IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

Plaintiffs David Harris, Christine Bowser, and Samuel Love ("Plaintiffs") submit this Memorandum of Law in Support of their Opposition to Defendants' Motion to Stay, Defer, or Abstain from the current action (Dkt. 43).

I. Introduction

Defendants' Motion is premised on the flawed contention that once the legislature or judiciary of 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. Decades of redistricting jurisprudence establish precisely the opposite principle: 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. *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 265 (2003). This principle is rooted in the sanctity of the right to vote. As the Supreme Court has explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). Accordingly, when federal courts balance the interest in allowing states to manage their elections against protecting the constitutional right of citizens to exercise the electoral franchise, the constitutional right must prevail.

This case vividly demonstrates the constitutional importance of the limitations on state control over elections. Plaintiffs' motion for a preliminary injunction describes how the North Carolina General Assembly deliberately packed African-Americans into Congressional Districts ("CDs") 1 and 12. By engaging in the sordid practice of shaping districts through packing based on skin color, 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 those districts. There was 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.

The North Carolina state courts have so far done nothing to stop this, and the state is thus hurtling toward a primary election in three months that will be conducted under an

unlawful voting map. Remarkably, this is happening despite the fact that the state trial court specifically found that race was the General Assembly's predominant purpose in creating one of the districts and that the redistricting plan is therefore subject to strict scrutiny. The North Carolina Supreme Court has taken no action to put the state on a lawful course and has shown no signs of urgency in deciding the appeal from the state court's deeply flawed application of the strict scrutiny standard. The responsibility of this Court is not to abstain or defer, as Defendants contend; rather, it is to act affirmatively to prevent an unconstitutional election.

Given the fundamental importance of the right to vote, it is hardly surprising that the abstention doctrines Defendants rely upon in their Motion plainly do not apply here. As the Supreme recently emphasized, "abstention from the exercise of federal jurisdiction is the 'exception, not the rule.'" *Sprint Communications v. Jacobs*, 134 S. Ct. 584, 593 (2013) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984)). Thus, *Younger* abstention applies only in narrow circumstances that are not present here—criminal prosecutions, civil enforcement proceedings, and a state's enforcement of the judgments of its courts. And the very limited *Colorado River* abstention doctrine does not apply for multiple reasons, not the least of which is that the plaintiffs in this case are different from the plaintiffs in the state case. In short, for this Court to surrender federal jurisdiction, as Defendants are requesting, there must be exceptional circumstances and the clearest of justifications—no such circumstances or justifications exist here.

For these reasons and those discussed below, the Court should deny Defendants' Motion and schedule an expedited hearing on Plaintiffs' Motion for a Preliminary Injunction.

II. Background

A. The General Assembly's Racial Gerrymandering

From 1997 to 2011, CDs 1 and 12 were not majority-minority districts. CD 1 was first drawn in approximately its current form in 1992, and although it contained a sizable African-American population, the district did not have a majority Black Voting Age Population ("BVAP"). *See* Declaration of John M. Devaney ("Devaney Decl."), Dkt. 18, Ex. 2, at Ex.4-5. CD 12 was also first drawn in approximately its current form in 1992. Like CD 1, it contained a sizable but not majority BVAP from 1997 to 2011. *Id.* 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 20 years. *Id.*, at Ex. 2.

In 2011 the General Assembly began the process of redrawing the Congressional map in the wake of the 2010 Census. Despite the long history of electing African-American candidates, the Assembly decided to restructure CDs 1 and 12 as majority BVAP districts. S.L. 2011-403. The officials responsible for the voting map publicly acknowledged that the districts were drawn with a racial purpose. *See id.*, Ex. 12, at 2-5.

As a result of these racial calculations, CD 1 and CD 12 are now bizarrely shaped districts that pack African-American voters in violation of the Equal Protection Clause. The districts are substantially less compact than their prior iterations, and show flagrant disregard for geographic and political boundaries. *See* Dkt. 36, 14-15.

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. A three-judge panel consolidated the cases under N.C. Gen. Stat. § 1-267.1.

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 Plaintiffs' pending motion for summary judgment and entering judgment for the Defendants. *See id.* Although the court acknowledged that the General Assembly used race as the predominant factor in drawing CD 1, it concluded broadly that North Carolina had a compelling interest in avoiding liability under the VRA, and that the redistricting was 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 this ruling to the North Carolina Supreme Court. *See Dickson v. Rucho*, No. 11-CVS-16940 (Plaintiffs' Notice of Appeal)

(07/22/13). However, no order has been issued staying the 2014 elections or adopting an interim map while the legality of the redistricting plan is being decided. On January 23, 2014, the North Carolina Supreme Court denied the plaintiffs' motion for a temporary injunction. *Dickson v. Rucho*, No. 201PA12-2, at 3 (North Carolina Supreme Court Petition Rulings), *available at* http://appellate.nccourts.org/petitions/p-01242014.pdf.

