IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

REBECCA HARPER, et al., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al., Defendants.	Civil Action No. 5:19-CV-00452-BO

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO REMAND AND TO EXPEDITE RESOLUTION OF MOTION TO REMAND

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INTRODUCTION

Plaintiffs brought this action in state court last month challenging North Carolina's 2016 congressional districting plan as an unlawful partisan gerrymander exclusively under the North Carolina Constitution. Two business days after the state court granted Plaintiffs' motion to expedite and scheduled a hearing on Plaintiffs' preliminary injunction motion for October 24, 2019, Legislative Defendants removed this case to federal court. The removal is an egregious and transparent attempt to delay and derail the state court proceedings. This case should be remanded immediately.

The removal is frivolous on its face. Just months ago, in a case involving the very congressional districts challenged in this case, the Supreme Court squarely held that federal courts lack subject matter jurisdiction to address "partisan gerrymandering claims." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019). The Court explained that "state courts" may address such claims under "state constitutions," but "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. Legislative Defendants procured this ruling in *Rucho* but have now removed this action on the supposition that federal courts have subject matter jurisdiction over partisan gerrymandering claims.

The removal is so clearly lacking in merit in light of *Rucho* that the Court should remand immediately, without waiting for a response to this motion. If the Court does permit a response, Plaintiffs respectfully request that the Court order Legislative Defendants to respond by Wednesday, October 16, and that the Court issue a remand decision by Friday, October 18, to avoid disrupting the state court's expedited schedule, under which all Defendants' responses to Plaintiffs' preliminary injunction motion are due Monday, October 21, and a hearing is set for October 24.

Independent of *Rucho*, the case would warrant immediate remand on multiple additional grounds. Less than a year ago, Judge Flanagan rejected a materially identical removal by Legislative Defendants of a state court partisan gerrymandering lawsuit. *See Common Cause v. Lewis*, 358 F. Supp. 3d 505 (E.D.N.C. 2019). There, like here, Legislative Defendants relied on the "Refusal Clause" of 28 U.S.C. § 1443(2), which protects state officials who are forced to choose between enforcing state law and "inconsistent" federal equal-rights laws. As Judge Flanagan held, the Refusal Clause does not apply here for multiple reasons: Plaintiffs challenge Legislative Defendants' enactment of an unconstitutional law, not their "refusal" to enforce state law; the Refusal Clause does not apply to legislators at all; and there is no plausible basis to believe that curing a partisan gerrymander will require a violation of federal equal rights law. Yesterday's removal is even more patently meritless than the one in *Common Cause v. Lewis.* The Supreme Court has held that Legislative Defendants lack any evidence that the Voting Rights Act (VRA) imposes requirements on the very congressional district on which Legislative Defendants now base their removal. *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017). And Legislative Defendants themselves asserted that the VRA did not apply when they drew that district.

The Court should remand this case immediately to avoid any interference with the state court's expeditious resolution of state constitutional claims of extraordinary public importance. Any delay in remanding this case would merely increase the likelihood that, when the case is remanded, the state court will be forced to move the congressional primaries in order to implement a remedial map for the 2020 elections. The Court should retain jurisdiction to consider Plaintiffs' forthcoming motion for fees and costs and other relief.

BACKGROUND

A. *Common Cause v. Lewis*: This Court Promptly Remands a Prior State Constitutional Partisan Gerrymandering Lawsuit to State Court

On November 13, 2018, numerous plaintiffs—including 11 of the 14 plaintiffs in this case—filed an action in Wake County Superior Court against the same defendants named in this case, asserting that North Carolina's 2017 state House and Senate districting plans violated specified provisions of the North Carolina Constitution. *See Common Cause v. Lewis*, No. 18 CVS 014001 (Wake County Super. Ct. Nov. 13, 2018). Plaintiffs did not assert any federal claims. One week later, the plaintiffs moved to expedite the case.

On December 14, 2018, two days after the state court indicated it would soon act on the motion to expedite, Legislative Defendants[1] removed the case to federal court under the Refusal Clause of 28 U.S.C. § 1443(2). *See Common Cause*, 358 F. Supp. 3d 505. As in the instant case, Legislative Defendants asserted that the plaintiffs' state constitutional partisan gerrymandering claims created a "colorable conflict" with the federal Voting Rights Act and the Fourteenth Amendments, supposedly because affording the relief requested by the plaintiffs would intentionally dismantle "minority crossover" districts. Notice of Removal at 5-7, *Common Cause v. Lewis*, No. 5:18-CV-589-FL, ECF No. 1 (E.D.N.C. Dec. 14, 2018). One business day after the removal, Plaintiffs filed an emergency motion seeking immediate remand to state court. *Id.*, ECF No. 5.

After expedited briefing, this Court (Judge Flanagan) remanded. The Court held that § 1443(2)'s Refusal Clause did not authorize removal for three separate reasons. First, "plaintiffs' state court action [was] not brought against the Legislative Defendants for 'refusing

[1] Legislative Defendants in *Common Cause* were the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the Senate, the Senior Chair of the House Standing Committee on Redistricting, and the Chair of the Senate Standing Committee on Redistricting, all sued in their official capacity. Legislative Defendants here are the same except that the two new co-chairs of the Senate committee have been added.

to do' anything." *Common Cause*, 358 F. Supp. 3d at 510. Second, "the 'refusal clause' … was intended to apply to 'state officers who refused to enforce' state laws," and Legislative Defendants "have only a legislative role, rather than a law enforcement role." *Id.* (quoting *Baines v. City of Danville*, 357 F.2d 756, 759 (4th Cir. 1966), *aff'd*, 384 U.S. 890 (1966)) (emphasis by court). Third, any suggestion that "plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law" was "speculative." *Id.* at 511. The Court "d[id] not reach additional arguments plaintiffs raise[d] in support of remand, including … sovereign immunity." *Id.* at 515 n.9.

On remand, following a two-week trial in July 2019, the three-judge state court panel unanimously entered final judgment for the plaintiffs, holding that the challenged 2017 state legislative plans violated the North Carolina Constitution and ordering the creation of new maps for the 2020 elections. *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019). Neither Legislative Defendants nor any other defendants appealed.

