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

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.	)	Case No:5:19-cv-452

RESPONSE OPPOSING PLAINTIFFS' EMERGENCY MOTION FOR REMAND

Plaintiffs' motion to remand is a master study in irony. Plaintiffs waited to file this action until just three weeks ago—only two months before the filing period begins for congressional districts—and now have the temerity to accuse Legislative Defendants of exercising their federal right to remove this action as a delay tactic. While Plaintiffs could have filed this action in 2016 (after the Middle District federal court rejected partisan gerrymandering claims against the map at issue here), in November 2018 (when many of these same plaintiffs filed partisan gerrymandering claims against North Carolina's legislative maps), or even in June 2019 (after the Supreme Court rejected partisan gerrymandering claims against the map at issue here in *Common Cause v. Rucho* No. 1:16-CV-1026 (M.D.N.C. 2016)), they failed to do so. Conversely, Legislative Defendants promptly removed this action to this Court well before the deadline to do so. Obviously, Plaintiffs, not Legislative Defendants, have created the time crunch they now complain about and should not be permitted to rush the Court and everyone else in considering the removal petition.

On the merits, plaintiffs obfuscate and ignore. They obfuscate the difference between this case and *Common Cause v. Lewis*. *Lewis* was a challenge to state legislative districts only. The

instant case is a challenge to congressional districts only. The districts are different, the rules governing redistricting of those maps are different, and many of the issues bearing on the removal of this case are very different from that case.[1] They obfuscate the difference between this case and *Common Cause v. Rucho*. *Rucho* was a challenge to the congressional districts on federal constitutional grounds, not state law; plaintiffs' hyperbole about the applicability of *Rucho* is therefore irrelevant.

Plaintiffs ignore key aspects of Legislative Defendants' removal petition that undermine their claims. They ignore that unlike in *Common Cause v. Lewis*, we now know the amorphous so-called standard that plaintiffs will ask the state court to apply to congressional districts and we know the effect that application of that alleged standard will have on the ability of minority voters to elect their candidate of choice in a crossover district, namely North Carolina's First Congressional district ("CD1"). This Court need look no further than the maps of Dr. Jowei Chen, plaintiffs' expert in *Rucho*, to see how the "standard" Plaintiffs expect the state court to apply will decimate this performing crossover district in Northeastern North Carolina. Plaintiffs' remand motion ignores these facts. But they will not go away. To whatever extent these issues may have been speculative in *Lewis*, the stark reality of them are presented front and center in this case. The voting rights issues in this case are real, and they merit federal review.

[1] Plaintiffs contend that Legislative Defendants should pay costs and fees of the removal because of the Court's ruling in Common Cause v. Lewis. The question of whether remand was proper in Common Cause v. Lewis, is currently on appeal at the Fourth Circuit, and has yet to be adjudicated. Moreover opinions by one district court judge are not binding at the district court level, even on the same judge. See Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("a decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") In any event, removal is warranted here because of the different federal issues involved in congressional versus legislative districting, not the least of which is the makeup of CD1, which was not at issue in Lewis. In the event the Court declines to recognize the differences, given that the Common Cause appeal has not been resolved, we urge the Court to reconsider its prior ruling for the reasons stated herein.

ARGUMENT

I. Expedited Review of Legislative Defendants' Removal is not Warranted under the Circumstances.

There is no need for this Court to rush its review of Legislative Defendants' removal of this case. Plaintiffs contend that it is "essential to resolve this case as expeditiously as possible" because of the upcoming 2020 primary and general elections. (D.E. 19, p. 34). However, it is Plaintiffs' own unreasonable, and inexplicable, procrastination that has created the alleged emergency they now foist on both Legislative Defendants and this Court.

In the remedial phase of *Harris v. McCrory*, No. 1:13-CV-949 (M.D.N.C. 2016), Democratic plaintiffs challenged the 2016 Congressional Plan as an "unconstitutional partisan gerrymander" through objections filed on March 3, 2016. *See Harris*, 2016 WL 3129213. One of Plaintiffs' attorneys here, Marc E. Elias, was also an attorney for the plaintiffs in *Harris*. It is clear that Plaintiffs (and their attorneys) knew they could challenge the Congressional Plan in state court as early as March 2016. Instead, they chose to wait until September 27, 2019, over three years later, to initiate their action. Plaintiffs' purposeful delay does not now create an "emergency" requiring this Court to expedite resolution of Legislative Defendants' removal, nor should Plaintiffs' ill-founded litigation strategy be rewarded.

Even if the Court does not believe that the Plaintiffs should have brought their challenge to the Congressional Plan in 2016, Plaintiffs should have initiated their state court lawsuit in November 2018, when the same attorneys brought identical claims before the same three judge panel that Legislative Defendants removed this current case from. In that November 2018 lawsuit, Plaintiffs' attorneys challenged the state legislative districts under the *identical* theory that Plaintiffs employ here.