Plaintiffs filed the current action in federal court on October 24, 2013, challenging the constitutionality of CD 1 and CD 12 under the Equal Protection Clause. Dkt. 1, ¶ 1. Plaintiffs are three U.S. citizens registered to vote in either CD 1 or CD 12. None of the Plaintiffs is involved in the state challenge.

C. The Impendency of the 2014 Election

With no resolution in sight from the North Carolina Supreme Court, time is 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 10 through February 28, 2014. N.C. Gen. Stat. § 163-106; Devaney Decl., Ex. 25. The primary election is scheduled for May 6, 2014. Devaney Decl., Ex. 25. The general election is scheduled for November 4, 2014. *Id.*

III. Argument

A. The Court Should Not Defer to the North Carolina State Courts Given the Imminent Threat of an Unconstitutional Election.

In seeking to delay these proceedings, Defendants rely primarily on the "*Germano* deferral" doctrine, which applies specifically to redistricting challenges. *See Growe v.*

Emison, 507 US 25, 32 n.1 (1993) (interpreting *Scott v. Germano*, 381 US 407 (1965)). But Defendants fundamentally misread and misapply the doctrine. *Germano* and its progeny do not, as Defendants suggest, blindly favor deferral by federal courts in all instances. Rather, the doctrine seeks to balance two competing priorities: the state interest in redistricting and the fundamental constitutional right to vote. The circumstances of this case weigh heavily against deferral, and this court should therefore deny Defendants' Motion to Stay, Defer, or Abstain.

1. The Legal Standards for *Germano* Deferral

No one would dispute that states have the primary responsibility for redistricting. *See Chapman v. Meier*, 420 U.S. 1, 27 (1975). However, when federal challenges to a redistricting plan are raised, federal courts have the vital role of protecting the right to vote. Consistent with this principle, *Germano* deferral instructs that if time permits, a federal court may *defer* to the state but should not *dismiss* a redistricting challenge. In other words, in some circumstances, a federal court may choose to 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. Importantly, there are limits to this type of deference, and those limits forcefully apply here. Specifically, in cases 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. at 261-65 (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").

A proper analysis of *Germano* and *Growe* demonstrates these principles. 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. In other words, *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 actually 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 Supreme Court made it clear that deference from

federal courts is not called for where there is evidence that a state may fail to carry out its responsibility of adopting a lawful map in time for an election. *Id.* at 34.

Importantly, in both *Germano* and *Growe*, the Supreme Court instructed federal district courts to defer to state courts that were actively working to remedy redistricting plans—not, as in this case, state courts that merely heard redistricting challenges but took no action. Indeed, the cases are explicit that deferral is only appropriate "[a]bsent evidence that the[] state branches will fail timely to perform [their] duty," *id.* at 34, which is to "adopt a constitutional plan within ample time to be utilized in the upcoming election," *id.* at 35 (internal quotation marks and alterations omitted). The Court emphasized 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.

2. Deferral Is Not Appropriate Here.

Far from crafting a plan to remedy the constitutional errors, the North Carolina state courts have shown every indication that they will allow current CD 1 and CD 12 to stand for the 2014 Congressional election. A state three-judge panel upheld both districts, and the North Carolina Supreme Court has shown no urgency in rendering a decision, most recently denying a temporary injunction.

The status of the state court litigation is particularly problematic because the state three-judge panel upheld CD 1 based on a flawed and incomplete application of the strict

scrutiny standard required for race-based classifications. "Strict scrutiny requires that [the court] conduct the most exacting judicial examination of the evidence the State put forth." *H.B. Rowe Co., Inc. v. Tippett*, 615 F.3d 233, 250 (4th Cir. 2010) (internal quotations omitted). *See also Bush v. Vera*, 517 U.S. 952, 978 (1996) (state must establish a "strong basis in evidence" that threshold conditions for § 2 liability are present). Yet rather than apply this exacting standard to the State's justification, the panel applied a far more deferential standard, and in the process (1) misinterpreted the VRA—accepting the State's erroneous contention that, even though black voters had elected their candidates of choice for over 15 years, the VRA somehow required the State to increase the black voting age population dramatically, from nearly 48% to nearly 53%—and (2) misapplied the Equal Protection Clause—failing to test the State's purported concerns of liability with "exacting judicial examination."

This unlawful outcome must be corrected, notwithstanding the North Carolina Supreme Court's inaction. In *Branch*, the federal court deferred its consideration of the case until January 7 of an election year, at which time the court determined that a timely state redistricting plan was unlikely. 538 U.S. at 259. Here, it is already well past January of an election year and there is not even a ruling, much less a remedial plan, from the North Carolina Supreme Court on the current CD 1 and CD 12. In this circumstance, this Court should affirmatively act to protect the fundamental rights at stake.