Notably, in the state court proceedings following this Court's remand order, Legislative Defendants put on no VRA defense, and the state court found that the plaintiffs' state constitutional claims did not conflict with the VRA or any other federal equal-rights law. As the state court explained, "Legislative Defendants introduced no evidence at trial to establish that any of the three *Gingles* factors … is present," as necessary to establish a VRA defense. *Common Cause*, 2019 WL 4569584, at *131. The court thus "conclude[d] that Legislative Defendants have not established that the VRA justifie[d] the current House or Senate districts or preclude[d] granting Plaintiffs relief on their claims." *Id.* The court also rejected any argument that the plaintiffs' state-law claims conflicted with the Fourteenth Amendment, stating:

"Legislative Defendants again have advanced no evidence to substantiate th[eir] claim" that "affording Plaintiffs relief would require intentionally lowering the BVAP in purported 'crossover' districts below the level necessary to elect candidates of choice of African Americans." *Id.* And, as yet another "fatal defect" in a Fourteenth Amendment defense, the court found "without difficulty that Plaintiffs have no intent to discriminate against racial minorities in seeking remedial plans to replace the current plans that violate state constitutional provisions," and in any event "[t]he remedial plans approved or adopted in this case, as ordered [by the state court], will not intentionally dilute the voting power of any North Carolina citizens." *Id.* at *131-32. The Court found "Legislative Defendants' stated concern that 'unpacking' heavily-Democratic districts could dilute the voting power of African-Americans to be a pretext for partisan gerrymandering." *Id.* at *102.

Despite having claimed in their removal-related submissions to this Court that they were "refusing" to comply with a state-law prohibition on partisan gerrymandering because such compliance would supposedly violate federal law, last month Legislative Defendants enacted proposed state legislative remedial maps that they contend both (1) comply with the state-law prohibition on partisan gerrymandering and (2) do not violate federal law. Legislative Defendants advised the state court on September 23 they had no evidence "on whether the Voting Rights Act prerequisites could be satisfied" in North Carolina, *i.e.*, no evidence that the Voting Rights Act applied. *See* Legislative Defendants' Mem. Regarding House and Senate Remedial Maps and Related Materials ("Remedial Map Mem.") at 25, *Common Cause v. Lewis*, 358 F. Supp. 3d 505 (E.D.N.C. 2019) (attached as Ex. A).

B. *Harris v. McCrory*: The U.S. Supreme Court Strikes Down the 2011 Congressional Plan and Holds that the *Gingles* Factors Are Not Satisfied

In separate litigation in federal court, another group of voters challenged North Carolina's 2011 congressional map as an unconstitutional racial gerrymander. The federal district court invalidated the plan, finding that Legislative Defendants' use of race in drawing districts was not justified under the VRA. The U.S. Supreme Court affirmed. Relevant here, the Supreme Court held that Legislative Defendants had "no evidence that … the third *Gingles* prerequisite" was satisfied in North Carolina's Congressional District 1, and thus could not establish that the VRA applied. *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

Legislative Defendants enacted the 2016 congressional plan at issue in the instant case (the "2016 Plan") as part of the *Harris* remedial proceedings. In drawing the 2016 Plan, Legislative Defendants repeatedly stated that they were ignoring racial considerations entirely because they believed "the *Harris* opinion found that there was not racially polarized voting in the state." ECF No. 5-1 at 322 (Feb. 16, 2016 Tr. of Proceedings, Joint Comm. On Redistricting, at 27:11-14).

C. *Rucho v. Common Cause*: The U.S. Supreme Court Holds That Federal Courts Lack Jurisdiction Over Partisan Gerrymandering Claims

After adoption of the 2016 Plan, a new set of voters challenged the plan as a partisan gerrymander in federal court. In June 2019, at Legislative Defendants' urging, the U.S. Supreme Court conclusively held that federal courts lack subject matter jurisdiction to hear partisan gerrymandering claims. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-08 (2019). Legislative Defendants convinced the Supreme Court that partisan gerrymandering claims present "a political question beyond the competence of the federal courts." *Id.* at 2500. The Supreme Court ordered the dismissal of the federal court action against Legislative Defendants challenging the 2016 Plan for lack of subject matter jurisdiction. *Id.* at 2508.

D. *Harper v. Lewis*: Legislative Defendants Frivolously Remove this State Constitutional Partisan Gerrymandering Lawsuit to Federal Court

Plaintiffs here, who are individual voters from each of North Carolina's congressional districts, filed this action in Wake County Superior Court on September 27, 2019, asserting that North Carolina's 2016 congressional plan violates the same provisions of the North Carolina Constitution that the state court recently relied upon in *Common Cause v. Lewis* in striking down the state legislative plans. ECF No. 5-1 at 36-43 (Verified Complaint). As in *Common Cause*, Plaintiffs do not assert any federal claims. One business day after filing their Verified Complaint, on September 30, Plaintiffs moved for a preliminary injunction and to expedite briefing and decision on the preliminary injunction. *Id.* at 94-156.

On October 2, 2019, the Chief Justice of the North Carolina Supreme Court appointed the same three-judge panel from *Common Cause v. Lewis* to preside over this case as well. On October 10, the three-judge panel granted Plaintiffs' motion to expedite in part, ordering all Defendants to respond to the preliminary injunction motion by Monday, October 21 at 5 p.m., and setting a hearing on the preliminary injunction motion for Thursday, October 24 at 10 a.m. ECF No. 5-1 at 653-59 (Order on Plaintiffs' Motion to Expedite; Notice of Hearing).

On October 14, just two business days after the state court expedited these proceedings and just months after they successfully convinced the U.S. Supreme Court to close the federal courthouse doors to partisan gerrymandering claims, Legislative Defendants removed this case to federal court under the Refusal Clause of § 1443(2). As in their *Common Cause* removal, Legislative Defendants once again assert that Plaintiffs' state constitutional partisan gerrymandering claims create a "colorable conflict" with the VRA and the Fourteenth Amendment, supposedly because affording the relief requested by the plaintiffs would intentionally dismantle a "minority crossover" district. *See* Notice ¶¶ 27, 37.

Plaintiffs file this emergency motion to remand one day after the removal.

ARGUMENT

"Because removal jurisdiction raises significant federalism concerns," courts "must strictly construe removal jurisdiction." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (citation omitted). "If federal jurisdiction is doubtful, a remand is necessary." *Id.* Courts must "resolve all doubts in favor of remand." *Korzinski v. Jackson*, 326 F. Supp. 2d 704, 706 (E.D.N.C. 2004). And the federalism concerns with removal are at their apex here. As this Court has acknowledged, "the redistricting process is primarily the province of the states," and "Supreme Court pronouncements on the importance of state control over apportionment decisions are manifold." *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 782 (E.D.N.C. 2001). The deference that federal courts owe to the states in the redistricting context is not limited to state legislatures, but extends to state courts. As Justice Scalia explained for a unanimous court in *Growe v. Emison*, 507 U.S. 25, 33 (1993), federal courts must defer to the "legislative *or* judicial branch" of a state on redistricting matters. "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *Voinovich v. Quiltier*, 507 U.S. 146, 156 (1993).