At the very latest, Plaintiffs should have brought their lawsuit in June 2019. In *Common Cause v. Rucho*, group of plaintiffs, who were also Democrat voters, challenged the *same* congressional districts that are being challenged here as an unlawful partisan gerrymander. That case went all the way to the United States Supreme Court which, in June 2019, ruled that partisan gerrymandering claims were non-justiciable. *See Common Cause v. Rucho*, 139 S.Ct. 2484 (2019). When the Supreme Court issued this ruling, specifically directing would-be plaintiffs to state courts or their legislatures for relief, Plaintiffs should have filed their claims.

There is simply no reason why the State's congressional districts could not have been challenged in the same lawsuit with the state legislative districts in 2018 or in their own separate lawsuit brought in June 2019. Had they been challenged then, Legislative Defendants would have had plenty of time to remove the case and this Court would have had more than ample time to consider Plaintiffs' remand arguments in normal course. It is Plaintiffs (and their attorneys), not Legislative Defendants, who have chosen to employ delay tactics in an effort to force both state and federal Courts to agree to an expedited resolution of this matter that will unjustly deprive the State and the People of North Carolina of their right to a full and complete defense.

It is ironic that Plaintiffs' caution this Court to not interfere with a State's handling of redistricting disputes, when they and their attorneys have spent the last decade inviting federal courts to do just that. *See Harris v. McCrory*, 1:13-CV-949 (M.D.N.C. 2016); *Covington v. North Carolina*, 1:15-CV-399 (M.D.N.C. 2016); *Common Cause v. Rucho*, No. 1:16-CV-1026 (M.D.N.C. 2018). Plaintiffs' admonition is absurd considering Democratic plaintiffs, utilizing lawyers repeatedly involved in these redistricting suits, immediately took to the federal courts to "obstruct state court adjudications of redistricting disputes" after the North Carolina Supreme Court *twice* ruled that the state's legislative and congressional districts were constitutional. *See*

Dickson v. Rucho, 368 N.C. 673, 789 S.E.2d 436 (2015); *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 278 (2014). Legislative Defendants' removal lays out the grounds for federal jurisdiction over this matter. Plaintiffs have not presented any excuse at all for their decision to delay filing their case, and there is no reason sufficiently persuasive to deprive the State and the People of North Carolina of their full due process rights—especially in a subject matter as important as redistricting. If there is an emergency here it is one of Plaintiffs' own creation. The Court should not reward Plaintiffs' dilatory tactics.

II. Removal is Proper under the "Refusal" Clause of Section 1443(2).

The clear language of the "refusal" clause of Section 1443(2) entitles the General Assembly to a federal forum for this matter. The refusal clause, authorizes "the defendant" to remove a civil action "for refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]." 28 U.S.C. § 1443(2).[2] Case law supports this interpretation, as W*hite v. Wellington*, held that a state official may invoke the "removal clause" of Section 1443(2) by identifying a "colorable conflict between state and federal law leading to the removing defendant's refusal to follow plaintiff's interpretation of state law because of a good faith belief that to do so would violate federal law." 627 F.2d 582, 587 (2d Cir. 1980) (quotations omitted). That is precisely the situation here. Plaintiffs interpret the North Carolina Constitution to require the Legislative Defendants to remove Democratic Party voters from "packed" Democratic districts. The Legislative Defendants refuse to implement Plaintiffs' interpretation of those provisions. One basis for refusal is that, given the "inextricable link between race and politics in North Carolina," *N.C.*

[2] These elements are clearly met. Legislative Defendants are officers sued in their official capacities, and in those capacities, represent the entire body of the General Assembly. *See, e.g. Adams v. Ferguson*, 884 F.3d 219, 225 (4th Cir. 2018) ("[S]uits against state officers generally represent only another way of pleading an action against an entity of which an officer is an agent." (quotations omitted).

State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016); *Id*. at 225[3] "unpacking" the Democratic-leaning districts would require the Legislative Defendants to dismantle at least one minority crossover district, CD1. Intentionally dismantling this district would likely violate the Fourteenth and Fifteenth Amendments; even unintentionally dismantling it would likely violate the VRA. Moreover, the districts Plaintiffs contend should be "unpacked" were approved under federal-court supervision and are in current use at its express permission. These conflicts support removal.

A. Legislative Defendants' Choice not to Implement Plaintiffs' Interpretation of State Law Amounts to a "Refusal" Under Section 1443(2).

The Legislative Defendants refuse to implement Plaintiffs' interpretation of state law in a new redistricting plan that Plaintiffs sued Defendants to obtain. Plaintiffs contend that the North Carolina Constitution requires the Legislative Defendants to remove Democratic Party voters from "packed" districts. The Legislative Defendants refuse to do this. Thus, Legislative Defendants are, "refusing to do an[] act" within the meaning of the "refusal" clause of Section 1443(2), and refusing to follow Plaintiffs' interpretation of state law because of their good faith belief that doing so would violate federal law.