Indeed, the Supreme Court has recognized that timeliness is a critical issue 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. However, the Court held that the "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 at stake, deferral is inappropriate.

The 2014 Congressional primaries will be held in less than three months, and a stay or deferral of this case would create a significant risk of the primaries occurring under an unconstitutional redistricting plan. The North Carolina Supreme Court may not issue an opinion for months. By then, the injury to Plaintiffs' constitutional rights will be irreparable. The course of action Defendants suggest amounts to abstention, which *Germano* and *Growe* emphatically do not require. *See Growe*, 507 U.S. at 37. Timely federal consideration of this case is critical to a constitutional redistricting plan for North Carolina, and Defendants' Motion to Stay should therefore be denied.

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 Plaintiffs "may be barred" by the doctrines of res judicata or collateral estoppel. Dkt. 44, at 11. In doing so, they fundamentally misunderstand the doctrine. 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. General Motors Corp.*, 522 U.S. 222, 246 (1998) (internal quotation marks omitted). Thus, North Carolina state law controls the extent to which the three-judge panel should be given preclusive effect.

"[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.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (emphasis added). Under North Carolina law, "privity" does not mean, as Defendants would have it, merely that one party's interests were "aligned and represented" by a party to a separate litigation. Dkt. 44, 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*, 100 N.C. App. 70, 76, 394 S.E.2d 263, 266 (1990)(no privity despite parties "interested in proving the same state of facts"). It is

undisputed in this case that Plaintiffs are not parties to the state court proceedings, and under North Carolina's standard for privity, no issue in this case would be precluded.

This result should come as no surprise, since many of the cases cited by Defendants involve concurrent federal and state challenges to redistricting. Indeed, the Supreme Court in *Growe* acknowledged the legitimacy of a federal redistricting challenge even after a state court decision. There, the Court first noted it was undisputed "that both courts had jurisdiction to consider the complaints before them," *Growe v. Emison*, 507 U.S. 25, 32, and later remarked that the federal court had authority to hear plaintiffs' claims after the state court issued its redistricting plan to the extent the plaintiffs challenge the state court's plan. *Growe v. Emison*, 507 U.S. at 36.

C. Abstention or Deferral Is Not Appropriate Under Other Abstention Doctrines.

Finally, Defendants have argued that the court should abstain or defer under two abstention doctrines that are simply not applicable to this type of case. Defendants ask the court to extend abstention doctrines well beyond the narrow circumstances for which they were created. In doing so, they ignore the well-established principle that abstention is "the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).

The Supreme Court has cautioned against such reckless overreaching in the abstention context, stressing that a court's task "is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain

whether there exist 'exceptional' circumstances, the 'clearest of justifications,' that can suffice . . . to justify the *surrender* of that jurisdiction." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983). That is particularly true in a case like this one where fundamental voting rights are at stake. *See O'Hair v. White*, 675 F.2d 680, 694 (5th Cir.1982) (en banc). Defendants cannot justify a surrender of federal jurisdiction in this case.

1. There Is No Basis for *Younger* Abstention.

Abstention under *Younger v. Harris*, 401 U.S. 37 (1971) is limited to a narrow subset of cases. In *Younger*, a criminal defendant in a state proceeding filed suit in federal district court under 42 U.S.C. § 1983 to enjoin the district attorney from prosecuting him. 401 U.S. at 39-40. The case stands for the proposition that a federal court should generally not hear challenges that seek to interfere with state criminal or quasi-criminal proceedings. 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 fact that a federal case may "for practical

purposes pre-empt, a future—or, as in the present circumstances, even a pending—state-court action," does not make a case appropriate for *Younger* abstention. *Id.* at 373.

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. The direction is clear: *Younger* cannot apply outside of a narrow set of circumstances. In this case, the state redistricting proceeding 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*. 491 U.S. at 368. For this reason, *Younger* abstention is inappropriate.

Notwithstanding the inapplicability of the doctrine, in a rare case applying *Younger* in the redistricting context, the Ninth Circuit overturned a district court's abstention under facts similar to those of this case. *Benavidez v. Eu*, 34 F.3d 825 (9th

Cir. 1994). There, a group of Latino voters brought a challenge to California's redistricting, but their case was dismissed under *Younger*. *Id.* at 827-28. The Ninth Circuit reversed, remarking that the dismissal of a voting rights case under *Younger* is all but unheard of. *Benavidez*, 34 F.3d at 832-33 (collecting cases). The Court observed that dismissal was not appropriate since the Latino voters, who were not parties to the state action, sought to challenge the state court's redistricting plan, which was plainly allowed by *Germano* and *Growe*. *Id.* at 833-34. Thus, even if this court were to consider *Younger* applicable to this type of case generally, abstention would still be inappropriate under the facts of this case.