Here, removal jurisdiction is more than doubtful—it is clearly absent. First, the U.S. Supreme Court held in *Rucho* that federal courts lack subject matter jurisdiction over partisan gerrymandering claims. Second, as this Court held in *Common Cause*, Legislative Defendants cannot invoke the "Refusal Clause" of 28 U.S.C. § 1443(2), for multiple reasons, including that there is no possible "conflict" between state-law partisan gerrymandering claims and federal

equal-rights law. Third, state sovereign immunity precludes removal jurisdiction over a lawsuit seeking to enjoin state officials under state law.

This Court should remand this case immediately, without waiting for a response to this motion. Alternatively, Legislative Defendants should be ordered to respond by Wednesday, October 16. Plaintiffs respectfully request that this Court issue its remand decision by Friday, October 18, to avoid disrupting the state court's expedited preliminary injunction schedule, which includes an in-person hearing before the three-judge panel on October 24.

I. The Court Must Remand Because Federal Courts Lack Subject Matter Jurisdiction Over Partisan Gerrymandering Claims

In *Rucho*, the U.S. Supreme Court squarely held that federal courts lack subject matter jurisdiction over "claims of excessive partisanship in districting." 139 S. Ct. at 2491. At Legislative Defendants' own urging, the Court "conclude[d] that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. The political question doctrine is an aspect of federal subject matter jurisdiction. Thus, the Court ordered the federal district court to dismiss a partisan gerrymandering challenge to North Carolina's 2016 congressional districting plan for "lack of jurisdiction." *Id.* at 2508.

Although *Rucho* involved partisan gerrymandering claims under the federal constitution, the Supreme Court held that federal courts lack jurisdiction over "partisan gerrymandering claims," full stop. *Id.* at 2506. The Court held that that there was no "appropriate role for the Federal Judiciary in remedying the problem of partisan gerrymandering." *Id.* at 2494. In the Court's view, "an unelected and politically unaccountable branch of the Federal Government" cannot be involved in "one of the most intensely partisan aspects of American political life," and therefore "[f]ederal judges have no license" to adjudicate partisan gerrymandering claims. *Id.* at 2507.

That jurisdictional holding applies fully to partisan gerrymandering claims under state constitutions. The Supreme Court made clear that state constitutional claims like those presented here must be raised *only* in state courts: "Provisions in state statutes and state constitutions can provide standards and guidance *for state courts* to apply." *Id.* at 2507 (emphasis added). Indeed, if "federal courts are not equipped to" adjudicate partisan gerrymandering challenges under the federal Constitution, *a fortiori*, they cannot adjudicate partisan gerrymandering challenges under a state constitution either. *Id.* at 2499, 2506. "It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions." *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). "Our system of dual government unequivocally designates the state courts as the arbiters of state law, and it demands that federal courts not usurp that function." *United States v. Vann*, 660 F.3d 771, 785 (4th Cir. 2011) (King, J., concurring); *accord, e.g.*, *Doe v. Duling*, 782 F.2d 1202, 1204 (4th Cir. 1986); *Douglas v. City of Jeannette (Pennsylvania)*, 319 U.S. 157, 163 (1943).

Post-*Rucho*, it is frivolous to assert that federal courts have subject matter jurisdiction over partisan gerrymandering claims. It is especially frivolous—and abusive of the federal judiciary—for Legislative Defendants to invoke federal jurisdiction over a partisan gerrymandering challenge to North Carolina's 2016 congressional plan. Legislative Defendants were the very litigants who procured the *Rucho* holding that federal courts lack jurisdiction to decide a partisan gerrymandering challenge to these very districts. Having successfully established that federal courts have neither the competency nor subject matter jurisdiction to hear partisan gerrymandering claims, Legislative Defendants cannot now demand that federal courts hear partisan gerrymandering claims. Legislative Defendants fail to even cite *Rucho* in their

notice of removal, let alone offer any basis for federal jurisdiction in light of the Supreme Court's decision.

Because this Court lacks subject matter jurisdiction, it must remand immediately. Federal law makes clear: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c).

II. There Is No Plausible Basis for Removal Under 28 U.S.C. § 1443(2)

Because *Rucho* deprives this Court of subject matter jurisdiction over partisan gerrymandering claims, it is irrelevant whether removal would otherwise be authorized under 28 U.S.C. § 1443(2)'s "Refusal Clause." But in any event, Legislative Defendants' attempt to remove under § 1443(2) suffers from numerous fatal defects—and they are even clearer here than they were when the Court remanded following removal in *Common Cause v. Lewis*.

The Refusal Clause authorizes removal of a civil action by state officers sued for "refusing to do any act on the ground that it would be inconsistent with" federal equal rights law. *Stephenson*, 180 F. Supp. 2d at 785 (quoting § 1443(2)). But Plaintiffs have sued Legislative Defendants for enacting an unconstitutional law, not "for refusing to do any act"; the Refusal Clause does not apply to state legislators because legislators do not enforce state law; and there is no "inconsisten[cy]" between Plaintiffs' state-law claims and federal equal-rights law.[2]

A. The Refusal Clause Does Not Apply Because Plaintiffs Have Not Sued Legislative Defendants "For Refusing To Do Any Act"

1. This Lawsuit Challenges Legislative Defendants' Enactment of a Law, Not their Refusal To Act

As this Court held in rejecting removal in *Common Cause*, the Refusal Clause does not authorize removal here because Plaintiffs have sued Legislative Defendants for a completed,

[2] Legislative Defendants do not assert that the first clause of § 1443(2), the "color of authority" clause, authorizes removal. That clause applies only to federal officers. *City of Greenwood v. Peacock*, 384 U.S. 808, 815 (1966).

affirmative act, not "for refusing to do any act." 28 U.S.C. § 1443(2); *see Common Cause*, 358 F. Supp. 3d at 510.

Congress enacted the Refusal Clause as part of the Civil Rights Act of 1866 to provide a federal forum for "state officers who refused to enforce discriminatory state laws … and who were prosecuted in the state courts because of their refusal to enforce state law." *Baines*, 357 F.2d at 772. As the Supreme Court has explained, the Refusal Clause was "intended to enable State officers, who shall refuse to enforce State laws discriminating … on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws." *City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). The provision thus "protect[s] state officers from being penalized for failing to enforce discriminatory state laws or policies." *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979).

