IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
NO. 1:15-cv-00399

SANDRA LITTLE COVINGTON, et al., Plaintiffs, v. THE STATE OF NORTH CAROLINA, et al., Defendants.	**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, DEFER, OR ABSTAIN**

Defendants are asking this Court to abandon its responsibility to enforce Plaintiffs' rights protected by the United States Constitution simply because a similar lawsuit by different plaintiffs is pending in state court. For all of the reasons that follow, Defendants' Motion should be denied.

STATEMENT OF THE FACTS

In this action, Plaintiffs have challenged as unconstitutional racial gerrymanders a number of State Senate and House districts enacted by the North Carolina General Assembly in 2011. None of the Plaintiffs in this case are parties to the previously-filed state case, which is currently pending at the North Carolina Supreme Court. *Dickson v. Rucho*, No. 201PA 12-3, 11-cvs-16896, 11-cvs-16940 (N.C.). Each individual plaintiff in this case asserts that his or personal right to equal protection under the laws is violated by assignment to a segregated election district.

A. Status of the State Court Proceeding

In November 2011, two sets of entirely different plaintiffs filed lawsuits in state court, challenging some of the same state legislative districts and several congressional districts that were challenged in this case. In 2013, after the 2012 elections, the trial court found that all but one legislative district challenged as a racial gerrymander in both *Dickson* and this case were subject to strict scrutiny but, as a matter of law, those gerrymandered districts survived strict scrutiny. The plaintiffs appealed, and eleven months after oral argument, and after the 2014 elections, the North Carolina Supreme Court assumed strict scrutiny applied and affirmed that the challenged districts passed strict scrutiny. The *Dickson* plaintiffs filed a petition for writ of certiorari to the United States Supreme Court seeking review.

On March 25, 2015, the United States Supreme Court issued its opinion in *Alabama Legislative Black Caucus v. Alabama*, ordering reconsideration of the plaintiffs' challenge to legislative districts that the Alabama legislature had drawn using "mechanical racial targets." 135 S. Ct. 1257, 1267. Rather than employing "a particular numerical minority percentage," the Court held legislators must consider "a minority's ability to elect a preferred candidate of choice." *Id.* at 1272. Thereafter, on April 20, 2015, the United States Supreme Court granted certiorari in the *Dickson* case, vacated the North Carolina Supreme Court's decision, and remanded for further proceedings in light of the Alabama case. The North Carolina Supreme Court heard arguments on remand on

August 31, 2015, and a decision is pending. The next potential opinion release date for the North Carolina Supreme Court is December 18, 2015.

B. Factual Basis of Plaintiffs' Claims in this Case

In response to the Supreme Court's ruling in *Alabama*, Plaintiffs in this case filed their Complaint in May 2015, alleging that Defendants here, as in *Alabama*, employed mechanical racial targets in creating the challenged districts in violation of the Constitution and gave no consideration to minority voters' demonstrated ability to elect their preferred candidates of choice in those districts. The challenged maps were drawn by Dr. Thomas Hofeller, an out-of-state consultant hired by the law firm for the legislature. (D.E. # 23-2, Ex A at 1896, 1903.). The chairs of the House and Senate redistricting committees orally gave their instructions to Dr. Hofeller, but the substance of those instructions was later reduced to writing in the form of public statements released by the chairs. (D.E. # 23-2, Ex. A at 1921-22; D.E. #23-3, Ex. B at 3078-79, 3184-85; D.E. #23-4, Ex. C at 2306.). Dr. Hofeller was instructed to draw House and Senate plans that would provide African-American citizens "with a substantial proportional and equal opportunity to elect their candidates." (D.E. #23-5, Ex. D at 1216; D.E. #23-4, Ex. C, at 2363-64; D.E. # 23-3, Ex. B at 3087-89, 3167.) In order to meet this goal, the redistricting chairs told Dr. Hofeller to "draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so" and to draw the majority black districts in numbers proportional to the number of African-

American citizens in the state. (D.E. #23-4, Ex. C at 2451; D.E. # 23-3, Ex. B at 3087-89, 3167).

Partial maps containing what were described as "VRA districts" were drawn and released to the public first. Citizens from around the state testified at public redistricting hearings that the proposed VRA districts went beyond what was required by the Voting Rights Act. (D.E. # 23-18, Ex. Q). However, the districts remained mostly unchanged. No African-American Senator or Representative voted in favor of the plans that were eventually enacted by the General Assembly. On July 27, 2011 the General Assembly passed the State Senate Redistricting Plan, 2011 S.L. 404, and on July 28, 2011, the General Assembly passed the State House Redistricting Plan, 2011 S.L. 402.

On September 24, 2015, with litigation pending in state and federal court, the General Assembly enacted 2015 N.C. Sess. Laws 258, which moved up the primary elections for state legislative districts from May to March 15, 2015, and the opening of filing for those offices to December 1, 2015. The Governor signed this bill on September 30, 2015.

ARGUMENT

I. THIS COURT SHOULD NOT STAY FURTHER PROCEEDINGS

A. A three-judge panel in a similar redistricting case has already rejected Defendants' arguments.

Defendants have unsuccessfully made these exact arguments in a similar case pending in this district. *Harris v. McCrory*, No. 1:13-cv-949 (M.D.N.C.), is a redistricting case involving Congressional Districts 1 and 12 that, like this case, was filed

after the state court case had been filed. Defendants twice filed the same motion to stay, defer, or abstain in that case, and they made the same arguments in support. The three-judge panel twice rejected their arguments and denied Defendants' motions. *See Harris* docket, 1:13-cv-949, at entries 43, 65, 105, and Minute Entry for 10/09/2015. In denying Defendants' first motion, the *Harris* panel observed that, ordinarily, federal courts should not refrain from exercising jurisdiction. (Order at *Harris* Dkt. 65 p. 8 (citing *Scott v. Germano*, 381 U.S. 407 (1965) and *Growe v. Emison*, 507 U.S. 25 (1993)) (copy attached as Appendix 1). The court found no requirement that a federal court "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 invalid." *Id.* (emphasis in original). At the end of the day, the court remained unconvinced that the federal court's exercise of its jurisdiction to enforce federal rights should be put on hold while the North Carolina Supreme Court litigation was underway. *Id.* Later, Defendants' renewed motion was summarily denied by the *Harris* court without a written decision. (Copy of portion of *Harris* docket attached as Appendix 2). Because Defendants' arguments are identical to those in the *Harris* case, this Court should likewise deny Defendants' motion.