2. *Colorado River* Abstention Is Improper.

Defendants also attempt to invoke abstention under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Colorado River* recognized a little-used, narrow exception to the rule that federal courts have a duty to adjudicate cases over which they have jurisdiction. This case does not fit that limited exception.

The grounds for abstaining under *Colorado River* are even narrower than they are for other types of abstention. Ordinarily, "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction," *Colorado River*, 424 U.S. at 818 (1976), but the Supreme Court recognized a limited exception to this rule for "considerations of wise judicial administration." *Id.* The Court warned, however, that this exception is "considerably more limited" than other

forms of abstention and must pass an "exceptional-circumstances test." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983).

This test has two strict requirements. First, the defendant must show that "there are parallel federal and state suits." *Great American Ins. Co. v. Gross*, 468 F.3d 199, 207 (4th Cir. 2006). Second, the defendant must show that the case is exceptional by weighing six factors. *Chase Brexton Health Servs., Inc. v. Maryland*, 411 F.3d 457, 463-64 (4th Cir. 2005). Only the "clearest justification" can overcome the federal court's duty to exercise its jurisdiction, *Moses H. Cone*, 460 U.S. at 25-26, and no such justification exists here.

a. There Are No Parallel Federal and State Cases.

Contrary to Defendants' contention, this case is not parallel to the state redistricting proceedings. Plaintiffs are not party to any of the state cases, and *Colorado River* requires that "the parties involved be almost identical." *Gross*, 468 F.3d at 208. Where plaintiffs in the federal suit are not also plaintiffs in the state matter, the Fourth Circuit has held that the cases are not parallel. *See id.*; *see also Chase Brexton*, 411 F.3d at 464. To hold otherwise and "abstain in favor of the . . . state court action[] would deprive [Plaintiffs] of the opportunity to litigate [their] claims." *Gross* 468 F.3d at 208. The Supreme Court has soundly rejected such ad hoc attempts to bind plaintiffs to a judgment when they were not parties to the case. *See Taylor v. Sturgell*, 553 U.S. 880,

893 (2008). Because Plaintiffs here are not parties to the State Redistricting Cases, the cases are not parallel.

b. This Is Not an Exceptional Case Warranting Abstention.

Defendants also cannot satisfy the second prong of the *Colorado River* test. This prong requires the court to weigh six factors, "with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone*, 460 U.S. at 16. As in *Moses H. Cone*, there is no dispute that the "first two factors are not present here." 460 U.S. at 19. This matter does not involve real property or in rem jurisdiction, and Plaintiff does not allege that the federal forum is any less convenient than the state forum. *Id.* As it did in *Moses H. Cone*, this absence supports exercising jurisdiction.

The third factor also counsel against abstention. Courts may consider the desirability of avoiding piecemeal litigation, *Chase Brexton*, 411 F.3d at 463, but "[o]nly in the most extraordinary circumstances . . . may federal courts abstain from exercising jurisdiction in order to avoid piecemeal litigation." *Gordon v. Luksch*, 887 F.2d 496, 497 (4th Cir. 1989). For example, where the individual rights of thousands of property owners could be adjudicated in conflicting ways the preference to avoid piecemeal litigation can warrant abstention. *See Colorado River*, 424 U.S. at 819. Here, by contrast, although the courts may reach different conclusions (as all courts with concurrent jurisdiction might), the conflict will not result in such "extraordinary circumstances" as to warrant abstention.

The remaining factors also counsel against abstention. The fourth factor is the order in which the courts obtained jurisdiction and the progress made. *Chase Brexton*, 411 F.3d at 464. "[P]riority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." *Moses H. Cone*, 460 U.S. at 21. The state cases are pending before a court that might delay a decision until after the primaries. Here, however, a three-judge panel has been appointed and the parties have fully briefed a motion for preliminary injunction. This factor therefore weighs against abstention. The fifth factor— whether state or federal law is at issue, *Chase Brexton*, 411 F.3d at 463—clearly weighs against abstention since Plaintiffs have stated claims under 42 U.S.C. § 1983 and the U.S. Constitution. And the sixth factor—the adequacy of the state court to protect Plaintiffs' rights, *id.*—must also weigh against abstention. The 2014 congressional election is quickly approaching, and the North Carolina Supreme Court has refused to expedite its consideration of the redistricting cases before the deadline passes. Thus, the state court may not protect Plaintiffs' voting rights in the 2014 elections. All of these factors show that this is not an "exceptional case" requiring abstention, and Defendants' request should be denied.

IV. Conclusion

For the reasons stated above, the Court should deny Defendants' Motion and schedule an expedited hearing on Plaintiffs' Motion for a Preliminary Injunction.

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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' 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 20th day of February, 2014.

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