Like this Court in *Common Cause*, three courts of appeals have held that the Refusal Clause does not authorize removal where the underlying suit challenges the removing defendants' action rather than inaction. In *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995), the Eighth Circuit held that the Refusal Clause did not apply to a state-law defamation claim because the removing defendants "d[id] not point out any act that they refused to do." *Id.* at 523. Similarly, in *New York v. Horelick*, 424 F.2d 697 (2d Cir. 1970), the Second Circuit held that the Refusal Clause did not apply to the state-law prosecutions of two public school teachers. *Id.* at 698-99. Even though they raised a federal equal protection defense, the teachers were being prosecuted for the completed act of resisting arrest, "not … for refusing to enforce any law of the State or ordinance of the City of New York." *Id.* at 703. And in *Detroit Police Lieutenants*, the Sixth Circuit held that the Refusal Clause did not apply to a state-law suit by a police union

"seeking injunctive relief to restrain the defendants from implementing a promotion eligibility list." 597 F.2d at 567. "[N]o one," the court held, had "attempted … to punish [the defendants] for refusing to do any act inconsistent with any law providing equal rights." *Id.* at 568.

Other district courts too have joined this Court in rejecting removals under the Refusal Clause on the same grounds. As one court explained, removal under the Refusal Clause is "unavailable where the removing party's action, rather than its inaction, is the subject of the state-court suit." *City & Cty. of San Francisco v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 2002 WL 1677711, at *4 (N.D. Cal. July 24, 2002). The court therefore remanded a claim that "did not challenge any refusal by the Civil Service Commission to enforce the law," but instead "challenged an affirmative order by the commission." *Id.* Another court likewise remanded a suit challenging the constitutionality of a state statute and two executive orders by the Mayor of Boston. "[T]he 'refusal' clause is unavailable," the court explained, "where the defendants' actions, rather than their inaction, are being challenged." *Mass. Council of Constr. Emp'rs., Inc. v. White*, 495 F. Supp. 220, 222 (D. Mass. 1980); *see also Wolpoff v. Cuomo*, 792 F. Supp. 964, 968 (S.D.N.Y. 1992) (Refusal Clause does not allow "legislators who are sued because of the way they cast their votes[] to remove their cases to federal courts").

As Judge Flanagan held, the Refusal Clause thus does not apply here because "[P]laintiffs' state court action is not brought against the Legislative Defendants for 'refusing to do' anything." *Common Cause*, 358 F. Supp. 3d. at 510. Instead, with respect to Legislative Defendants, "[P]laintiffs challenge an action already completed"—the enactment of the 2016 Plan. *Id.* As in *Common Cause*, "Plaintiffs' prayer for injunctive relief further reinforces this point," as Plaintiffs here "seek to enjoin defendants from 'administering, preparing for, or moving forward with the 2020 primary and general elections … using the [2016 Plan],' which is

not a legislative activity." *Id.* at 511; *see* ECF No. 5-1 at 46 (Prayer at b.). As in *Common Cause*, Plaintiffs "do not seek an injunction compelling the Legislative Defendants to act, but rather call upon the state court to establish new plans '*if* the North Carolina General Assembly fails to' do so." *Common Cause*, 358 F. Supp. 3d. at 511; *see* ECF No. 5-1 at 46 (Prayer at c.).

Reasserting the very argument Judge Flanagan rejected in *Common Cause*, Legislative Defendants contend that this suit challenges their "refus[al]" to provide "[a]ffirmative cooperation" in creating and implementing a new redistricting plan. Notice ¶¶ 9, 10, 12. But Plaintiffs have not sued Legislative Defendants for refusing to enact new redistricting legislation. That purported "refusal" could relate only to the remedial phase of this case—after the merits have been adjudicated—and even then Legislative Defendants will not be forced to do anything. If Plaintiffs prevail on their state-law claims, Legislative Defendants may be afforded an *opportunity* to enact a new plan, but they will not be *compelled* to take any action. If Legislative Defendants are unable or unwilling to draw a constitutional redistricting plan, the state courts will do so and order the State Board of Elections and its members ("State Defendants") to implement them.

Moreover, the question is not whether Legislative Defendants are refusing to do *something*, but whether that refusal is what Plaintiffs are suing them *for*. The Refusal Clause applies only if the plaintiff is suing the removing defendant "for refusing to do any act." 28 U.S.C. § 1443(2). Plaintiffs are not suing Legislative Defendants for "refusing …. to create new legislation," Notice ¶ 12, but for *creating* unconstitutional legislation. That Plaintiffs are not asking the state court to order Legislative Defendants to do anything at all underscores that Plaintiffs are not suing Legislative Defendants "for" a refusal.

2. Legislative Defendants Cannot Invoke the Refusal Clause Because They Do Not Enforce State Election Laws

Legislative Defendants cannot invoke the Refusal Clause for a second reason: they serve only a "legislative role, rather than a law enforcement role." *Common Cause*, 358 F. Supp. 3d at 511. Legislative Defendants do not point to a single case in the 153-year history of the Refusal Clause where any federal court has ever permitted state legislators to remove under the Refusal Clause. No court has ever allowed removal by a state legislator because, as this Court and the Fourth Circuit have recognized, "the 'refusal' clause of § 1443 was intended to apply to 'state officers who refused to enforce' state laws." *Common Cause*, 358 F. Supp. 3d at 511 (quoting *Baines*, 357 F.2d at 759). The Supreme Court too has explained that the Refusal Clause is designed for state officers who "refuse to enforce State laws discriminating … on account of race or color." *Peacock*, 384 U.S. at 824 n.22 (quotation marks omitted). "The privilege of removal" under the Refusal Clause thus "is conferred … only upon state officers who refuse to enforce state laws discriminating on account of race or color." *Id.* (quoting *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 311 (S.D. Ind. 1969)).

Since state legislators like Legislative Defendants do not "enforce" state laws in the first place, they cannot be sued "for" refusing to enforce state laws as contemplated by § 1443(2). The Refusal Clause "is not available to legislators" because "a legislator's refusal to cast his or her vote a certain way cannot be considered 'refusing to do any act' within the meaning of the refusal clause contained in 28 U.S.C. § 1443(2)." *Wolpoff*, 792 F. Supp. at 968.[3]

Legislative Defendants do not enforce state redistricting laws. In *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015), the Fourth Circuit held that, because "[t]he North

[3] Legislative Defendants rely on *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). But the removing defendants in *Cavanagh* were state election officials; "*Cavanagh* does not discuss removal by state legislators." *Common Cause*, 358 F. Supp. 3d at 511; *see id.* at 512-13 (distinguishing additional cases cited by Legislative Defendants in the *Common Cause* case).

Carolina Constitution clearly assigns the enforcement of laws to the executive branch," "[t]he General Assembly retains no ability to enforce any of the laws it passes." *Id.* at 262. Only State election officials in the State executive branch "ha[ve] the specific duty to enforce [a] redistricting plan." *Id.* Because Legislative Defendants do not enforce redistricting laws, they cannot remove on the ground that they are "refusing" to enforce such laws.