B. *Germano* and its progeny do not require this Court to stay, defer, or abstain from hearing this matter.

Defendants have presented the Court with no authority that requires this Court to abstain. None of the cases relied upon by Defendants require a Court to abstain simply because a parallel state case is proceeding. *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 v. Emison*, 507 U.S. 25, 32 (1993). In *Growe*, the federal court actively prevented the state court from issuing a final remedy by enjoining enforcement of the state court's orders. In contrast, Plaintiffs have not asked this Court to enjoin the state courts from deciding *Dickson*.

In fact, as the *Harris* court recognized, the limitations of the *Germano* cases only apply when a state court is itself drawing and enforcing a redistricting plan. *Growe* and *Germano* only require a federal court to defer when a state court is "actually drawing up and selecting a redistricting plan," not when a state court is merely reviewing the same plan the federal court is reviewing. *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1180 (D. Colo. 2004) (interpreting *Growe*). "Once 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.* Similarly, the court in *Brown v. Kentucky*, Nos. 13-cv-68, 13-cv-25, 2013 U.S. Dist. LEXIS 90401, 2013 WL 3280003, at *12 (E.D. Ky. June 27, 2013) (copy attached as Appendix 3), 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 *8-9. 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. *Id.* at *13. 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.* at *15.

Defendants' reliance on *Rice v. Smith*, 988 F. Supp. 1437 (M.D. Ala. 1997) is misplaced. There, the court dismissed the case "[b]ecause the State court [had] adjudicated the merits of [the same plaintiffs'] claims," so "both res judicata and the *Rooker-Feldman* doctrine preclude this court's review of that decision." *Id.* at 1440. Here, as discussed below, res judicata does not apply, and Defendants have advanced no argument under the *Rooker-Feldman* doctrine. Thus, Defendants have presented no authority requiring this Court to defer or abstain from determining this matter.

C. This Court has an obligation to decide matters involving Constitutional rights and voting rights.

This Court has an important role in deciding matters involving the federal Constitution. A primary responsibility of federal courts is to protect federal constitutional rights. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995); *United States v. Jefferson County Bd. of Education*, 372 F.2d 836, 873 (5th Cir. 1966). This case involves the protection of Plaintiffs' federal constitutional right to not be assigned to electoral districts based on the color of their skin. Abstention is the exception, not the rule. *See Badham v. United States Dist. Ct. for the Northern Dist. of Calif.*, 721 F.2d 1170, 1173

(9th Cir. 1983) ("The dangers posed by an abstention order are particularly evident in voting cases. . . . In a redistricting case such as this, for example, the courts' failure to act before the next election forces voters to vote in an election which may be constitutionally defective."). Given the important issues at stake, Defendants have shown no basis for this Court to defer or abstain.

II. YOUNGER ABSTENTION DOES NOT APPLY

Younger abstention would be inappropriate in this case. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that a federal court should abstain from exercising jurisdiction and interfering with a state *criminal* proceeding where three elements are met: (1) there is an ongoing state judicial proceeding brought prior to substantial progress in the federal proceeding; (2) that implicates important, substantial, or vital state interests; and (3) provides adequate opportunity to raise constitutional challenges. *Id.* at 51; *Nivens v. Gilchrist*, 444 F.3d 237, 241 (4th Cir. 2006). *Younger* generally applies to challenges that seek to interfere with state criminal or quasi-criminal proceedings but does not apply to federal judicial review of state legislative action. 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 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 (quoting *Hawaii Housing Authority v. Midkiff*, , 467 U.S. 229, 236 (1984)). In fact, the three-judge panel in *Harris* agreed, holding that "Defendants' alternative arguments for abstention under *Younger*, which ordinarily only applies in the criminal context…have been considered and are deemed meritless." (Order at *Harris* Dkt. 65 p. 10). In this case, the state redistricting lawsuit 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*. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 368. Accordingly, this Court should not abstain from deciding this case under *Younger*.

III. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

Defendants unabashedly argue this Court should defer proceeding in this case because one or more of the Plaintiffs "*may* be bound by the judgment in *Dickson* under the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion)." (Defs' Br. 12). First, Defendants are wrong that res judicata or claim preclusion applies to this case. Notably, Defendants do not list the elements of either doctrine. Under North Carolina law, collateral estoppel applies where in an earlier suit there was 1) a final judgment; 2) on the merits; 3) the issue in question was identical to an issue in the earlier suit; 4) that issue was actually and necessarily litigated; and 5) the party against whom collateral estoppel is asserted was a party, or in privity with a party, to the earlier litigation. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 429, 349 S.E.2d 552 (1986); *Sartin v. Macik*, 535 F.3d 284, 287-88 (4th Cir. 2008) (citing *McInnis*). Similarly, res judicata applies where a party can show 1) a final judgment; 2) on the merits; 3) the same cause of action is involved in both suits; and 4) the party against whom res judicata is asserted was a party, or was in privity with a party, to the earlier suit. *Id.*

Here, the parties are not the same as those in the *Dickson* case. Defendants argue without authority that if some Plaintiffs are members of organizations that were plaintiffs in *Dickson*, they may be bound. Importantly, they have offered no evidence of this alleged tenuous connection. Even if this Court could assume without factual basis that some Plaintiffs are members of organizations that were plaintiffs in *Dickson*, there is no

evidence in the record that the Plaintiffs here had any knowledge of, leadership role regarding, control over, or decision-making role in the state court litigation.

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 represented by," a party to a separate litigation. (Defs' Br. 13). "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." *State ex rel Tucker v. Frinzi*, 344 N.C. 411, 417, 474 S.E.2d 127, 130 (1996); *see also Cnty. of Rutherford By & Through Child Support Enforcement Agency ex rel. Hedrick v. Whitener*, 394 S.E.2d 263, 266 (N.C. Ct. App. 1990) (no privity despite parties "interested in proving the same state of facts"). Thus, even if collateral estoppel or res judicata could apply, the elements would not be met in this case.

