IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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 JOSHUA HOWARD, in his capacity as Chairman of the North Carolina State Board of Elections,** **Defendants.**	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO STAY, DEFER, OR ABSTAIN**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs David Harris and Christine Bowser submit that Defendants' Renewed Motion to Stay, Defer, or Abstain ("Defendants' Renewed Motion") (Dkt. 105) should be denied. The motion is premised on the same flawed contention—that once a state has begun to address redistricting issues, a federal court must stand aside and allow the state to proceed, even if that would result in an election under an unconstitutional voting plan—that led to this Court's denial of the original Motion. It is no more persuasive in its warmed over iteration.

Decades of redistricting jurisprudence establish the principle that if a state fails to take timely action to fix an unconstitutional map, a federal court has an affirmative duty to step in and prevent an unlawful election. North Carolina is hurtling toward a primary election; the current filing deadline for candidates seeking nomination for a seat in the U.S. House of Representatives is in February 2016, just over four months after trial is set to begin, and the state is poised to radically *accelerate* even that deadline.[1] Yet the state courts have so far shown no indication that they will remedy the constitutional deficiencies that are the subject of this litigation prior to the rapidly-approaching 2016 elections. Though the North Carolina Supreme Court heard oral argument just over a

[1] On September 24, 2015, the General Assembly adopted legislation advancing the filing deadline to *December 21, 2015*, just over two months after the start of trial. H.B. 373, N.C. Gen. Ass., 2015-16 Sess. (Sept. 24, 2015), §§ 1.(b), 2.(a)-(b), *available at* http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H373v4.pdf. On September 25, 2015, the legislature presented the bill to the Governor for his signature. North Carolina General Assembly Bill Lookup, House Bill 373, *available at* http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015&BillID=h373&submitButton=Go (last visited Sept. 25, 2015). The bill would move the primary to March 15, 2016. H.B. 373, § 1.(b), 2.(a).

month ago, that same court took nearly 11 months—blowing past the 2014 primary *and* general elections—to issue a decision the first time around. Thus, there is strong evidence that the state courts will not act in advance of the impending election.

Moreover, even if there were evidence that the North Carolina Supreme Court would issue a timely decision, the Court should still deny Defendants' motion because it rests on their erroneous contention that the deferral doctrine established by *Scott v. Germano*, 381 U.S. 407 (1965), and *Growe v. Emison*, 507 U.S. 25 (1965), requires courts to defer to a 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. Dkt. 65, at 9. Neither *Germano* nor *Growe* impose any such requirement, as lower federal courts interpreting those two cases have recognized.

The stakes in this case are high. The North Carolina General Assembly packed African-Americans into Congressional Districts ("CDs") 1 and 12, based on a patently flawed understanding of the requirements of the Voting Rights Act. By sorting voters by race, the General Assembly converted CDs 1 and 12 into majority-minority districts, even though African-Americans had long been able to elect the candidates of their choice without being a majority in either district. The suggestion that the Voting Rights Act, of all things, would require racial sorting under such circumstances is as offensive as it is unsupported. There was, moreover, no compelling governmental interest for this race-based treatment of North Carolina citizens, and even if there had been, the General Assembly's packing of African-American into the districts plainly was not a narrowly

tailored use of race. Given the critical importance of the rights at stake in this litigation, this Court must act to prevent an election under an unconstitutional plan.

Plaintiffs respectfully submit that Defendants' Renewed Motion should be denied.

II. RELEVANT FACTS

A. The General Assembly's Racial Gerrymandering

From 1997 to 2011, CDs 1 and 12 were not majority-minority districts. They were first drawn in approximately their current form in 1992, and although they contained a sizable African-American population, the districts did not have a majority Black Voting Age Population ("BVAP"). *See* Declaration of John M. Devaney ("Devaney Decl. I"), Dkt. 18, Ex. 2, at Ex. 4-5. Nonetheless, as the result of white cross-over support for minority-preferred candidates, both districts have elected the candidate of choice for African-Americans in every Congressional election for two decades—without exception. *Id.*, at Ex. 2. The vast majority of those elections were not even close.