Legislative Defendants alternatively contend that they "represent[] the State" and that the "State" is being sued for "refus[ing]" to administer redistricting laws. Notice ¶¶ 11, 12. But it is the State Board of Elections, not Legislative Defendants, that administers redistricting laws, and the State Board of Elections has not removed. Moreover, North Carolina law is clear that the Attorney General alone, not private counsel for Legislative Defendants, is charged with "represent[ing] all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State." N.C.G.S.A. § 114-2(2); *see Common Cause*, 358 F. Supp. 3d at 512 (holding that Legislative Defendants cannot rely under the Refusal Clause on any purported "enforcement" activity by the state defendants where "the State Defendants oppose removal").

In any event Plaintiffs have not sued *any* defendant "for refusing to do any act," including the state board and its members. As in *Common Cause*, Plaintiffs' requested relief makes this plain: Plaintiffs do not seek an injunction compelling *any* defendant to act. Even as to the State Defendants, Plaintiffs simply seek an injunction preventing them from implementing the 2016 Plan—*i.e.*, preventing them from acting. ECF No. 5-1 at 46 (Prayer).

B. The Refusal Clause Does Not Apply Because There Is No Plausible Conflict Between Plaintiffs' State-Law Claims and Federal Equal Rights Laws

Even if Legislative Defendants were being sued for refusing to enforce state law, the Refusal Clause still would not authorize removal. That is because there is no conceivable

"inconsisten[cy]" between Plaintiffs' state-law claims and federal equal-rights laws, and Legislative Defendants certainly have not refused to do anything "on the ground" of any such inconsistency. 28 U.S.C. § 1443(2). The purported conflicts between state law and federal law are preposterous and no reasonable litigant could assert such conflicts.

1. Federal Law Does Not Require Intentional Discrimination Against Democratic Voters

Plaintiffs' state-law claims allege that Legislative Defendants *intentionally* discriminated against Democratic voters by sorting them into districts based on their political views in order to dilute their votes and advantage Republicans. *See* ECF No. 5-1 at 4-5, 14-20, 36-43 (Verified Complaint). Plaintiffs bring claims under the same state constitutional provisions at issue in *Common Cause*, and the state court in *Common Cause* held that intent is a necessary element for liability under each of these claims. *See* 2019 WL 4569584, at *110-124. Thus, for Plaintiffs to succeed on their state law claims, Plaintiffs must demonstrate that Legislative Defendants acted with improper motive and intentionally discriminated against Democratic voters.

Plaintiffs' state-law theories accordingly would conflict with federal law only if federal law *requires* state legislatures to *intentionally* discriminate against voters of one political party and favor the other political party. Federal law of course requires nothing of the sort. There is no federal requirement to engage in intentional partisan gerrymandering, and it is plainly possible for a state legislature to engage in neither partisan nor racial discrimination in redistricting. Legislative Defendants themselves claimed to have accomplished just this weeks ago in enacting remedial state House and state Senate districts in *Common Cause*. They claimed that their proposed remedial plans do not violate state law as interpreted by the *Common Cause* state court and that the plans also comport with federal law. *See* Ex. A at 2, 23 (Remedial Map Memorandum).

2. There Is No Conflict with the VRA

The specific conflicts that Legislative Defendants assert between state and federal law are frivolous on their face. Legislative Defendants contend that complying with state law would require violating the VRA. Specifically, Legislative Defendants contend that following state law would necessitate reducing the black voting age population ("BVAP") in Congressional District 1, which they contend is a "minority crossover district." Notice ¶ 27 (internal quotation marks omitted). However, the U.S. Supreme Court has already held that Legislative Defendants have no basis to believe that the VRA imposes any requirements for the BVAP of Congressional District 1, and Legislative Defendants themselves recognized as much at the time they created the district.

It is blackletter law that "*each* of the three *Gingles*" factors is a "prerequisite[]" to VRA liability. *Harris*, 137 S. Ct. at 1472. If any *Gingles* factor is not met, "§ 2 [of the VRA] simply does not apply." *Id.* That is true with respect to purported "crossover" districts, majority-minority districts, or any other districts—if *any Gingles* factor is not met, Section 2 does not come into play and no VRA claim "could succeed." *Id.*; *see also Hall v. Virginia*, 385 F.3d 421, 426, 432 (4th Cir. 2004). As relevant here, the third *Gingles* factor requires that "a district's white majority must 'vote sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Harris*, 137 S. Ct. at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)) (alterations omitted).

In *Harris*, the Supreme Court applied these principles to the prior version of Congressional District 1, which covered roughly the same geographic areas as the current district. The Court held that there was "no evidence that . . . the third *Gingles* prerequisite" was met in Congressional District 1 given the high rates at which whites in the area voted for African-Americans' candidate of choice. *Id.* at 1470. And, the Court held, because no VRA

claim "could succeed" in District 1 given the "absence of effective white bloc-voting," there was no evidence that the VRA required the district to meet a particular BVAP threshold. *Id.* at 1472.

Legislative Defendants nonetheless contend in their removal that the VRA requires that Congressional District 1 have a BVAP above 45%. Notice ¶¶ 27-38. Legislative Defendants' sole support for this proposition is testimony from the *Harris* case in which, according to Legislative Defendants, Congressman Butterfield testified that the BVAP of the district should be above 45%. *See id.* But this testimony was from the very same case in which the Supreme Court held on appeal that the third *Gingles* factor was not met in Congressional District 1 and therefore the VRA did not impose any requirements for the BVAP of the district. The Supreme Court's holding obviously supersedes the testimony of any trial witness in the same case.

Legislative Defendants understood this to mean that the VRA imposed no constraints on the 2016 Plan. In creating the current Congressional District 1 after the *Harris* decision, Legislative Defendants stated that "the *Harris* opinion found that there was not racially polarized voting in the state, and therefore, the race of the voters should not be considered." ECF No. 5-1 at 322 (Joint Comm. Tr. 26:11-14). Legislative Defendants recognized that, notwithstanding the "evidence" presented at trial in *Harris*, *id.* at 510, the Supreme Court "found that there was no racially polarized voting" in Congressional District 1, precluding any assertion that the VRA required the district to have a particular racial composition. ECF No. 5-1 at 510 (Rucho Dep. at 31:2-8). Legislative Defendants even specifically disclaimed any requirement to create crossover districts with a BVAP at a certain level below 50%. They told the *Harris* district court that there was no evidence "that racially polarized voting existed in either district but only at a level that required the State to create either district at some other quota for black voting age

population" below 50%, "such as 47%." *Harris v. McCrory*, No. 13-cv-949, ECF No. 159 at 3 (M.D.N.C. Mar. 7, 2016).