Second, Defendants cite no authority to support their contention that a court should defer considering a matter over which it has jurisdiction because one of these doctrines could *possibly* apply. Defendants have not shown that res judicata or collateral estoppel *does* apply; thus they have not made a sufficient showing that the case should be stayed. Third, even the potential application of one of these doctrines as to one or more plaintiffs in no way warrants deferral of the entire case. At most, assuming without conceding the applicability of res judicata or collateral estoppel, these doctrines would only affect those specific plaintiffs and the districts in which they live. Defendants have no grounds to argue the entire case should be stayed because res judicata or collateral

estoppel might apply to some plaintiffs. Indeed, Defendants have shown no basis whatsoever for this case to be stayed.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Stay, Defer, or Abstain with prejudice.

Respectfully submitted, this the 17th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY, DEFER, OR ABSTAIN**, with service 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 17th day of November, 2015.

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

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID HARRIS, CHRISTINE BOWSER, and SAMUEL LOVE,	)	
Plaintiffs,	)	
v.	)	1:13CV949
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.	)	

MEMORANDUM ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion to Stay, Defer, or Abstain (Doc. Nos. 18, 43). Plaintiffs are North Carolina voters seeking declaratory and injunctive relief on the ground that two of the State's congressional districts are the result of racial gerrymandering in violation of the Equal Protection Clause. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials presently before the Court, and argument would not aid in our decision. See M.D. Loc. R. 7.3(c). For the reasons discussed below, both motions are DENIED WITHOUT PREJUDICE.

I.

The North Carolina congressional districts at issue — Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12") — were redrawn in 1997 following litigation in the United States Supreme Court challenging both districts as illegal racial gerrymanders.[1] See Shaw v. Hunt, 517 U.S. 899 (1996) ("Shaw II"); Shaw v. Reno, 509 U.S. 630 (1993) ("Shaw I"). Neither district was redrawn as a majority African-American district, that is, one in which African-Americans constitute more than 50 percent of the population, and both districts survived subsequent constitutional challenges. See Easley v. Cromartie, 532 U.S. 234 (2001) ("Cromartie II"); Hunt v. Cromartie, 526 U.S. 541 (1999) ("Cromartie I"). North Carolina again redrew CD 1 and CD 12 after the 2000 Census, and although the State increased the Black Voting Age Population ("BVAP") of both districts, neither became a majority African-American district. However, the districts were again redrawn after the 2010 Census, in 2011, and CD 1 and CD 12 are now both majority African-American districts by voting age population.

Plaintiffs have sued Governor Patrick McCrory in his official capacity, the North Carolina State Board of Elections,

[1] The facts and legal conclusions contained herein are found based on this preliminary record, without prejudice to the parties' presentation of such facts and argument as may be appropriate following discovery and further briefing.

and its Chairman, Joshua Howard, in his official capacity, asserting that North Carolina has "packed" African-American voters into CD 1 and CD 12, that race was the predominant factor in the redistricting plan, and that Defendants had no compelling interest in doing so. In support of their claims, Plaintiffs cite, inter alia: statements from the officials responsible for developing the redistricting plan about their purpose in redrawing the districts; the unusual geographic shape of the districts; and the fact that African-American voters consistently had been able to elect their preferred candidate even when CD 1 and CD 12 were not majority African-American districts. In response, Defendants argue that they redrew CD 1 not on the basis of race, but rather because CD 1 was under-populated and because they sought to avoid liability under Sections 2 and 5 of the Voting Rights Act[2] by redrawing CD 1 as a majority African-American district. With respect to CD 12, Defendants argue that they redrew the district boundaries in

[2] Section 2 prohibits any voting practices that "result in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color," or membership in a particular language group. 42 U.S.C. § 1973(a). Section 5 requires covered jurisdictions to obtain preclearance before changing their districting plans, granting preclearance only when the change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." Riley v. Kennedy, 553 U.S. 406, 412 (2008). Recently, the Supreme Court struck down the formula used to determine which jurisdictions are covered as unconstitutional, but without holding that Section 5 itself is unconstitutional. See Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013).

order to obtain a partisan advantage by making the surrounding districts more competitive for Republican candidates, and also to avoid liability under Section 5 of the Voting Rights Act.

In a separate state court action, Margaret Dickson and the North Carolina National Association for the Advancement of Colored People ("NAACP") have also challenged the constitutionality of the 2011 redistricting plan, including a challenge to CD 1 and CD 12. Dickson v. Rucho, Nos. 11CVS 16896, 11 CVS 16940, 2013 WL 3376658 (N.C. Sup. 2013). On July 8, 2013, the North Carolina trial court upheld the 2011 redistricting plan, finding that the State had a strong evidentiary basis to conclude that it was reasonably necessary to redraw CD 1 as it did in order to avoid liability under the Voting Rights Act, and that the district was narrowly tailored to this purpose. The court also found that the State's predominant motive in redrawing CD 12 was to establish a Democratic stronghold and that race was not a predominant factor. Dickson and the North Carolina NAACP appealed the trial court's ruling, and the North Carolina Supreme Court heard oral argument on January 6, 2014. As of the present date, the North Carolina Supreme Court has yet to rule.

Plaintiffs in this matter seek a preliminary injunction enjoining Defendants from holding elections under the 2011 redistricting plan, whereas Defendants urge the Court to stay,

defer, or abstain in light of the pending appeal before the North Carolina Supreme Court.

II.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 129 S.Ct. 365, 374 (2008) (internal citations omitted). "[I]njunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Id. (internal citations omitted). See Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 811 (4th Cir. 1991) ("Federal decisions have uniformly characterized the grant of interim relief as an extraordinary remedy involving the exercise of a very far-reaching power which is to be applied 'only in [the] limited circumstances' which clearly demand it.")

We review a state's redistricting plan under strict scrutiny if the plaintiff shows "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a

particular district." Miller v. Johnson, 515 U.S. 900, 916 (1995). "To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." Id. We otherwise review the state's redistricting plan under rational basis review. If the plaintiff meets the burden for strict scrutiny, however, "the State must demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest." Id. at 920. When the state maintains that its race-based districting plan was done in order to achieve its interest in complying with federal anti-discrimination laws, the state must establish that it has a "strong basis in evidence . . . for concluding that creation of a majority-minority district is reasonably necessary to comply with [the Voting Rights Act], and the districting that is based on race substantially addresses the [Voting Rights Act] violation." Bush v. Vera, 116 S.Ct. 1941, 1960 (1996) (internal quotation marks and citations omitted).

