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

Defendants Patrick McCrory, North Carolina State Board of Elections, and Joshua Howard (collectively "Defendants") submit this Reply in support of their Renewed Motion to Stay, Defer, or Abstain from further proceedings in this action. Under the procedural posture of this case, in light of parallel litigation involving the same claims and issues currently pending before the North Carolina Supreme Court on remand from the Supreme Court of the United States, this Court is obligated to stay, defer, or abstain from further proceedings in this case.

I. *Germano, Growe* and their progeny require deference to the pending state court proceedings.

Plaintiffs' arguments against a stay or deferral ignore the proper role of a federal court in state redistricting matters. Where the state courts have taken on the "highly political" task of considering redistricting, the federal court's role is as a "last-minute

federal court rescue of" the state electoral process. It is decidedly not a "race to beat [the state court process] to the finish line." *Growe*, 507 U.S. at 37.

The North Carolina state courts began the task of considering North Carolina redistricting over four years ago upon the filing of the *Dickson v. Rucho* case. The state trial court entered a judgment upholding the plans in July 2013. It was only after this judgment in favor of the state—in October 2013—that the plaintiffs in this case, represented by many of the same lawyers who represented the plaintiffs in the *Dickson* case, filed this action. There is absolutely no evidence that the state courts of North Carolina have failed to timely perform their duty of considering redistricting and "[a]bsent [such] evidence, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe*, 507 U.S. at 34. Although "i[n] other contexts, a federal court's decision to decline to exercise jurisdiction is disfavored and thus exceptional . . . 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 the current circumstances indicates a need for this Court to "rescue" the North Carolina electoral process. A three-judge panel of the Superior Court of Wake County has upheld the legality of the Congressional plan under both state and federal law. The North Carolina Supreme Court has done the same. Following remand by the United States Supreme Court for additional consideration in light of *Alabama Legislative Black Caucus v. Alabama,* 135 S. Ct. 1257 (2015) (hereinafter *"Alabama"*), the North

Carolina Supreme Court expedited the briefing and oral argument schedule. There is no reason to believe that the North Carolina Supreme Court will not promptly exercise its obligation to consider the Congressional redistricting plan.

None of the cases cited by plaintiffs resemble the procedural posture of this case. Instead, those cases involved redistricting plans that had already been declared illegal in some respect and a federal court directly interfered with the process of redrawing the districts. The teaching of these cases is that federal courts must not insert themselves into state redistricting disputes unless the State—through its legislature or its courts—is doing nothing to remedy a plan that has already been declared illegal. For instance, in *Keller v. Davidson*, 299 F. Supp. 2d 1171 (D. Colo. 2004), the Colorado Supreme Court had already invalidated the redistricting plan at issue. Moreover, that court's refusal to invoke deferral as required by *Growe* was *dicta* as the court nonetheless stayed its consideration of the case on other grounds. *Keller*, 299 F. Supp. 2d at 1181. In another case cited by plaintiffs, *Brown v. Kentucky*, No. 13-cv-68 DJB-GFVT-WOB, 2013 WL 3280003 (E.D. Ky. June 27, 2013), the court, consistent with *Growe*, described itself only as a "Plan B" in the event that a plan already declared illegal was not being remedied by the state through its legislature or the courts. *Brown*, 2013 WL 3280003 at *2. Indeed, in *Brown*, the Kentucky Supreme Court had invalidated the most recently enacted districts, but the state was nevertheless continuing to use redistricting plans from 2002 which everyone agreed were unconstitutional.