Indeed, Legislative Defendants' statements at the time of creating the 2016 Plan independently preclude removal based on the VRA. Legislative Defendants specifically stated—both during the legislative hearings and in their submissions to the *Harris* district court in seeking approval of the 2016 Plan—that they did *not* draw the 2016 Plan to comply with the VRA, because they had assessed that the VRA did not apply. Legislative Defendants adopted as a formal criterion for the 2016 Plan: "Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts." ECF No. 5-1 at 312. Legislative Defendants explained that they adopted this criterion because, consistent with *Harris*, they believed that "racially polarized voting did not exist" as required to meet the third *Gingles* factor. *Harris*, No. 13-cv-949, ECF No. 159 at 16; *see also id*. at 9, 12, 16, 19, 25-27. Representative Lewis confirmed in a subsequent deposition that he had "no discussion with" the mapmaker "regarding VRA compliance" when drawing the 2016 Plan. ECF No. 5-1 at 117 (Lewis Dep. at 119:2-13).

Given these statements, Legislative Defendants cannot remove under § 1443(2) based on the VRA. In an effort to evade their own prior statements and conclusions, Legislative Defendants argue that some hypothetical "VRA plaintiff" in some hypothetical future case could argue that the VRA imposes certain requirements. Notice ¶ 28. But Legislative Defendants cite no case authorizing removal under the Refusal Clause where the removing defendants believed that enforcing state law would be consistent with federal law, but feared some other unidentified party might disagree. Legislative Defendants must assert that *they* are "refusing" to comply with state law because *they* believe "it would be inconsistent" with federal law. 28 U.S.C. § 1443(2).

Legislative Defendants cannot assert that the VRA is a ground for their refusal to comply with state law given their statements that the VRA does not apply.[4]

Even putting aside *Harris*' holding and Legislative Defendants' dispositive contemporaneous statements, Legislative Defendants' VRA defense is nonsensical on its own terms. Legislative Defendants contend that Congressman Butterfield testified that the VRA requires that Congressional District 1's BVAP be above 45%, but he actually testified that the required number was 47%. ECF No. 5-2 at 201-02. The BVAP of Congressional District 1 as enacted by Legislative Defendants is 44.46%, several percentage points below the BVAP suggested by Congressman Butterfield and even below the 45% that Legislative Defendants now claim is the legal threshold. In other words, if Legislative Defendants' removal papers are right that the BVAP of District 1 must be above the level Congressman Butterfield specified, *see* Notice ¶¶ 27, 31, 41, Legislative Defendants *themselves* violated the VRA and the Fourteenth Amendment in enacting the 2016 Plan. Of course, there was no such violation given *Harris'* holding that the third *Gingles* factor was not met.[5]

3. There is No Conflict with the Federal Equal Protection Clause

Legislative Defendants fare no better in arguing that complying with state law would require violating the federal Equal Protection Clause. To establish "intentional vote dilution" in

[4] In fact, Legislative Defendants' prior statements judicially estop them from raising any VRA defense in this case. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). First, to raise a VRA defense, Legislative Defendants would need to establish that there is sufficient evidence of racial bloc voting to satisfy the third *Gingles* factor in Congressional District 1, but that would be "clearly inconsistent" with their position during the *Harris* remedial phase. *Id.* The existence of racial bloc voting under the VRA, or lack thereof, is a question of fact. *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 936 (8th Cir. 2018). Second, in allowing implementation of the 2016 Plan, the *Harris* court relied on Legislative Defendants' statements that they had ignored racial considerations entirely in creating the Plans. *See Harris v. McCrory*, 2016 WL 3129213 (M.D.N.C. June 2, 2016). And third, it would be unfair and an abuse of the "judicial machinery" for Legislative Defendants to obtain removal based on a purported conflict with the VRA when they repeatedly told another federal court that they did not believe the VRA applied. *New Hampshire*, 532 U.S. at 750-51.

[5] Rep. Butterfield received 70% of the vote in the 2018 congressional election, notwithstanding Legislative Defendants' claim that a 45% BVAP is required for African Americans to elect a candidate of their choice.

violation of the Fourteenth Amendment in the redistricting context, there must be a showing that the state intentionally used race with the purpose of "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (quotation marks and alterations omitted).

The suggestion that Plaintiffs—who are a diverse array of North Carolina voters—want to intentionally discriminate against minority voters for the benefit of the Democratic Party is wrong and deeply offensive. Plaintiffs do not "demand" that anyone "dismantle[e] a crossover district" by "intentionally cracking communities composed of racial minorities." Notice ¶¶ 40-41; *see also id.* at 28-30, 45-47. Plaintiffs want an end to all discrimination against voters.

Regardless, Plaintiffs themselves will have no power to draw remedial maps in this case. In any remedial phase, only two entities will be able to adopt remedial plans: North Carolina's General Assembly or state courts. As the Supreme Court recently observed in rejecting an equal protection challenge to a plan initially drawn by a court, "no one" would seriously suggest that courts would "act[] with invidious intent" in drawing remedial plans. *Abbott*, 138 S. Ct. at 2328.

And it plainly will be possible for the General Assembly or state courts to draw remedial maps that simultaneously (1) do not intentionally disadvantage Democratic voters in violation of state law and (2) do not intentionally dilute the voting strength of minorities in violation of federal law. Legislative Defendants' contention that any alternative map that eliminates partisan discrimination necessarily would conflict with federal equal-protection requirements flies in the face of their own recent conduct. In *Common Cause*, Legislative Defendants enacted remedial state House and state Senate plans that they contend comport with the state court's ruling barring partisan gerrymandering, and Legislative Defendants clearly do not believe that they are intentionally discriminating against racial minorities in so doing.

4. At a Minimum, Any Purported Conflict is Speculative

While there is no conceivable conflict between Plaintiffs' state-law claims and federal law, at a minimum, any such conflict is "speculative." *Common Cause*, 358 F. Supp. 3d at 511. The federal district court in *Common Cause* remanded on this basis, *see id.*, and in so doing the court followed the lead of other courts that have held the same in prior redistricting cases.

In *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), the plaintiffs challenged North Carolina's state legislative districts under the North Carolina Constitution, including on grounds of "partisan gerrymandering." *Id.* at 781. As here, the defendants removed under § 1443(2), arguing that the suit sought to compel them to violate the VRA and federal equal-protection guarantees. *Id.* at 785. After observing that "it is not entirely clear what the defendants refuse to do" to trigger § 1443(2) at all, *id.*, the district court concluded that the defendants could not show a conflict between state and federal law. It was "unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law," and therefore "any implication of the refusal clause [was] speculative." *Id.* The plaintiffs were "merely seeking an alternative apportionment plan which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law." *Id.* (quotation marks and alterations omitted).