Plaintiffs have marshaled both circumstantial and direct evidence that race was the predominant factor in North Carolina's redistricting plan, but "courts [are required] to exercise extraordinary caution in adjudicating claims that a

State has drawn district lines on the basis of race" in light of "the sensitive nature of redistricting," "the presumption of good faith that must be accorded to legislative enactments," and the fact that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." Miller, 515 U.S. at 916. Assuming, without deciding, that strict scrutiny applies, Plaintiffs' burden in establishing a likelihood of success on the merits is made heavier by the evidentiary support for Defendants' claim that they reasonably feared that failing to redraw CD 1 and CD 12 as majority-minority districts would subject the State to liability under the Voting Rights Act, coupled with the race-neutral interests of addressing under-population and obtaining partisan advantage.

Plaintiffs have articulated the harms that they will likely suffer in the absence of preliminary relief should the Court ultimately find that they prevail on the merits. However, this factor must also be weighed against the harms to Defendants upon the issuance of an order enjoining them from proceeding with the upcoming elections under the present districting plan, along with the public's interest in having elections proceed in a timely manner with minimal voter confusion. Plaintiffs' burden is quite a heavy one, and weighing all four of the factors considered when granting or denying preliminary relief, the Court finds that Plaintiffs have failed to make the clear

showing required for this extraordinary remedy. Accordingly, Plaintiffs' motion is denied without prejudice.

III.

Defendants ask us to stay, defer, or abstain from this action because of parallel state litigation. They argue that the state case presents substantially similar claims as the instant case, and that the plaintiffs should not be permitted a "second bite at the apple" by litigating in federal court. Defendants' primary argument for a stay or deferral derives from Scott v. Germano, 381 U.S. 407 (1965), and Growe v. Emison, 507 U.S. 25, 34 (1993). They also seek abstention under Younger v. Harris, 401 U.S. 37 (1971), or Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

Ordinarily, federal courts, when possessed of jurisdiction, should not refrain from exercising that jurisdiction. See Sprint Communications v. Jacobs, 134 S. Ct. 584, 590-91 (2013). However, in Germano, the Supreme Court observed that "the power of the judiciary of a state to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the states in such cases has been specifically encouraged." 381 U.S. at 409. In Growe, the Court reiterated that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state

reapportionment nor permit federal litigation to be used to impede it." 507 U.S. at 34; see also Chapman v. Meier, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.").

In light of the Supreme Court's pronouncements on this subject, we acknowledge that stays or deferrals of federal litigation are often appropriate when the state – through either its legislature or its judiciary – is contemporaneously engaged in the process of redrawing its congressional map. However, it is not entirely clear that Growe requires us 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 invalid. See Growe, 507 U.S. at 27-32 (reversing the district court's decision to enjoin a state court engaged in the process of redrawing the state's map). But see Rice v. Smith, 988 F. Supp. 1437, 1438 (M.D. Ala. 1997) (dismissing federal case where review of a challenge to a state map was pending before the state's highest court). In any event, we need not decide this question today because we are not convinced that the North Carolina Supreme Court will issue a decision in the state litigation in a timely manner. 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). Given this concern, we are not constrained to stay our hand under Growe, and we decline to exercise our discretion to do so. Accordingly, we will deny the motion without prejudice.

Defendants' alternative arguments for abstention under Younger, which ordinarily only applies in the criminal context, and under Colorado River, which requires exceptional circumstances, have been considered and are deemed meritless. We therefore will deny Defendants' motion on those grounds as well.

IV.

For the aforementioned reasons, it is therefore ordered that Plaintiffs' Motion for Preliminary Injunction (Doc. 18) is **DENIED WITHOUT PREJUDICE** and that Defendants' Motion to Stay, Defer, or Abstain (Doc. 43) is **DENIED WITHOUT PREJUDICE.**

This the 22nd day of May, 2014.

For the Court

/s/ William L. Osteen, Jr.
Chief United States District Judge

18BC,THREE-JUDGE,TRIAL

U.S. District Court
North Carolina Middle District (NCMD)
CIVIL DOCKET FOR CASE #: 1:13-cv-00949-WO-JEP

HARRIS, et al v. MCCRORY, et al
Assigned to: CHIEF JUDGE WILLIAM L. OSTEEN JR.
Referred to: MAG/JUDGE JOI ELIZABETH PEAKE
Cause: 42:1983 Civil Rights Act

Date Filed: 10/24/2013
Jury Demand: None
Nature of Suit: 400 State Reapportionment
Jurisdiction: Federal Question