In 2011 the General Assembly began the process of redrawing the Congressional map in the wake of the 2010 Census. In the face of the long and unbroken history of electing African-American candidates, the Assembly abruptly decided to restructure CDs 1 and 12 as majority BVAP districts by manipulating the district boundaries to pull African-American voters *into* the two districts and draw white voters *out* of them. S.L. 2011-403. The officials responsible for the voting map publicly acknowledged that the districts were created with a mechanical numerical threshold in mind—to achieve a BVAP of over 50%—in a fundamentally misguided effort to comply with the Voting

Rights Act. *See id.*, Ex. 12, at 2-5. Not surprisingly, this mission was accomplished; the BVAP in CD 1 increased from 47.76% to 52.65%, and the BVAP in CD 12 increased from 43.77% to 50.66%. *See id.*, Exs. 19-20.

B. The State and Federal Challenges to the Racial Gerrymandering

Two sets of plaintiffs challenged the Congressional voting plan in state court for illegal racial gerrymandering. *See North Carolina Conference of Branches of the NAACP et al. v. State of North Carolina et al.*, 1st Amended Complaint (12/9/12), Dkt. 44, Ex. 1-2; *Dickson et al. v. Rucho et al.*, 1st Amended Complaint (12/12/12), Dkt. 44, Ex. 3-4. One set of plaintiffs included the North Carolina State Conference of Branches of the NAACP ("NC NAACP"). 1st Amended Complaint (12/9/12), Dkt. 44, Ex. 1-2. A three-judge panel consolidated the two cases.

The state court held a two-day bench trial on June 5-6, 2013. *See Dickson et al. v. Rucho et al.*, Judgment and Memorandum of Opinion ("State Court Opinion"), Dkt. 30, Ex. 1-2. On July 8, 2013, the court issued a decision denying the plaintiffs' pending motion for summary judgment and entering judgment for the defendants. *See id*. The court acknowledged that the General Assembly used race as the predominant factor in drawing CD 1—a conclusion that was compelled by the overwhelming evidence before it. Nonetheless, applying strict scrutiny, the court concluded that North Carolina had a compelling interest in avoiding liability under the VRA, and that the districts had been narrowly tailored to avoid that liability. With regard to CD 12, the court held that race

was not the driving factor in its creation, and therefore examined and upheld it under rational-basis review.

The state court plaintiffs appealed the ruling to the North Carolina Supreme Court. *See Dickson v. Rucho (Dickson I)*, No. 11-CVS-16940 (Plaintiffs' Notice of Appeal) (07/22/13). That court entertained oral argument on January 6, 2014, and rendered a decision nearly a year later, on December 19, 2014, affirming the trial court's judgment. *Dickson v. Rucho (Dickson II)*, 766 S.E.2d 238 (N.C. 2014).

The U.S. Supreme Court, however, granted certiorari, vacated the decision, and remanded the case to the North Carolina Supreme Court for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). In *Alabama*, the Court held that when a state employs a rigid mechanical numerical threshold to sort voters by race without analyzing voting behavior on a district-specific basis to determine whether African-American voters had the "ability to elect" their candidates of choice, such an approach constitutes "strong, perhaps overwhelming" evidence that race predominated—and is not narrowly tailored to achieve a compelling state interest. *Alabama*, 135 S. Ct. at 1271-72.

Following post-remand briefing, the North Carolina Supreme Court heard oral argument on August 31, 2015. To date, the North Carolina Supreme Court has not issued a decision, has not adopted an interim map, or otherwise taken steps to ensure a constitutional map is in place for the rapidly approaching 2016 primary election.

This case was filed in this Court on October 24, 2013. Dkt. 1. The lawsuit challenges the constitutionality of CD 1 and CD 12 under the Equal Protection Clause. Dkt. 1, ¶ 1. Plaintiffs David Harris and Christine Bowser are U.S. citizens registered to vote in either CD 1 or CD 12. Neither Plaintiff was involved in the state-court litigation.

C. The 2016 Primary Election is Rapidly Approaching

With no resolution in sight from the North Carolina Supreme Court, time is rapidly running out to remedy the congressional redistricting before the next election. The statutory filing period for candidates in North Carolina seeking a seat in the U.S. House of Representatives is February 9 through February 26, 2016, less than four months after trial is set to begin. N.C. Gen. Stat. § 163-106(c). The primary election is scheduled for May 3, 2016, and the general election is set for November 8, 2016. N.C. Gen. Stat. § 163-1.

All of these dates, moreover, are about to be highly *accelerated*. On September 24, 2015, the North Carolina General Assembly adopted House Bill 373. H.B. 373, N.C. Gen. Ass., 2015-16 Sess. (Sept. 24, 2015) (ratified bill presented to Governor for signature), §§ 1.(b), 2.(a)-(b), *available at* http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H373v4.pdf. The law would advance the filing deadline to *December 21, 2015*, just over two months after the start of trial, and would advance the primary to March 15, 2015. *See id*. § 2.(b).