The only case that has been cited that is analogous to the instant case is *Rice*, cited by defendants in their initial briefing. In *Rice*, as here, a state court found the challenged

redistricting plans valid and plaintiffs' claims without merit. *Rice*, 988 F. Supp. at 1438. The federal court noted that in redistricting cases, abstention or deferral takes on a more important role. In that context, "when parallel State proceedings exist, the decision to refrain from hearing the litigant's claims should be the routine course." *Id.* at 1439. In their Response, plaintiffs here claim that *Rice* deferred on the basis of res judicata or the *Rooker-Feldman* doctrine. That is clearly incorrect. While both of those doctrines clearly applied to the *Rice* plaintiffs (which they admitted), the *Rice* court applied *Growe* to "stay [its] hand" as to similar claims by a different set of plaintiffs known as the "Thompson plaintiffs." *Id.* at 1440. The court recognized the teaching from *Growe* that absent evidence the state was abdicating its redistricting duty, "a federal court should not interject itself into the State's matter." *Id.* So long as the state court "is willing or able to hear [the plaintiffs' redistricting] claims," then the federal court should at the least defer consideration of the claims until the state court has been allowed to consider them. Otherwise, the federal courts may be used to "impede" or "obstruct" the state process. *Growe*, 507 U.S. at 34.

Moreover, to the extent that plaintiffs here complain that this action has waited "long enough" to be heard while the *Dickson* litigation has progressed, any such circumstances are entirely of the plaintiffs own making. As noted, plaintiffs waited until October 2013 to file this action, nearly three months after the three-judge panel of the Superior Court of Wake County entered its order in the *Dickson* case rejecting the claims of the plaintiffs in that case—including the *Harris* plaintiffs' membership organizations—and upheld the validity of the redistricting plans, and over two years after

the *Dickson* case was initiated. Moreover, this case was scheduled for trial in 2014 but plaintiffs agreed to stay the case pending the United State Supreme Court's ruling in *Alabama*. Thus, to the extent that plaintiffs have "waited" for relief, their wait is of their own making and is no reason for this Court now to impede, obstruct, or otherwise race to completion with the parallel *Dickson* litigation.

II. Res Judicata and Collateral Estoppel at a minimum require a stay or deferral of this case.

Plaintiffs argue that despite their membership in the very organizations prosecuting the *Dickson* litigation in state court, they are not precluded from pursuing identical claims in this case even though they, through the NC NAACP and other organizations, are bound by the rulings in the state court case. Plaintiffs' arguments are specious.

For instance, to avoid the obvious preclusive implications of their NC NAACP membership, plaintiffs assert that "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." This assertion is not accurate. On December 19, 2011, the defendants in the *Dickson* litigation moved to dismiss the four organizational plaintiffs, the NC NAACP, the LWV NC, Democracy NC, and the Randolph Institute (collectively the "Organizational Plaintiffs") named in the NAACP Plaintiffs' Amended Complaint on the grounds that these plaintiffs lacked standing to challenge the districts, including the First and Twelfth Congressional Districts. The Organizational Plaintiffs filed a memorandum of law in opposition to the motion to dismiss in which they argued that

they had alleged in their Amended Complaint "facts sufficient to establish organizational standing under federal law by alleging that their members live throughout the state and would be harmed by the use of redistricting plans unjustifiably based on race." A copy of this memorandum was filed with the Court as an attachment to Defendants' Memorandum of Law in support of its first Motion to Stay, Defer, or Abstain. (D.E. 44-5, p.11). The Organizational Plaintiffs also quoted language from the United States Supreme Court's decision in *Warth v. Seldin,* 422 U.S. 490 (1975), in which the Supreme Court held that "an association may have standing solely as the representative of its members" and that "the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.* (quoting *Warth*, 422 U.S. at 511).

On February 6, 2012, the three-judge state court denied, in part, defendants' motion to dismiss but did not specifically rule on whether the Organizational Plaintiffs lacked standing. (D.E. 44-6) The Organizational Plaintiffs, however, have remained plaintiffs in *Dickson.*

Moreover, plaintiffs cite *Meza v. Gen. Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990) in support of their position that the plaintiffs here cannot be bound by the judgment in *Dickson.* Plaintiffs contend that the court in *Meza* found that the plaintiff in that case "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. But what plaintiffs fail to mention is that the

plaintiff in *Meza* was a *former* member of the union at issue. *See id.* at 1271 ("A union's representative authority does not automatically extend to its former members.") The *Meza* court went on to say that, "it seems clear to us (as it apparently did to the district court) that the [union's] authority to bind extended *only to its members*." *Id.* at 1272. That is the same concept at issue here.[1]