Plaintiff

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10/05/2015		Motion Submitted: 105 RENEWED MOTION to Stay, Defer, or Abstain to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 10/05/2015)
10/05/2015	122	NOTICE of Trial Calendar: Bench Trial set for 10/13/2015 09:30 AM in Greensboro Courtroom #1 before CHIEF JUDGE WILLIAM L. OSTEEN JR., JUDGE MAX O. COGBURN, JR., JUDGE ROGER L. GREGORY. (Welch, Kelly) (Entered: 10/05/2015)
10/07/2015	123	REPLY, filed by Defendants JOSHUA HOWARD, PATRICK MCCRORY, NORTH CAROLINA STATE BOARD OF ELECTIONS, THE, to Response to 107 MOTION to Exclude *the Testimony and Reports of Stephen Ansolabehere* filed by JOSHUA HOWARD, PATRICK MCCRORY, NORTH CAROLINA STATE BOARD OF ELECTIONS, THE. (FARR, THOMAS) (Entered: 10/07/2015)
10/07/2015	124	REPLY, filed by Plaintiffs CHRISTINE BOWSER, DAVID HARRIS, to Response to 114 MOTION to Exclude *in Part Testimony of Dr. Thomas Hofeller* filed by CHRISTINE BOWSER, DAVID HARRIS. (SPEAS, EDWIN) (Entered: 10/07/2015)
10/08/2015		Motions Submitted: 107 MOTION to Exclude the Testimony and Reports of Stephen Ansolabehere, 114 MOTION to Exclude in Part Testimony of Dr. Thomas Hofeller, to CHIEF JUDGE WILLIAM L. OSTEEN, JR. (Welch, Kelly) (Entered: 10/09/2015)
10/09/2015		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR, JUDGE ROGER L. GREGORY and JUDGE MAX O. COGBURN in G-1: Final Pretrial Conference held on 10/9/2015. Attorneys Edwin Speas and John O'Hale present on behalf of the Plaintiffs. Attorney Kevin Hamilton participated via telephone conference call. Attorneys Thomas Farr, Phillip Strach and Alexander Peters present on behalf of the Defendants. Court denied without prejudice 105 Defendants' Motion to Stay, Defer, or Abstain; Court will reserve ruling on the Motion in Limine. Bench Trial to commence October 13, 2015 at 9:00 a.m. in Greensboro, Courtroom 1. (Court Reporter Briana Nesbit.) (Welch, Kelly) (Entered: 10/09/2015)
10/12/2015	125	STIPULATION *by All Parties and Filed* by CHRISTINE BOWSER, DAVID HARRIS. (SPEAS, EDWIN) (Entered: 10/12/2015)
10/13/2015		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., JUDGE ROGER L. GREGORY, and JUDGE MAX O. COGBURN in G-1. Bench Trial held on 10/13/2015. Attorneys Hamilton, Speas, and O'Hale appeared as counsel on behalf of Plaintiffs and Attorneys Farr, Peters, and Strach on behalf of Defendants. Plaintiffs moved for admission of Notebook of Stipulated Exhibits containing 1-12, 14-69, 71-144 and Court admits. Plaintiffs presented evidence (see witness and exhibit list). Court recessed at 5:30 p.m. to reconvene at 9:00 a.m. on Wednesday October 14, 2015. (Court Reporter Joseph Armstrong.) (Powell, Gloria) (Entered: 10/13/2015)
10/13/2015		Set/Reset Deadlines/Hearings: Bench Trial continued to 10/14/2015 09:00 AM in Greensboro Courtroom #1. (Powell, Gloria) (Entered: 10/13/2015)
10/13/2015		TEXT ORDER denying without prejudice 105 Motion to Stay for reasons as stated from the bench on October 9, 2015. (Powell, Gloria) (Entered: 10/14/2015)
10/14/2015		Minute Entry for proceedings held before CHIEF JUDGE WILLIAM L. OSTEEN, JR., JUDGE ROGER L. GREGORY, and JUDGE MAX O. COGBURN in G-1. Bench Trial held on 10/14/2015. Attorneys Hamilton, Speas, and O'Hale appeared as counsel on behalf of Plaintiffs and Attorneys Farr, Peters, and Strach on behalf of Defendants.

Brown v. *Kentucky*

United States District Court for the Eastern District of Kentucky

June 27, 2013, Decided; June 27, 2013, Filed

Civil No. 13-cv-68 DJB-GFVT-WOB; Civil No. 13-cv-25 DJB-GFVT-WOB

Reporter
2013 U.S. Dist. LEXIS 90401; 2013 WL 3280003

KENNY BROWN, individually and in his official capacity as the Boone County Clerk, et al., Plaintiffs, v. THE COMMONWEALTH OF KENTUCKY, et al., Defendants. MARTIN HERBERT, et al., Plaintiffs, v. KENTUCKY STATE BOARD OF ELECTIONS, et al., Defendants.

Subsequent History: Summary judgment granted by, Injunction granted at, Motion denied by, As moot Brown v. Ky. Legislative Research Comm'n, 2013 U.S. Dist. LEXIS 116191 (E.D. Ky., Aug. 16, 2013)
Motion denied by, As moot, Motion granted by, Motion denied by Brown v. Ky. Legislative Research Comm'n, 2013 U.S. Dist. LEXIS 184443 (E.D. Ky., Oct. 31, 2013)
Costs and fees proceeding at Brown v. Ky. Legislative Research Comm'n, 2014 U.S. Dist. LEXIS 9486 (E.D. Ky., Jan. 27, 2014)

Prior History: *Legislative Research Comm'n v. Fischer, 366 S.W.3d 905, 2012 Ky. LEXIS 55 (Ky., 2012)*

Core Terms

maps, redistricting, legislative district, elections, district court, session, districts, enjoining, obstruct, duties, plans

Counsel: **[*1]** For Kenny Brown, In his official capacity as the Boone County Clerk (2:13-cv-00068-WOB-GFVT-DJB), Official Plaintiff: Christopher David Wiest, LEAD ATTORNEY, Crestview Hills, KY; Edward Jason Atkins, Richard A. Brueggemann, LEAD ATTORNEYS, Hemmer DeFrank PLLC, Ft. Mitchell, KY.

For Kenny Brown, Individually, Steve Arlinghaus, Individually, Phyllis Sparks, Cathy Flaig, Brett Gaspard, Terry Donoghue, Lawrence Robinson, Kenneth Moellman, Garth Kuhnhein, Timothy J. Jones, Brandon Voelker, Garry Moore, Individually (2:13-cv-00068-WOB-GFVT-DJB), Plaintiffs: Christopher David Wiest, LEAD ATTORNEY, Crestview Hills, KY; Edward Jason Atkins, Richard A. Brueggemann, LEAD ATTORNEYS, Hemmer DeFrank PLLC, Ft. Mitchell, KY.

For Martin Herbert, Plaintiff in 3:13-cv-25, Geri Herbert, Plaintiff in 3:13-cv-25, Teena Halbig, Plaintiff in 3:13-cv-25, Donald L. Allewalt, Jr., Plaintiff in 3:13-cv-25, Linda Allewalt, Plaintiff in 3:13-cv-25 (2:13-cv-00068-WOB-GFVT-DJB), Plaintiffs: Benjamin W. Carter, LEAD ATTORNEY, Ben Carter Law PLLC, Louisville, KY; M. Laughlin McDonald, LEAD ATTORNEY, ACLU Voting Rights Project, Atlanta, GA; William Ellis Sharp, LEAD ATTORNEY, ACLU of Kentucky, Louisville, KY.

For The Commonwealth **[*2]** of Kentucky (2:13-cv-00068-WOB-GFVT-DJB), Defendant: Clay A. Barkley, LEAD ATTORNEY, Office of Attorney General - KY, Frankfort, KY.

