required by the United States Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). Plaintiffs' objection to the Twelfth District is based in part upon their expert's conclusion that race better explains the shape of the district than party registration even though the United States Supreme Court has twice previously rejected the very same test used by

Plaintiffs' expert with respect to Twelfth District. (See D.E. 29, pp. 10-12.) Plaintiffs are asking the Court to enjoin all congressional elections in the state under these implausible theories while failing to cite a single case in which another court has granted a preliminary injunction based upon a theory of alleged racial gerrymandering. The lack of fact and law to support Plaintiffs' claims and request for injunctive relief further weighs in favor of deferring further action here until the *State Redistricting Cases* are resolved.

II. Both *Younger* and *Colorado River* provide additional grounds for this Court to stay, defer, or abstain from further proceedings in this action

In addition to *Germano* and *Grove*, the principles outlined in *Younger* and *Colorado River* provide the Court with additional grounds to stay, defer, or abstain from further proceedings in this action until the *State Redistricting Cases* are resolved. Plaintiffs contend that *Younger* is inapplicable because the class of cases to which *Younger* applies was narrowed by the United States Supreme Court's recent decision in *Sprint Commc'ns, Inc. v. Jacobs*, 134 S.Ct. 584 (2013). While *Jacobs* clarified that *Younger* applies in only three "exceptional" categories of cases, one such category of cases are "civil proceedings involving certain orders . . . uniquely in furtherance of state courts' ability to perform their judicial functions." *Id.* at 591 (citation omitted). While the *Jacobs* Court did not address whether redistricting actions fall within this or any other category of cases to which *Younger* may apply, the declaratory and injunctive relief Plaintiffs are seeking here—the implementation of new Congressional maps for the 2014 elections—if granted, would directly interfere with the pending *State Redistricting Cases* because the plaintiffs in those cases are seeking the same relief from the North Carolina

state courts even though the State of North Carolina can only have one set of congressional districts. *See Growe*, 507 U.S. at 35.

Even if *Younger* does not apply here following *Jacobs* as Plaintiffs contend, the unique procedural posture and strong state interests in the redistricting process only further underscore why this action presents the “exceptional circumstances” warranting a stay or abstention under *Colorado River*. Plaintiffs contend *Colorado River* is inapplicable because “this case is not parallel to the state redistricting proceedings” since the parties in the *State Redistricting Cases* and this action are not “almost identical.”² (D.E. 47, p. 17.) While Plaintiffs quote language from two Fourth Circuit cases in support of this proposition, neither case involves a redistricting dispute or other matter in which parties to a federal lawsuit are seeking the same declaratory and injunctive relief as parties to a pending state court action. Because the Plaintiffs here are seeking and will either receive or be denied the same “relief” as the plaintiffs in the *State Redistricting Cases*, the fact that the Plaintiffs here are nominally different from the plaintiffs in the *State Redistricting Cases* does not mean that these proceedings are not “parallel” for purposes of the *Colorado River* doctrine.

Plaintiffs also contend that this case does not present the “exceptional circumstances” required for this Court to stay further proceedings under *Colorado River* pending resolution of the *State Redistricting Cases*. Plaintiffs’ arguments regarding the

² In their Opposition to Defendants’ motion, Plaintiffs do not address whether any of them are members of any of the Organizational Plaintiffs named in the *State Redistricting Cases*. If so, they may be bound by the judgment of the North Carolina Supreme Court in the *State Redistricting Cases*. *See Warth v. Seldin*, 422 U.S. 490, 511 (1975).

factors courts must consider only further shows why *Colorado River* applies here. Plaintiffs first argue that the facts that “[t]his matter does not involve real property or in rem jurisdiction” and they “do not allege that the federal forum is any less convenient than the state forum” weighs against abstention. The Fourth Circuit addressed the same circumstances in *Sto Corp. v. Lancaster Homes, Inc.* and found that the absence of these two factors did not prevent application of *Colorado River* because “a decision to abstain does not require the presence of all of the factors. Instead, the factors are to be applied ‘in a pragmatic, flexible manner with a view to the realities of the case at hand.’” 11 Fed. App’x 182, 187 (4th Cir. 2001) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 2 (1983)).

In view of that directive, the remaining factors weigh heavily in favor of a stay or abstention. This action was filed nearly two years after the *State Redistricting Cases* that involve the same issues raised by Plaintiffs here that have already been fully briefed and argued in January before the North Carolina Supreme Court. No credible argument can be made that “more progress” has been made in this action than in the *State Redistricting Cases*. Further, because any aggrieved party in the *State Redistricting Cases* can appeal to the United States Supreme Court which may then issue a decision that would be binding on this Court, the possibility of piecemeal litigation is significant here. Finally, other than the fact that the North Carolina states courts have, thus far, disagreed with Plaintiffs’ position on the legality of the First and Twelfth Districts, Plaintiffs have failed to show how the North Carolina courts are incapable of weighing the same claims with respect to these districts that they seek to bring here.

This the 26th day of February, 2014.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Reply Memorandum of Law in Further Support of Defendants' Motion to Stay, Defer, or Abstain** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

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This the 26th day of February, 2014.

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