Further, in their Response, plaintiffs contend that the Court should ignore defendants' arguments because "Defendants cite no authority for the bold proposition that, if there is a judgment against an organizational plaintiff, all members of *affiliated*

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[1] In their Response, plaintiffs contend that a "myriad [of] cases have found res judicata and collateral estoppel inapplicable" in contexts similar to the instant case. (D.E. 116, p. 19) Like *Meza*, *supra*, the cases cited by plaintiffs are not similar to this case at all. For instance, *Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3, 20 (1st Cir. 2009) and *Perez-Guzman v. Gracia*, 346 F.3d 229, 236 (1st Cir. 2003) apply *Puerto Rican* law which plaintiffs fail to inform the Court requires "*perfect identity* between...the persons of the litigants." *Coors*, 562 F.3d at 19-20 (emphasis added). In significant contrast, North Carolina does not require "perfect identity"; the applicability of privity is more flexible in that "courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest." *See Whiteacre P'Ship v. Biosignia, Inc.*, 358 N.C. 1, 36 (2004). Further, plaintiffs cite *Hoffman v. Sec'y of State of Maine*, 574 F. Supp. 2d 179, 187-88 (D. Me. 2008) and *Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978). However, *Hoffman* and *Griffin*, like *Perez-Guzman*, involved the association and membership of voters in a *political party*. *Hoffman*, 574 F. Supp. 2d at 187. The *Griffin* Court explained why political party membership is different: "[w]hile [the candidate's] personal interests were... parallel with the voters, they are not necessarily identical–some voters voted for other candidates...[as a result the court was] unable to say that [his] candidate status...was enough to" make him their representative for preclusion purposes. *Id.* Here, however, the NAACP and their members are both unequivocally interested in the advancement of racial equality and both are seeking to invalidate the same congressional districts using identical arguments as were advanced by plaintiffs in *Dickson*. Plaintiffs specifically acknowledged such interest in their Response and when arguing standing in *Dickson*. (D.E. 116, p. 18; D.E. 44-5, p.11) Thus, there is no ambiguity as to whether the NC NAACP in *Dickson* adequately and vigorously represented the interests of its individual members.

organizations are bound by that judgment under the doctrines of res judicata and collateral estoppel." (D.E. 116, p. 21) (emphasis added) At best this argument distorts the testimony on record in this case. Contrary to the suggestion in plaintiffs' brief, there is no dispute that both plaintiffs are members of at least one of the *Dickson* Organizational Plaintiffs. Both plaintiffs admitted that they were members of either the local or national chapter of the NAACP. (Bowser Dep. 45-48); (Harris Dep. 45-50) NC NAACP President Rev. William J. Barber, II confirmed that anyone who was a member of a local branch or the national NAACP was also a member of the N.C. State Conference of the NAACP. (Barber Dep. 17, 25-27); *Cf. NAACP v. Alabama*, 357 U.S. 449, 451-52 (1958) (recognizing that membership in local branches is equivalent to membership in higher affiliates). Plaintiff Christine Bowser further admitted she was also a member of another of the *Dickson* Organizational Plaintiffs, Democracy NC. (Bowser Dep. 51) It is the plaintiffs who have not cited a single case where members of organizations such as these brought a lawsuit on behalf of their members, received an adverse decision, and the members of the organization were then permitted to pursue a separate lawsuit and were held to not be bound by the prior decision.

In fact, while plaintiffs argue strenuously that there is no "privity" between them and the NC NAACP or other *Dickson* plaintiffs sufficient to invoke claim or issue preclusion, applicable authority is to the contrary.