For The Kentucky State Board of Elections, Kentucky State Board of Elections, Defendant in 3:13-cv-25, Allison L. Grimes, Defendant in 3:13-cv-25 - in her official capacities as Secretary of State & Chair, Kentucky State Board of Elections, David Cross, Defendant in 3:13-cv-25 - in his official capacity as Board Member, Kentucky State Board of Elections, John W. Hampton, Defendant in 3:13-cv-25 - in his official capacity as Board Member, Kentucky State Board of Elections, Stephen Huffman, Defendant in 3:13-cv-25 - in his official capacity as Board Member, Kentucky State Board of Elections, Denise May, Defendant in 3:13-cv-25 - in her official capacity as Board Member, Kentucky State Board of Elections, George Russell, Defendant in 3:13-cv-25 - in his official capacity as Board Member, Kentucky State Board of Elections, Maryellen Allen, Defendant in 3:13-cv-25 - in her official capacity as Executive Director, Kentucky State Board of Elections, Roy Sizemore, Defendant in 3:13-cv-25 - in his official capacity as Board Member,

Kentucky State Board of Elections **[*3]** (2:13-cv-00068-WOB-GFVT-DJB), Defendants: Lynn Sowards Zellen, LEAD ATTORNEY, Kentucky Secretary of State, Frankfort, KY; Noel Embry Caldwell, LEAD ATTORNEY, Kentucky Attorney General, Frankfort, KY.

For Kentucky Legislative Research Commission (2:13-cv-00068-WOB-GFVT-DJB), Defendant: Laura Hromyak Hendrix, LEAD ATTORNEY, Legislative Research Commission, Frankfort, KY; Gregory Allen Woosley, Kentucky Legislative Research Commission - 170, Frankfort, KY.

For Steve Beshear, In his official capacity as Governor of the Commonwealth of Kentucky (2:13-cv-00068-WOB-GFVT-DJB), Official Defendant: Clay A. Barkley, LEAD ATTORNEY, Office of Attorney General - KY, Frankfort, KY.

For Allison Lundergan Grimes, In her official capacity as Secretary of State of the Commonwealth of Kentucky (2:13-cv-00068-WOB-GFVT-DJB), Official Defendant: Lynn Sowards Zellen, LEAD ATTORNEY, Kentucky Secretary of State, Frankfort, KY; Noel Embry Caldwell, LEAD ATTORNEY, Kentucky Attorney General, Frankfort, KY.

For Greg Stumbo, In his official capacity as Speaker of the House of Representatives (2:13-cv-00068-WOB-GFVT-DJB), Official Defendant: Pierce B. Whites, LEAD ATTORNEY, Whites & Whites, Frankfort, KY; Anna S. Whites, **[*4]** Frankfort, KY.

For Robert Stivers, In his official capacity as President of the Kentucky Senate (2:13-cv-00068-WOB-GFVT-DJB), Official Defendant: Jessica Ann Burke, LEAD ATTORNEY, J. Burke Law Offices, PLLC, Frankfort, KY; Stanton L. Cave, LEAD ATTORNEY, Law Office of Stanton L. Cave & Associates, P.S.C., Lexington, KY.

For Robert Stivers, In his official capacity as President of the Kentucky Senate (2:13-cv-00068-WOB-GFVT-DJB), Cross Claimant: Jessica Ann Burke, LEAD ATTORNEY, J. Burke Law Offices, PLLC, Frankfort, KY; Stanton L. Cave, LEAD ATTORNEY, Law Office of Stanton L. Cave & Associates, P.S.C., Lexington, KY.

For Allison Lundergan Grimes, In her official capacity as Secretary of State of the Commonwealth of Kentucky, The Kentucky State Board of Elections (2:13-cv-00068-WOB-GFVT-DJB), Cross Defendants: Lynn Sowards Zellen, LEAD ATTORNEY, Kentucky Secretary of State, Frankfort, KY; Noel Embry Caldwell, LEAD ATTORNEY, Kentucky Attorney General, Frankfort, KY.

For Kentucky Legislative Research Commission (2:13-cv-00068-WOB-GFVT-DJB), Cross Defendant: Laura Hromyak Hendrix, LEAD ATTORNEY, Legislative Research Commission, Frankfort, KY; Gregory Allen Woosley, Kentucky Legislative Research **[*5]** Commission - 170, Frankfort, KY.

For Steve Beshear, In his official capacity as Governor of the Commonwealth of Kentucky (2:13-cv-00068-WOB-GFVT-DJB), Cross Defendant: Clay A. Barkley, LEAD ATTORNEY, Office of Attorney General - KY, Frankfort, KY.

For Greg Stumbo, In his official capacity as Speaker of the House of Representatives (2:13-cv-00068-WOB-GFVT-DJB), Cross Defendant: Pierce B. Whites, LEAD ATTORNEY, Whites & Whites, Frankfort, KY; Anna S. Whites, Frankfort, KY.

For Robert Stivers, In his official capacity as President of the Kentucky Senate (2:13-cv-00068-WOB-GFVT-DJB), Counter Claimant: Jessica Ann Burke, LEAD ATTORNEY, J. Burke Law Offices, PLLC, Frankfort, KY; Stanton L. Cave, LEAD ATTORNEY, Law Office of Stanton L. Cave & Associates, P.S.C., Lexington, KY.

For Steve Arlinghaus, Individually, Kenny Brown, Individually, Terry Donoghue, Cathy Flaig, Brett Gaspard, Timothy J. Jones, Garth Kuhnhein, Kenneth Moellman, Garry Moore, Individually, Lawrence Robinson, Phyllis Sparks, Brandon Voelker (2:13-cv-00068-WOB-GFVT-DJB), Counter Defendants: Christopher David Wiest, LEAD ATTORNEY, Crestview Hills, KY; Edward Jason Atkins, Richard A. Brueggemann, LEAD ATTORNEYS, Hemmer DeFrank **[*6]** PLLC, Ft. Mitchell, KY.

For Martin Herbert, Geri Herbert, Teena Halbig, Donald L. Allewalt, Jr., Linda Allewalt (3:13-cv-00025-GFVT-WOB-DJB), Plaintiffs: Benjamin W. Carter, LEAD ATTORNEY, Ben Carter Law PLLC, Louisville, KY; M. Laughlin McDonald, LEAD ATTORNEY, PRO HAC VICE, ACLU Voting Rights Project, Atlanta, GA; William Ellis Sharp, LEAD ATTORNEY, ACLU of Kentucky, Louisville, KY.