III. ARGUMENT

A. The *Germano* Deferral Doctrine Permits This Court to Act to Prevent an Imminent Unconstitutional Election.

In seeking to delay these proceedings, Defendants rely primarily on the "*Germano* deferral" doctrine, which applies specifically to redistricting challenges. *See Growe*, 507 U.S. at 32 n.1 (interpreting *Germano*, 381 U.S. at 407). But Defendants fundamentally misread and misapply the doctrine. *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)." *Growe*, 507 U.S. at 32. "In rare circumstances, however, principles of comity dictate otherwise." *Id.* Though Defendants suggest that the doctrine favors deferral by federal courts in all or even most instances, *Germano* and its progeny in fact counsel the opposite conclusion: deferral is appropriate in "rare circumstances" not present here. The effort to distort applicable authority is telling.

1. The *Germano* Deferral Doctrine Does Not Apply Here Because There Is an Imminent Threat of an Unconstitutional Election.

As this Court recognized in its Memorandum Order denying Defendants' original Motion to Stay, Defer, or Abstain, this Court need not defer deciding this action if it is "not convinced that the North Carolina Supreme Court will issue a decision in the state litigation in a timely manner." Dkt. No. 65 at 9. Indeed, though states undisputedly have

the primary responsibility for redistricting, *see Chapman v. Meier*, 420 U.S. 1, 27 (1975), when federal challenges to a redistricting plan are raised, federal courts must accept the role of protecting the right to vote. *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).

Consistent with these principles, the *Germano* deferral doctrine instructs only that, "[a]bsent evidence that the[] state branches will fail to timely perform that duty [to enact constitutional redistricting plans], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id.* at 34. In other words, in narrow circumstances, a federal court must delay hearing a case but only while retaining jurisdiction to ensure that the state is progressing toward a valid redistricting plan. *See Germano*, 381 U.S. at 409. Where state bodies are unable or unwilling to craft timely, valid redistricting plans, federal courts should act affirmatively to prevent unconstitutional elections and should not defer to the states. *See, e.g., Branch v. Smith*, 538 U.S. 254, 261-65 (2002) (upholding district court's injunction of a state court redistricting plan on the basis that it "had no prospect of being precleared in time for the 2002 election").

Even a cursory analysis of *Germano* and *Growe* demonstrates the principle. In *Germano*, a district court declined to stay proceedings after the Illinois Supreme Court "held the composition of the Illinois Senate invalid." 381 U.S. at 409-09. The state court had allowed the legislature to redraw the map with the caveat that the state court would take "such affirmative action as may be necessary to insure that the 1966 election is

pursuant to a constitutionally valid plan." *Id*. at 408. The district court refused to defer to this remediation process. *Id*. at 408-09. The Supreme Court reversed, but instructed the district court to "retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate *is not timely adopted* it may enter such orders as it deems appropriate." *Id*. at 409 (emphasis added). Accordingly, *Germano* recognizes that a federal court may have to act to ensure an election is held under a constitutional voting plan.

In *Growe*, the federal district court stayed all proceedings in the state challenge and enjoined the state parties from attempting to implement the state court's redistricting plan. 507 U.S. 30. The federal court proceeded to issue its own redistricting plan and "permanently enjoin[ed] interference with state implementation of those plans." *Id*. at 31. The Supreme Court noted that the state court was capable of developing a timely redistricting plan, and held that the federal court should have deferred to that plan. *Id*. at 37. In so holding, however, the Court noted that "[o]f course the District Court would have been justified in adopting its own plan if it had been apparent that the state court, through no fault of the District Court itself, *would not develop a redistricting plan in time for the primaries*." *Id*. at 36 (emphasis added). Thus, *Growe* too recognized that federal courts must affirmatively act to ensure that a constitutional plan is in place if it is apparent that the state will not act in time.

When the parties in this case first briefed this issue in February 2014, the North Carolina Supreme Court had entertained oral argument in the state-court litigation over a

month earlier, and the primary election was three months away. *See* Dkt. 44 at 4-5; Dkt. 47 at 2. Despite Defendants' assertion that Plaintiffs "cannot credibly contend that the North Carolina courts have failed to timely weigh challenges to the First and Twelfth districts," Dkt. 52, at 6, this Court unsurprisingly disagreed. In doing so, this Court recognized that, given the weight of the constitutional issues at stake and the lack of a sense of urgency on the part of the North Carolina Supreme Court, it could not defer the state court action. And this Court's assessment turned out to be accurate. In fact, the North Carolina court did not act in a timely manner.