The Seventh Circuit similarly rejected a removal of a redistricting lawsuit under the Refusal Clause in *Sexson v. Servaas*, 33 F.3d 799 (7th Cir. 1994). There, the defendants initially removed based on one VRA defense, but then at trial switched to a different VRA defense—namely, that "federal law was implicated because their redistricting plan was in accordance with the [VRA]." *Id.* at 804. But "it does not follow that just because an apportionment plan conforms with federal law, an attack on that plan necessarily seeks to transgress federal law." *Id.* The VRA "established broad boundaries which no state apportionment law could contravene,"

the court explained, but "[w]ithin those boundaries, in any given case, infinite variations of apportionment plans could be formulated, none of which would violate federal law." *Id.* The court also strongly suggested that the initial removal based on the defendants' first VRA theory was not proper either. *See id.* at 803-04 & n.2.

In *Senators v. Gardner*, 2002 WL 1072305 (D.N.H. May 29, 2002), the district court likewise rejected a § 1443(2) removal of a legislative redistricting case. The court explained that "defendants have failed to make even a colorable claim that, if the New Hampshire Supreme Court is forced to intervene and formulate a redistricting plan, defendants' compliance with that plan would compel them to violate the [VRA]." *Id.* at *1. The district court reached a similar conclusion in *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002). Because, as here, the state court had not even begun to address whether the relevant redistricting plan violated state law and, if so, what remedy would apply, "at the present there [was] not a colorable conflict between federal and state law," and the defendant's "reliance on the 'refusal' clause [was] therefore 'speculative.'" *Id.* at 1351.

The reasoning of these decisions is directly applicable here. Plaintiffs are not seeking to affect minority populations in a way that would violate federal law. There are "infinite variations of apportionment plans" that comply with federal law, *Sexson*, 33 F.3d at 804, and Plaintiffs "are merely seeking an alternative apportionment plan" among those infinite variations "which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law," *Common Cause*, 358 F. Supp. 3d at 511 (quoting *Stephenson*, 180 F. Supp. 2d at 785). It is beyond speculative that the state court would not adopt such a plan, and instead adopt a remedial plan that violates federal law.

Indeed, Legislative Defendants' theory rests on the untenable assumption that North Carolina state courts will interpret state law in a way that conflicts with federal law or otherwise adopt a remedial plan that violates federal law. Federal courts must presume the opposite—that state courts will interpret state law to comport with federal law. *Manning v. Hunt*, 119 F.3d 254, 270-71 (4th Cir. 1997). That is particularly true for North Carolina, since the "state supreme court has already pronounced that 'compliance with federal law is . . . an express condition to the enforceability of every provision in the State Constitution.'" *Common Cause*, 358 F. Supp. 3d at 513 (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 392 (N.C. 2002)). And there is every reason to believe the three-judge state court panel would ensure compliance with federal law here. In *Common Cause*, the same three-judge panel held that "[a]ny Remedial Maps must comply with the VRA and other federal requirements concerning the racial composition of districts." 2019 WL 4569584, at *133. The panel then invited briefing on whether and to what extent federal law imposed requirements for the composition of remedial districts in that case. *Id.* Legislative Defendants offer no basis to conclude that the state court would not likewise ensure compliance with federal law in any remedial stage here. It is speculative (to say the least) that Legislative Defendants or any other party will establish that federal law requires a minimum BVAP for any remedial district. And it is even more speculative that if such a showing were made, the state court would nonetheless adopt a remedial district—whether created by one of Plaintiffs' simulation experts or anyone else—with a BVAP below that threshold.

Moreover, it is speculative that Legislative Defendants will even actually present a federal "equal rights" defense in this lawsuit. In *Common Cause*, despite removing on the basis of the same purported conflicts with federal law that they invoke here, Legislative Defendants presented *zero* federal defense at trial. As the state court explained, "[Legislative] Defendants

presented no expert testimony or any other evidence to establish the existence of legally sufficient racially polarized voting in any area of North Carolina." *Common Cause*, 2019 WL 4569584, at *100. Although Legislative Defendants had retained a VRA expert, they did not have him testify at trial. *See id.* at *101. Then, even though they had previously insisted in their removal that they would "refuse" to enact remedial plans that comport with Plaintiffs' state law theory on federal grounds, Legislative Defendants adopted remedial plans without any regard to the VRA or federal law. They stated in submitting the remedial plans to the state court that "no strong basis in evidence was presented to justify the use of race to draw districts for Voting Rights Act-compliance purposes," and that "Legislative Defendants do not have affirmative evidence either way on whether the Voting Rights Act's prerequisites could be satisfied." Ex. A at 25. Legislative Defendants' abandonment of their federal defenses in *Common Cause* demonstrates the pretextual nature of their removal here, and at a minimum it is further evidence of why any purported conflict with federal law is speculative and cannot support removal.

III. This Court Must Remand Because It Independently Lacks Jurisdiction Over Plaintiffs' State-Constitutional Claims Under *Pennhurst*

Beyond *Rucho*'s bar on federal court jurisdiction over partisan gerrymandering claims and Legislative Defendants' inability to establish grounds for removal under § 1443(2), this Court independently must remand because it lacks jurisdiction under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). Plaintiffs seek injunctive relief barring the State Board of Elections and its members from conducting elections under the 2016 Plan, on the ground that those plans violate state law. *See Wright*, 787 F.3d at 262. *Pennhurst* squarely forecloses federal jurisdiction over such claims; it holds that Eleventh Amendment state sovereign immunity prevents federal courts from granting injunctive relief against "state officials on the basis of state law." 465 U.S. at 117. The Eleventh Amendment is a "jurisdictional

limitation on the power of the federal courts." *Westinghouse Elec. Corp. v. W. Va. Dep't of Highways*, 845 F.2d 468, 469 (4th Cir. 1988). And if the "district court lacks subject matter jurisdiction, the case *shall* be remanded." 28 U.S.C. § 1447(c) (emphasis added).

Legislative Defendants do not dispute the point. Instead, they purport in their notice of removal to "waive the State's sovereign immunity for the purposes of this case." Notice ¶ 23; *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). But private counsel for Legislative Defendants do not represent defendants the State Board of Elections or its members, cannot remove on behalf of the State Board or its members, and cannot waive the State Board's sovereign immunity. North Carolina law authorizes the Attorney General to represent not only the State but "all State departments" and "agencies" in "any court … or tribunal in any cause or matter, civil or criminal." N.C. Gen. Stat. § 114-2(1), (2). That means the Attorney General is the state official with the power to waive sovereign immunity, *see Lapides*, 535 U.S at 621-22, but the Attorney General did not join Legislative Defendants' notice of removal, consent to removal, or otherwise waive sovereign immunity. As the parties invoking federal jurisdiction, Legislative Defendants bear the burden to establish federal jurisdiction—here, through a valid waiver of sovereign immunity. *See Strawn v. AT & T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008). They have failed to do so.