For Kentucky State Board of Elections, Allison L. Grimes, in her official capacities as Secretary of State and Chair, Kentucky State Board of Elections, David Cross, in his official capacity as Board Member, Kentucky State Board of Elections, John W. Hampton, in his official capacity as Board Member, Kentucky State Board of Elections, Stephen Huffman, in his official capacity as Board Member, Kentucky State Board of Elections, Denise May, in her official capacity as Board Member, Kentucky State Board of Elections, George Russell, in his official capacity as Board Member, Kentucky State Board of Elections, Roy Sizemore, in his official capacity as Board Member, Kentucky State Board of Elections, Maryellen Allen, in her official capacity as Executive Director, Kentucky State Board of Elections (3:13-cv-00025-GFVT-WOB-DJB), **[*7]** Defendants: Lynn Sowards Zellen, LEAD ATTORNEY, Kentucky Secretary of State, Frankfort, KY; Noel Embry Caldwell, LEAD ATTORNEY, Kentucky Attorney General, Frankfort, KY.

Judges: Gregory F. Van Tatenhove, United States District Judge.

Opinion by: Gregory F. Van Tatenhove

Opinion

MEMORANDUM OPINION & ORDER

Before: BOGGS, *Circuit Judge*; VAN TATENHOVE, *District Judge*; and BERTELSMAN, *Senior District Judge*.

Defendant Greg Stumbo, Speaker of the Kentucky House of Representatives, asks the Court to stay this action in which several Kentucky citizens have challenged the constitutionality of the Commonwealth's legislative districts. [R. 36]. He argues that redistricting is the legislature's job, a job that will be accomplished given the recent Extraordinary Legislative Session called by the Governor for just such a purpose. The Plaintiffs counter that though the General Assembly should be permitted another opportunity to enact new legislative districts, this Court must take steps necessary to draw constitutional lines should the legislature once again fail to perform its duties. [R. 38]. For the reasons that follow, the Motion to Stay is DENIED.

I

These cases are always informed by the unsuccessful efforts of the legislative **[*8]** process. Based on the 2000 United States Census, the Kentucky General Assembly passed a legislative redistricting plan in 2002. KRS 5.010(2)(c). This was done not only to satisfy the constitutional dictates of *Section 33 of the* Kentucky Constitution, which requires the General Assembly to redistrict every ten years, but also to ensure adherence to the "one person one vote" principle derived from the *Fourteenth Amendment to the United States Constitution*. Ten years later, after another census was conducted revealing population changes in Kentucky, the General Assembly passed a new redistricting plan. However, the constitutionality of this plan was challenged in *Legislative Research Comm'n v. Fischer, 366 S.W.3d 905 (Ky. 2012)*, wherein the Kentucky Supreme Court invalidated it. Remarkably, the 2012 elections were held under the 2002 legislative district lines, which had not been altered to reflect demographic changes in Kentucky over the intervening decade. Since that time, the legislature went in and out of the 2013 Regular Session without enacting a new redistricting plan.

Now, approaching year four of the ten year election decennial, the legislative districts in force in Kentucky are **[*9]** the lines passed during the second year of former President George W. Bush's administration. Concerned that the population changes have caused vote dilution and legislative malapportionment, two sets of Plaintiffs initiated an action, consolidated in this Court, against various officials in the Kentucky state government. Speaker Stumbo, one of those named defendants, now requests the Court to stay its hand to allow the Kentucky General Assembly another opportunity to provide the citizens of the Commonwealth of Kentucky with constitutional legislative districts.

II

Before considering Speaker Stumbo's substantive arguments in favor of staying this action, it is critical to set forth what the Plaintiffs seek at this point in the litigation. First, they request a declaration by the Court that it would be unconstitutional for the legislative districts passed in 2002 to be employed yet again in 2014. [1] Toward this end, the Plaintiffs seek a period of

[1] At the hearing, the constitutionality of the 2012 elections seemed to be a point of concern for the Plaintiffs. However, the Brown Plaintiffs have now withdrawn their claim for damages based on past constitutional violations.

discovery so that relevant population information can be gathered in support of a dispositive motion. Second, if found unconstitutional, the Plaintiffs seek an order enjoining future elections from taking place under the 2002 legislative districts. **[*10]** Finally, if, and only if, the legislature is unsuccessful in passing constitutional legislative districts sufficiently in advance of the November 4, 2013, residency deadline, the Plaintiffs request that the Court be prepared to fulfill its statutory duty and provide constitutional legislative district plans so that fair elections may go forward in the Commonwealth of Kentucky. Typically, this requires the Court to consider expert testimony and maps proposed by the parties at a trial, after which the Court will adopt a legislative redistricting plan for the next election cycle.

A

Speaker Stumbo's first argument essentially claims that redistricting is in the province of elected members of the Kentucky General Assembly and should not be wrested from the people by unelected judges. In support of this proposition, he cites Growe v. Emison, *507 U.S. 25, 33, 113 S. Ct. 1075, 1081, 122 L. Ed. 2d 388 (1993)*, wherein the United States Supreme Court stated, "In the reapportionment **[*11]** context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch has begun to address the highly political task itself." As a result, Speaker Stumbo argues that the Court should stay this action to allow the legislature to do its job without further interference from the Court.

The Kentucky General Assembly has the primary responsibility for apportioning legislative districts in the Commonwealth of Kentucky. *Ky. Const. § 33*; Growe, *507 U.S. at 34*. Though the Defendants have expended much ink in support of this proposition, neither the Plaintiffs nor the Court disagrees that the law contemplates the legislature as Plan A for redistricting. [2] To be clear, in the view of this Court, the most desirable outcome in this matter is for the Kentucky General Assembly to timely pass a constitutional legislative redistricting plan. However, it is equally apparent that when the political branches fail, the law has vested secondary responsibility for these duties in the hands of the courts — Plan B. Growe, *507 U.S. at 36*; *see Fischer, 366 S.W.3d at 908*.