For instance, in *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1082-83 (9th Cir. 2003), the court found that "[o]ne of the relationships that has been deemed "sufficiently close" to justify a finding of privity is

that of an organization or unincorporated association filing suit on behalf of its members." *Id.* (citing 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4456 (2002)). "Of course, the organization must adequately represent the interests of its individual members if its representation is to satisfy the due process concerns articulated in *Hansberry v. Lee*, 311 U.S. 32, 40–43, 61 S. Ct. 115, 85 L.Ed. 22 (1940)" *Id.* at 1082 (citing *Pedrina v. Chun*, 97 F.3d 1296, 1302 (9th Cir.1996)). If there "is no conflict between the organization and its members, and if the organization provides adequate representation on its members' behalf, individual members not named in a lawsuit may be bound by the judgment won or lost by their organization." *Id.* at 1083.[2]

The court's reasoning was telling and completely applicable to this case:

> Allowing the earlier litigation to bind the current plaintiffs is especially appropriate in light of the only available alternative here. The Association vigorously litigated the prior action on its members' behalf. Now that a

[2] This discussion did not rely on the "virtual representation" theory. While plaintiffs' brief discusses this theory in detail, defendants are simply not relying on the virtual representation theory. Indeed, in *Taylor v. Sturgell*, 553 U.S. 880 (2008), the Supreme Court stated that "while references to 'virtual representation' have proliferated in the lower courts, our decision is unlikely to occasion any great shift in actual practice. Many opinions use the term 'virtual representation' in reaching results at least arguably defensible on established [adequate representation exception] grounds." *Taylor*, 553 U.S. at 904 (citations omitted). The *Taylor* Court opined that "in these cases, dropping the 'virtual representation' label would lead to clearer analysis with little, if any, changes in outcome." *Id.* Plaintiffs here apparently understand this point, conceding in their Response that *Taylor* recognized an "adequately represented" basis for privity in this context. (D.E. 116, p.17 n.3) Plaintiffs misleadingly imply that the "adequately represented" basis is "limited" to certain circumstances, but that is not how the Supreme Court described it in *Taylor*. It is plaintiffs, not defendants, who seek to "radically revise well-settled law" by confusing virtual representation (where the non-party has no connection to the party) with a member of an organization who is adequately represented by that organization in litigation.

> final judgment has issued, it should not be able to evade preclusion continually by averring that unidentified members are not bound and bringing successive suits by claiming injury to different identified members. If the individual members of the Association were not bound by the result of the former litigation, the organization would be free to attack the judgment *ad infinitum* by arranging for successive actions by different sets of individual member plaintiffs, leaving the Agency's capacity to regulate the Tahoe properties perpetually in flux. The Association may not avoid the effect of a final judgment in this fashion.

Id. at 1084 (internal citations and quotations omitted).[3]

Finally, plaintiffs' own delay and the North Carolina Supreme Court's timely handling of *Dickson* on remand, coupled with the fact that the state is not "hurtling toward a primary election" under a redistricting plan that has been declared illegal, requires that this Court not "permit federal litigation to be used to impede" state reapportionment.[4] (D.E. 47, p. 2). Accordingly, defendants' renewed motion should be granted.

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[3] The court also noted that, like *Dickson*, the "posture of the case" resembled a class action, and that "binding current members of an association to the results of prior litigation conducted by the association is considered especially appropriate when the litigation resembles a class action in substance, if not in form." *Id.* at 1083 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276-80 (9th Cir. 1991)).

[4] While North Carolina is not in danger of an imminent primary under plans declared illegal, a recent change to the 2016 election schedule counsels further caution and deferral. The North Carolina General Assembly recently enacted House Bill 373 which provides that all primary elections will be held March 15, 2016 instead of in May 2016. The enacted bill also provides for a filing period beginning December 1, 2015 instead of February 2016. Thus the 2016 election process is already underway and any interference with that process at this late date would run afoul of the United States Supreme Court's admonition to federal district courts against last-minute interference with state election laws in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

This the 1st day of October, 2015.

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CERTIFICATE OF SERVICE

I, Thomas A. Farr, hereby certify that I have this day electronically filed the foregoing **Reply in Support of Defendants' Renewed 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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