That record only bolsters the need for urgency now. It took the North Carolina court nearly *11 months* after its first oral argument (on January 6, 2014) to issue a decision (on December 9, 2014), Dkt. 106 at 4, and there is no reason to expect that the North Carolina Supreme Court will issue a decision any sooner on this occasion. In 2014, that court did not in fact issue its decision until long after not only the primary election, but the general election itself—which occurred a full *10 months* after oral argument. If the court takes as long to issue a decision in the pending state court litigation following the oral argument on August 31, the decision would not issue until August 2016—over 5 months *after* the filing deadline for candidates, nearly 3 months *after* the primary election, and only approximately two months before the general election. If the Governor signs HB 373 into law, the situation is even more dire. And, of course, even if the North Carolina Supreme Court did issue a decision on the merits,

adopting a remedial plan would take even longer. The citizens of North Carolina deserve better.

Without immediate intervention by this Court, the injury to Plaintiffs' constitutional rights will be irreparable. Nothing in *Germano* or *Growe* require, much less counsel, deferral. *See Growe*, 507 U.S. at 37.

2. The *Germano* Deferral Doctrine Applies Only Where a State Court Is Actually Redrawing a Map.

This Court denied Defendants' original deferral motion because it appeared that the North Carolina Supreme Court would not issue a decision in a timely manner. Dkt. 65, at 9. As a result, the Court declined to address whether "Growe requires [this Court] 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 in valid." *Id.* (emphasis in original).

As before, the Court need not address this question, because there is now even more evidence than before that the North Carolina Supreme Court will not act in time. Even if did, however, the result would be the same. *Germano* and *Growe* themselves support the conclusion that deferral is not warranted unless a state court is actually drawing a map. Courts interpreting *Growe* agree.

In both *Germano* and *Growe*, the U.S. Supreme Court instructed federal district courts to defer to state courts that were actively working to implement a remedial redistricting plans—not, as in this case, state courts that were merely *adjudicating* redistricting challenges. Indeed, in *Growe*, the federal court permanently enjoined the

state court from interfering with maps the federal court had adopted, even though the state court had adopted its own plan. *See* 507 U.S. at 36-37. *Growe* gives only two admonishments against federal courts adjudicating issues at the same time as state courts—"a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." 507 U.S. at 34. Where, as here, a federal court is merely reviewing a plan that a state court is also reviewing, the federal court is not "affirmatively obstruct[ing]" the state court or impeding the state-court litigation in any way. The federal court is running alongside the state court, not pushing it out of the way.

Second, lower federal courts have expressly concluded that federal courts need not and should not defer when the only issues at play in both the state and federal court are those of federal law. In *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1180 (D. Colo. 2004), the court flatly held that the "deference the Supreme Court required in *Growe* was to state legislative and judicial processes for *actually drawing up and selecting* a redistricting plan." (emphasis added). Indeed, "[o]nce 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*.

Keller directly applies here. There, much like in this case, the federal district court was considering a challenge to a Colorado congressional redistricting plan while the Colorado Supreme Court was entertaining an original petition, filed by the Attorney General, seeking an order blocking the implementation of that plan. *Id*. at 1176. The

Colorado Supreme Court invalidated the plan and ordered the state to employ a court-approved plan for the next election. *Id*. After this decision, but before the deadline for filing a writ of *certiorari* in the U.S. Supreme Court, the plaintiffs in the federal case argued that the district court was required to defer under *Germano* and *Growe*. Swiftly rejecting the argument, the court held that federal courts must defer only to state processes for "actually drawing up and selecting a redistricting plan." *Id*. at 1180.

Similarly, the court in *Brown v. Kentucky*,, Nos. 13-cv-68, 13-cv-25, Slip Copy, at *2 (E.D. Ky. June 27, 2013) (copy attached as Appendix 1), 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 *1. Concluding that deferral was not warranted, the court expressly distinguished *Growe*, 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. *See id*. at *3. 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*.[2]

[2] *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997), cited by defendants in previous briefing, is simply inapposite. The court there dismissed the case "[b]ecause the State court [had] adjudicated the merits of their claims," so "both res judicata and the *Rooker-Feldman* doctrine preclude this court's review of that decision." *Id*. at 1440. Here, res judicata does not apply, and Defendants have advanced no argument under the *Rooker-Feldman* doctrine. Because the plaintiffs in *Rice* "admitted that [the court] cannot consider their claims in the face of [a] State