The Supreme Court precedent cited by the Defendants clearly permits the simultaneous operation of these two procedures to ensure constitutional legislative districts are in place in time for an election. In Growe, a group of Plaintiffs challenged the constitutionality of the Minnesota legislative districts in a State Court action. *507 U.S. at 27*. The parties in that case stipulated that in light of new census data, the challenged districts were unconstitutional. *Id.* A second group of Plaintiffs filed suit, raising similar challenges in Federal Court. *Id. at 28*. A three-judge panel was convened, pursuant to *28 U.S.C. § 2284*. *Id.* As both cases proceeded, the Minnesota Legislature held public hearings and passed new maps. *Id.* Regrettably, these new maps contained several flaws, requiring curative legislation, which did not pass the legislature before the session ended. *Id.* As this draft legislation was scheduled to be taken up at the beginning of the next session, the Federal District Court granted a motion "to defer further proceedings pending action by the Minnesota Legislature." *Id at 29*. However, in the **[*13]** interim, the Court did set a deadline for legislative actions and appointed special masters to develop contingent plans in the event the legislature failed to provide constitutional legislative districts. *Id.*

Speaker Stumbo seems to argue that these actions taken by the three-judge panel of the Federal District Court in Minnesota — determining the constitutionality of prior maps, setting deadlines, and working toward the creation of contingency maps — constituted the unconstitutional practice condemned in Growe. This is decisively not the case. The Supreme 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 a develop a redistricting plan in time for the primaries. [*Scott v.] Germano[, 381 U.S. 407, 408, 85 S. Ct. 1525, 14 L. Ed. 2d 477 (1965)*,] requires deferral, not abstention." *Id. at 36-37*.

The failure of the Minnesota three-judge district court was not in making the necessary preparations to fulfill its duties in the event that the legislature could not, but in proactively enjoining all proceedings in the parallel State Court action until after the legislature had **[*14]** the opportunity to pass its maps. *Id at 30*. This stay was ultimately lifted by the Supreme Court. *Id.* The State Court then produced a redistricting plan that was conditioned on the failure of the legislature to pass a

[2] Therefore, the focus of the Court in this action **[*12]** shall be upon the constitutionality of districts to be used in future elections.

constitutional map. *Id.* The Minnesota Legislature did ultimately pass a map, but it was vetoed by the Governor. *Id.* The State Court then issued orders adopting its plans. *Id.* Shortly thereafter, the Federal District Court issued an order adopting its own plans and permanently enjoining state interference with those plans. *Id. at 31*. The District Court justified its order on the basis that the State Court's plan violated federal law, the Voting Rights Act. *Id.* It was this action by the District Court that was condemned. The United States Supreme Court reiterated that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body" and that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Id at 34* (internal quotation marks omitted).

The relief suggested by the Plaintiffs **[*15]** in our case is distinct from the type of actions taken by the District Court in Growe. As an initial matter, in this case there is no parallel state court proceeding that this Court is taking affirmative steps to enjoin and overrule. In addition, the remedy sought by the Plaintiffs is deferential and would neither obstruct state reapportionment nor use federal litigation to impede it. Now that the Governor has called the Extraordinary Legislative Session, the Plaintiffs are agreeable to affording the General Assembly another opportunity to enact constitutional maps. However, the Plaintiffs argue that this Court should find the 2002 maps that are currently in force to be unconstitutional, enjoin their use, and have a process in place to provide for constitutional districts should the legislature fail. Proceeding in this manner would not run afoul of the teachings of Growe, as the District Court therein took nearly identical steps without admonition of the Court. Moreover, by taking these actions, the Court would do nothing to obstruct the work of the legislature, which would retain the primary responsibility to produce constitutional districts. On the contrary, as recognized by counsel **[*16]** for Senate President Stivers, the specter of this litigation may serve as a "powerful motivating factor" for the General Assembly to timely pass its own redistricting plan.

Further, even if the remedy sought by the Plaintiffs at this point could be considered to be obstructive, it would not necessarily offend Growe, which contains an exception for federal court actions taken when there exists "evidence that these state branches will fail timely to perform their duty." *Id.* Counsel for Speaker Stumbo asserts that the General Assembly will pass constitutional legislative maps in the newly called legislative session. And while all are hopeful that the legislature will be successful, history teaches that all too often the past is prologue. As noted by the Plaintiffs, the Kentucky General Assembly has already once failed to pass constitutional legislative maps. *See Fischer, 366 S.W.3d at 908*. After this failure, the legislature unsuccessfully addressed redistricting in the following 2013 session. A map passed the House of Representatives, but as confirmed by both the Plaintiffs and some Defendants, this map has generated nearly as many constitutional questions as it answered. At the hearing, **[*17]** between assurances that a redistricting plan would pass, the representatives of each legislative chamber raised competing concerns over the House map.

The Court remains hopeful, but time is short for all. By November 4, 2013, the Kentucky Constitution requires that citizens of the Commonwealth must reside in the district in which they seek to run for election. Allowing that date to pass constrains the choices of these Plaintiffs and allows districts to be drawn punitively. In short, though the Plaintiffs do not seek and the Court does not intend to provide relief that obstructs the legislature, actions must be taken now to prepare for the possibility that the state institutions will be unable to fulfill their duty in a timely manner.

B

These same reasons defeat Speaker Stumbo's second argument that a stay is justified under the factors that govern granting a stay pending appeal or ordering a preliminary injunction. When considering a stay pending appeal, the Sixth Circuit considers the following factors:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the **[*18]** prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

Serv. Emps. Int'l Union Local 1 v. Husted, 698 F.3d 341, 343 (6th Cir. 2012) (internal quotation marks omitted). Assuming without deciding that these factors are relevant in determining whether a stay is necessary here, as Speaker Stumbo suggests, a stay would still not be merited under these circumstances. As previously

discussed, there is some evidence to persuade the Court that the legislature will not be able to timely develop constitutional maps. However, even without a stay, the legislature is permitted sufficient time to attempt to do so, thereby causing no irreparable harm if the stay is not granted. Finally, if the legislature were to fail in passing constitutional legislative districts and the Court were not prepared to do so, the fundamental voting rights of both the Plaintiffs and the general public would be severely threatened.

The Kentucky General Assembly has the primary responsibility to enact a constitutional redistricting plan, and this Court will not interfere with its ability to carry out these duties. However, the Court also has a statutory job to do. **[*19]** As this Court is secondarily responsible for timely providing constitutional electoral maps should the legislature fail, a stay would interfere with the Court's duties. Either as a result of Plan A or Plan B, all citizens of the Commonwealth of Kentucky must be fairly represented in the coming elections.

III

Accordingly, for the reasons stated herein, it is hereby **ORDERED** as follows:

(1) The Motion of Defendant Greg Stumbo, Speaker of the Kentucky House of Representatives, to Stay Further Action of this Court [R. 36] is **DENIED**; and

(2) A separate Scheduling Order shall issue by the Court directing the parties of the manner of proceeding and the expedited deadlines to govern this action going forward.

This 27th day of June, 2013.

BY THE COURT:

/s/ Gregory F. Van Tatenhove

Gregory F. Van Tatenhove

U.S. District Judge