Legislative Defendants are likely to argue in response that N.C. Gen. Stat. § 1-72.2 gives the "General Assembly" authority to represent the State in litigation. In fact, § 1-72.2 simply "request[s]" that federal courts allow both the State legislative and executive branches to "participate" in cases challenging the validity of North Carolina statutes. It does not authorize Legislative Defendants' private counsel to waive North Carolina's sovereign immunity without the executive branch's consent.

Ultimately, this Court need not resolve whether Legislative Defendants have authority to waive North Carolina's sovereign immunity (although they do not). Any doubt about Legislative Defendants' purported waiver of sovereign immunity must be construed against them twice over. "A State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (quotation marks omitted). "[O]nly by requiring this clear declaration by the State can [a federal court] be certain that the State in fact consents to suit." *Id.* (quotation marks omitted). This clear statement rule is compounded by the principle that "[i]f federal jurisdiction is doubtful, a remand is necessary." *Mulcahey*, 29 F.3d at 151. If this Court harbors any doubt whatsoever about Legislative Defendants' purported waiver, then remand to state court is required.

IV. This Motion Warrants Expedited Treatment and an Immediate Remand

Removals "call[] for expeditious superintendence by district courts," *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 76 (1996), and there is a particular need to act with urgency on a motion to remand where the removal is used "merely as a delay tactic in litigation," *Johnson v. Advance Am.*, 596 F. Supp. 2d 922, 930 (D.S.C. 2008). The removal here is a delay tactic, nothing more.

As Plaintiffs explained in their motion to expedite filed in the state court, it is essential to resolve this case as expeditiously as possible to ensure that new, lawful congressional districts can be established for the 2020 primary and general elections. The state court agreed. On October 10, the three-judge panel granted the motion to expedite in part, ordering defendants to respond to the preliminary injunction motion on Monday, October 21, and setting an in-person hearing on the preliminary injunction motion for Thursday, October 24 in Raleigh. ECF No. 5-1 at 653-59. Legislative Defendants removed the case to federal court just days later, in a transparent attempt to upend the state court's adjudication of the preliminary injunction motion and run out the clock.

Legislative Defendants' removal is an abuse of the federal machinery and an affront to the state court. This Court should not reward such tactics. It is especially important in the redistricting context for federal courts not to be used as a vehicle to obstruct state court adjudications of redistricting disputes, as "Supreme Court pronouncements on the importance of state control over apportionment decisions are manifold." *Stephenson*, 180 F. Supp. 2d at 782; *see also Growe*, 507 U.S. at 33 (federal courts must defer to the "legislative *or* judicial branch" of a state on redistricting matters). And under Rucho, *only* state courts can adjudicate partisan gerrymandering challenges to redistricting plans.

Given the briefing and hearing schedule that the state court set on Plaintiffs' preliminary injunction motion, Plaintiffs respectfully request that this Court remand this case by October 18 or earlier. As Judge Flanagan did in *Common Cause*, the Court could enter a remand order with opinion to follow. *See Common Cause*, 385 F. Supp. 3d at 509. Any delay in remanding beyond October 18 would disrupt the state court's schedule in these time-sensitive proceedings. The state court reserved the courtroom in Campbell Law School for the October 24 hearing, which requires significant logistical coordination. ECF No. 5-1 at 653. The state court specifically noted in its case management order that "facilities and court personnel to conduct three-judge panel hearings are limited, and coordinating the schedules of the members of the three-judge panel, in light of their already existing dockets, can be difficult." ECF No. 5-1 at 649.

This Court should remand the case without giving Legislative Defendants an opportunity to oppose this motion given the frivolousness of their removal, but at most, Legislative Defendants should have 24 hours to respond from the filing of this motion. *See, e.g., League of Women Voters of Pa. v. Pennsylvania*, 2018 WL 1787211, at *1-2 (E.D. Pa. Apr. 13, 2018)

(remanding partisan gerrymandering lawsuit to state court after emergency hearing convened hours after plaintiffs filed emergency remand motion).[6]

V. The Court Should Retain Jurisdiction to Consider a Motion for Fees

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Plaintiffs intend to seek fees and costs and other relief under § 1447(c), the Federal Rules, and other applicable law. Plaintiffs request that the Court retain jurisdiction to consider those motions. *See, e.g., Davis v. Pizza Hut of New Bern, Inc.*, 2006 WL 8438587, at *3 (E.D.N.C. Apr. 6, 2006) (remanding and stating that "this court shall retain jurisdiction over this action only insofar as plaintiff may desire to pursue an award of costs and attorneys' fees pursuant to 28 U.S.C. 1447(c)"); *Nies v. Town of Emerald Isle*, 2013 WL 12159366, at *6 (E.D.N.C. Mar. 27, 2013) (remanding and directing plaintiff to file an affidavit listing costs and attorneys' fees, and allowing defendant to object to same); *Int'l Legware Grp., Inc. v. Americal Corp.*, 2010 WL 3603784, at *4 (E.D.N.C. Sept. 8, 2010) (remanding and permitting plaintiff to submit accounting of attorneys' fees and costs).

CONCLUSION

For the foregoing reasons, the Court should immediately remand this case to state court and should retain jurisdiction to consider Plaintiffs' forthcoming motion for fees and costs.

[6] This Court's remand order will be effective immediately upon entry, and no automatic or other stay is available. As the Court recognized in denying a stay of its remand order in *Common Cause*, "if the remand is based on the lack of subject-matter jurisdiction or a defect in the removal process," "[a] remand is effective" "when the remand order is entered." No. 5:18-CV-589-FL, ECF No. 53 at 5 (M.D.N.C. Jan. 17, 2019) (quoting *Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 235 n.1 (4th Cir. 2007)). Because that is the case here, the remand order is effective immediately upon entry, and any argument for a stay would "conflict[] with the Fourth Circuit rule that a remand order is effective upon entry when based upon a lack of subject matter jurisdiction." *Id.* at 6.

DATED: October 15, 2019

Respectfully submitted,

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**Pro Hac Vice motions forthcoming.*

CERTIFICATE OF SERVICE

I hereby certify that on this date, October 15, 2019, I caused the foregoing document to be filed and served on all counsel of record by operation of the CM/ECF system for the United States District Court for the Eastern District of North Carolina.

DATED: October 15, 2019

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