Federal-court adjudication is particularly vital where voting rights are concerned. In *Harmon v. Forssenius*, 380 U.S. 528 (1965), the Court affirmed a three-judge court that refused to abstain in a voting-rights case because of "the importance and immediacy of the problem." *Id*. at 537. Similar to Defendants' argument in this case, the *Harmon* defendants argued that the court should have stayed the proceedings until the state court could weigh in. *Id*. at 534. The Court, however, held that "the nature of the constitutional deprivation alleged and the probable consequences of abstaining" weighed heavily in favor of hearing the case. *Id*. at 537. "[T]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id*. (internal quotation marks and alterations omitted). In such circumstances, with the right to vote is at stake, deferral is decidedly inappropriate.

In short, given the significant rights at stake, the federal courts' role in protecting those rights, and the fact that here the Court would not be affirmatively obstructing or otherwise impeding the state court's ability to pass a constitutional map, this Court should not defer to the state-court action and nothing in *Growe* or *Germano* counsels otherwise. This action has been pending long enough. Plaintiffs, and the voters of North Carolina, deserve a hearing on their claims now, when an effective remedy in advance of the 2016 elections is still possible.

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court decision on their claims," *id*., the court had no occasion to analyze whether *Germano* deferral would apply.

B. Because Plaintiffs in this Case Are Not Parties in the State Case, Res Judicata and Collateral Estoppel Do Not Apply.

With almost no citation to authority, Defendants argue that the "doctrines of Res Judicata and Collateral Estoppel . . . require this Court to stay all proceedings" pending final disposition of the claims raised in *Dickson*. Dkt. 106, at 10. The argument is as unpersuasive as it is unsupported by authority. Neither the claim nor issue preclusion applies for the simple, and obvious, reason that Plaintiffs are not parties in the state-court action. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must "give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Baker v. Gen. Motors Corp*., 522 U.S. 222, 246 (1998) (internal quotation marks omitted). Thus, North Carolina state law controls the extent to which the decision of the three-judge state-court panel should be given preclusive effect. And North Carolina law definitively and unmistakably answers that question.

A "final judgment on the merits in one action precludes a second suit based on the same cause of action *between the same parties or their privies*." *Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870, 880 (N.C. 2004) (emphasis added). Defendants make no attempt to argue that Plaintiffs are parties to the state-court action, asserting only that "[b]oth Plaintiffs admitted in their depositions that they were members of either a local branch or the national NAACP." Dkt. 106 at 11. Unsurprisingly, Defendants cite no authority for the bold proposition that, if there is a judgment against an organizational

plaintiff, all members of affiliated organizations are bound by that judgment under the doctrines of res judicata and collateral estoppel.

Moreover, 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 are represented by," a party to a separate litigation. Dkt. 106, at 10. "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." *Id*. at 630; *see also Cnty. of Rutherford By & Through Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 394 S.E.2d 263, 266 (N.C. App. 1990) (no privity despite parties "interested in proving the same state of facts"). It is undisputed in this case that Plaintiffs are neither parties, nor privy to parties, to the state court proceedings. As a result, no claim or issue is precluded in this litigation as a matter of well-settled North Carolina law.

Defendants, in arguing that Plaintiffs are bound by the state court judgment because they are "members" of the NAACP and their interests "align with, and are represented by, the plaintiffs in Dickson," Dkt. 106, at 10, are apparently attempting to revive a concept known as "virtual representation" under prior Fourth Circuit jurisprudence. *See Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 651-62 (4th Cir. 2005). Virtual representation is no longer an accepted basis for applying res judicata and collateral estoppel, in North Carolina or anywhere else. In *Taylor v. Sturgell*, the United States Supreme Court definitively rejected the doctrine in no uncertain terms:

> [V]irtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in [case law] and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to create de facto class actions at will.

553 U.S. 880, 901 (2008) (internal quotation marks and citation omitted). Defendants' assertion that Plaintiffs' claims are barred by the state-court litigation thus fails at the outset, as a matter of law.[3]

Even if the doctrine of virtual representation had not been so definitively rejected, it would in any event not apply here. Virtual representation was always a very narrow exception to the rule that a person is not bound to judgments to which she was not a party. *Martin*, 407 F.3d at 651-62 (describing exception as "narrow" and the standard for finding virtual representation "stringent"); *see also Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987) (application of res judicata to a non-party to litigation "must cautiously be applied in order to avoid infringing on principles of due process"). Courts would find "virtual representation" only if two conditions were met: (1) the party to the prior suit must be "accountable to the nonparties who filed a subsequent suit," and (2) the virtual representative for a nonparty must have had "at least the tacit approval of the court" to proceed on behalf of non-parties. *Martin*, 407 F.3d at 652.

