

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

DAVID HARRIS and CHRISTINE)
BOWSER,)
)
Plaintiffs,)
)
v.)
)
PATRICK MCCRORY, in his capacity)
as Governor of North Carolina; NORTH)
CAROLINA STATE BOARD OF)
ELECTIONS; and A. GRANT)
WHITNEY, JR., in his capacity as)
Chairman of the North Carolina State)
Board of Elections,)
)
Defendants.)

**DEFENDANTS’ EMERGENCY MOTION TO STAY FINAL JUDGMENT AND
TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW**

Defendants respectfully move this Court to stay its Final Judgment ordering the North Carolina General Assembly to redraw a new congressional plan by February 19, 2016 and enjoining the State from conducting any elections for the office of U.S. House of Representatives until a new redistricting plan is in place. [D.E. 143] Because of the exigent nature of the circumstances, including that the 2016 primary election is already underway, and that the North Carolina General Assembly is not currently in session, Defendants request a ruling on this motion today so that Defendants can immediately seek relief in the United States Supreme Court if necessary. In support of this motion, Defendants show the Court:

1. On July 28, 2011, following the 2010 Census, the North Carolina General Assembly enacted a congressional district plan (the “Enacted Plan”) for North Carolina. *See* Session Law 2011-403 (July 28, 2011) *as amended by* Session Law 2011-414 (Nov. 7, 2011)). The Enacted Plan has already been used in two previous election cycles.

2. After the Enacted Plan became law, two groups of plaintiffs, including the North Carolina State Conference of the NAACP—a group of which both Plaintiffs here are members—challenged the Enacted Plan under the same legal theory asserted by the Plaintiffs here. *See Dickson v. Rucho*, Nos. 11 CVS 16896 and 11 CVS 16940 (consolidated) (July 8, 2013) (“*Dickson*”). A three-judge panel unanimously rejected the *Dickson* plaintiffs’ claims and the North Carolina Supreme Court twice affirmed the panel’s decision, most recently on December 18, 2015. *See Dickson v. Rucho*, ___ S.E.2d ___, 2015 WL 9261836, at *38 (N.C. Dec. 18, 2015). The *Dickson* Plaintiffs have filed a petition for rehearing with the North Carolina Supreme Court which remains pending. If the petition for rehearing is denied, the *Dickson* Plaintiffs will then have 90 days to file a petition for writ of certiorari with the United States Supreme Court. Rule 13(3), U.S. S.Ct.

3. Candidate filing for the 2016 Elections Cycle, including the districts in the Enacted Plan, ran from noon on December 1, 2015, to noon on December 21, 2015 and elections officials began moving forward with the process of preparing for the primary election which is scheduled to occur on Tuesday, March 15, 2016. On January 18, 2016, county elections officials began issuing mail-in absentee ballots to civilian voters and those qualifying under the Uniformed and Overseas Citizens Absentee Voting Act

("UOCAVA"), which requires transmittal of ballots no later than 45 days before an election for a federal office. State Board of Elections data indicates that county elections officials have mailed 8,621 ballots to voters, 903 of whom are located outside the United States. Hundreds of those ballots have already been voted and returned.

4. Along with this Motion, Defendants have filed with this Court a Notice of Appeal to the United States Supreme Court of this Court's Order Addressing Objections [D.E. 141], Memorandum Opinion [D.E. 142], and Final Judgment [D.E. 143]. Because voting has already started in North Carolina, unless it is stayed, this Court's order requiring the General Assembly to redraw a congressional plan by February 19, 2016 and enjoining the State from conducting any elections for the office of U.S. House of Representatives until a new redistricting plan is in place is likely to cause significant voter confusion and irreparable harm to the citizens of North Carolina and the election process that is already underway. Particulars of the harm that will be caused to North Carolina's citizens and election process absent a stay are set forth in detail in the Declaration of Kimberly Westbrook Strach, which is attached to this Motion as Exhibit 1.

5. Given that two different three-judge panels have reviewed substantially the same record yet reached opposite conclusion on the merits of the same claims involving the same congressional districts and because Defendants are entitled to an appeal as of right to the United States Supreme Court of this Court's Final Judgment and related orders, this Court should stay its Final Judgment and modify the injunction contained within it to allow North Carolina to proceed with conducting elections for the U.S. House of Representatives under the Enacted Plan until the United States Supreme Court has an

opportunity to rule upon the legality of the two congressional districts at issue in this action.

6. While Defendants believe this Court's Judgment will be reversed by the United States Supreme Court on appeal, mandatory injunctions of statewide election laws, including redistricting plans, issued by lower courts at the later stages of an election cycle have consistently been stayed. *See, e.g., Hunt v. Cromartie*, 529 U. S. 1014 (2000); *Voinovich v. Quilter*, 503 U.S. 979 (1992); *Wetherell v. DeGrandy*, 505 U.S. 1232 (1992); *Louisiana v. Hays*, 512 U.S. 1273 (1994); *Miller v. Johnson*, 512 U.S. 1283 (1994). The United States Supreme Court has also affirmed decisions by lower courts to permit elections under plans declared unlawful because they were not invalidated until late in the election cycle. *Watkins v. Mabus*, 502 U.S. 952 (1991) (summarily affirming in relevant part *Watkins v. Mabus*, 771 F. Supp. 789, 801, 802-805 (S.D. Miss. 1991) (three judge court)); *Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976) (summarily affirming *Dixon v. Hassler*, 412 F. Supp. 1036, 1038 (W.D. Tenn. 1976) (three-judge court)); *Grove v. Emison*, 507 U.S. 25, 35 (1993) (noting that elections must often be held under a legislatively enacted plan prior to any appellate review of that plan).

WHEREFORE, the Court should stay its Final Judgment in this case pending Supreme Court review and modify the injunction contained within it to allow North Carolina to conduct the 2016 congressional elections under the Enacted Plan.

Respectfully submitted this 8th day of February, 2016.

NORTH CAROLINA DEPARTMENT OF
JUSTICE

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **DEFENDANTS' MOTION TO STAY FINAL JUDGMENT AND TO MODIFY INJUNCTION PENDING SUPREME COURT REVIEW** 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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*Local Rule 83.1
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This the 8th day of February, 2016.

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