[3] While *Taylor* recognized a distinct "adequately represented" exception, that exception is limited to "properly conducted class actions," "suits brought by trustees, guardians, and other fiduciaries," and similar circumstances. *Id.* at 894-95. The state court case was not certified as a class action and the NC NAACP was not a "fiduciary." There is no credible argument that any exception applies here.

Here, it is undisputed that Plaintiffs have had utterly no involvement in the state court case. They did not know the state court case had been filed. *See* Declaration of John M. Devaney ("Devaney Decl. II"), Dkt. 78-1, Ex. 2 (Harris Dep. 52:14-19, 56:2-17, 70:7-71:8); *id*., Ex. 3 (Bowser Dep. 54:13-55:6). They did not authorize the NC NAACP (or any other state court plaintiff) to file the lawsuit, *see id*., Ex. 2 (Harris Dep. 52:14-19, 56:2-17, 70:7-71:8); *id*., Ex. 3 (Bowser Dep. 58:25-59:20), and they had no power to control its course, *see id*., Ex. 2 (Harris Dep. 49:14-16); *id*., Ex. 3 (Bowser Dep. 54:13-55:6). Plaintiffs, indeed, do not even believe they *are* members of the NC NAACP. *Id*., Ex. 2 (Harris Dep. 45:20-46:15, 47:23-42:2, 47:16-48:7); *id*., Ex. 3 (Bowser Dep. 47:24-48:22). They contributed money to NAACP branches because they believed in the NAACP's broad-based goal to advance racial equality—not to advance Plaintiffs' interests in litigation of which they were not even aware. *Id*., Ex. 2 (Harris Dep. 51:11-16); *id*., Ex. 3 (Bowser Dep. 48:24-49:7).

In such circumstances, Plaintiffs were not even arguably "in privity" with the NC NAACP for res judicata and collateral estoppel purposes. The state court plaintiffs were in no sense "accountable" to Plaintiffs, and there is no evidence in the record that the NC NAACP had the tacit approval of the state court to represent Mr. Harris or Ms. Bowser. The state court litigation was not certified as a class action under Federal Rule of Civil Procedure 23, and as far as Plaintiffs are aware, the scope of the NC NAACP's representation under principles of associational standing was never considered by the state court.

Myriad cases have found res judicata and collateral estoppel inapplicable in similar contexts.[4] For example, in *Meza v. Gen. Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990), the court held the plaintiff was *not* bound to the result of litigation by a labor union because "no evidence was presented to show that [the employee] 'chose' the [union] to represent him"; the record showed the plaintiff was "completely unaware of the [union] action purportedly undertaken on his behalf," and "one cannot acquiesce to something of which one is unaware." *Meza*, 908 F.2d at 1271-72. The same is true here.

Indeed, the contrary rule suggested by Defendants would not only radically revise well-settled law but would reach a decidedly repugnant result: barring citizens from challenging unconstitutional race-based redistricting in federal court because some third party organization had previously filed suit in state court, even where the citizens were uninvolved in the prior litigation, unaware of its filing or resolution, and played no role in it. With all due respect, that is not the law and never has been. This Court should reject the proposition out of hand.

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[4] *See, e.g., Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 20 (1st Cir. 2009), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (brewer was not bound by earlier judgment against trade association, absent evidence it "either controlled the litigation strategy of the association or duly approved the [association] to represent its interests" in litigation); *Perez-Guzman v. Gracia*, 346 F.3d 229, 236 (1st Cir. 2003) (party member not bound by judgment against party absent evidence that he controlled prior litigation or that the party "in the institution of this action, were engaged in tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple"); *Hoffman v. Sec'y of State of Maine*, 574 F. Supp. 2d 179, 187-88 (D. Me. 2008) (persons nominating candidate were not in privity with candidate nor bound by adverse judgment against candidate); *Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978) (candidate was not in privity with voters, as his efforts to advance voters' interest were not "enough to make him their actual personal representative whose action or non-action in the state proceeding would legally bind them").

IV. CONCLUSION

For the reasons stated above, plaintiffs respectfully submit that the Court should deny Defendants' Renewed Motion.

Respectfully submitted, this the 26th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO STAY, DEFER, OR ABSTAIN** 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 26th day of September, 2015.

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