Plaintiffs are flat wrong (Pl. Mem. at 11-12) to characterize this suit as one over a "completed act" instead of "refusing to do any act." The suit seeks relief that requires the Legislative Defendants to act in a manner that would violate Federal Civil rights law. The type of refusal at issue here qualifies, as precedent makes clear. In *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995), plaintiffs brought a state-law challenge to a city's 5-3-1 school-board districting plan; the city refused to adopt "some other system" compliant with the plaintiffs'

[3] Cert. denied sub nom. *North Carolina v. N.C. State Conference of NAACP*, 137 S. Ct. 1399 (2017).

state-law theory. *Id.* The city's basis for refusal was that a federal-court consent decree in VRA litigation ratified the 5-3-1 system and departing from it would violate the consent decree. The Fifth Circuit concluded that this rejection of plaintiffs' state-law arguments was a "refusal" and affirmed Section 1443(2) removal. The refusal here to implement Plaintiffs' view of state law into a redistricting plan is no different.[4]

This Court reached an identical holding in *Cavanaugh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). The state-court plaintiffs there asserted that numerous districts in North Carolina's 1980-cycle redistricting plans violated the state Constitution's whole county provision (WCP). The State defended on the ground that implementing the WCP would require the State to violate the VRA. This was a "refusal," so this Court denied the motion to remand. Similarly, one of Plaintiffs' lead cases, *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), though it granted remand, treated the choice not to implement the plaintiffs' view of state law into a redistricting plan as a refusal—which is why it called the case "a close call." *Id.* at 785.

Plaintiffs appear to believe that, because they challenge the affirmative *act* of passing the 2016 plan, this case involves no *omission*, no "refusal" to act. But for every case they cite, numerous others are at odds with their position, including *Cavanaugh, Alonzo,* and *Stephenson*. In fact, if Plaintiffs were right, then a state-law challenge to a school-desegregation plan would also be unremovable as a challenge to an *act*, the adoption of the desegregation plan, not an omission. Yet such challenges are paradigmatic removable cases under the refusal clause. *See, e.g., Burns v.*

[4] Legislative Defendants' acknowledge that the holding in *Alonzo* conflicts with two decisions cited by this Court in its decision in *Common Cause v. Lewis. See Brown v. Florida*, 208 F.Supp. 1344, 1351 (S.D. Fl. 2002) and *Wolpoff v. Cuomo,* 792 F.Supp. 964, 968 (S.D. N.Y. 1992). However, these cases, and the Court's decision in *Common Cause v. Lewis* conflict with the ruling in *Cavanaugh*, where the "state of North Carolina" was part of the defendant group that removed the case to federal court. *See Cavanaugh v. Brock*, 577, F.Supp. at 179 (E.D.N.C 1983).

Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 437 F.2d 1143, 1144 (7th Cir. 1971); *Linker v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 344 F. Supp. 1187, 1195 (D. Kan. 1972); *Mills v. Birmingham Bd. of Ed.*, 449 F.2d 902, 905 (5th Cir. 1971); *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691, 694 (W.D.N.Y. 1979).

The desegregation cases illustrate Plaintiffs' error. They fail to appreciate that plaintiffs in these cases want a *new* regime, not merely invalidation of the status quo. Plaintiffs' preliminary-injunction motion in this very case demonstrates this: it expressly demands "a remedial process to create a new plan" and anticipates that "[t]he General Assembly" can be coerced into adopting such plans "within 8 days of the first legislative hearings." Mot. at 1, 48. Refusal to implement that regime is just that, a refusal. Thus, just as state officials who "refuse to undo their actual and contemplated transfer of teachers" satisfy the refusal element, *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 312 (S.D. Ind. 1969), the Legislative Defendants also engage in an omission by refusing to adopt new plans, which Plaintiffs' prayer for relief expressly demands, and undo the minority crossover district that Plaintiffs' Complaint identifies as unlawfully "packed." *See also Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 722 (D. Conn. 1976) (reading "the phrase 'any act'…literally, without limitation" to reach a refusal to undo an appointment of officials and make new appointments).

Indeed, Plaintiffs forget that the "state laws" the Legislative Defendants refuse to enforce are the state constitutional provisions (actually, Plaintiffs' interpretation of them) that govern redistricting. Legislators most certainly can "refuse" to implement them in redistricting. Not only is this refusal something the legislature can logically accomplish, but it is in fact the *primary* state actor to accomplish it—since the executive branch does not enact a redistricting plan. That is why state legislative actors, such as school boards and city councils, are allowed to remove cases (or at

least to try) challenging their refusal to implement state law in their legislation. *See, e.g.*, *Buffalo Teachers Fed'n*, 477 F. Supp. at 694; *Bridgeport Ed. Ass'n*, 415 F. Supp. at 720; *Burns*, 302 F. Supp. at 311–12.

Unlike, *Cavanaugh, Alozo, and Stephenson*, Plaintiffs cite to cases that have nothing to do with districting. By contrast, their cases involve, challenges to prosecutions on various state criminal charges, including obstructing public streets, and criminal trespass, *City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 810 (1966), and *People v. State of N.Y. v. Horelick*, 424 F.2d 697, 698-99 (2nd Cir. 1970), a challenge to a city's implementation of a promotional eligibility list, *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 567 (6th Cir. 1979), a defamation case involving statements made before the EEOC, *Thornton v. Holloway*, 70 F.3d 522, 523 (8th Cir. 1995), a state civil-service commission's order requiring reinstatement of a public official, *City and County of San Francisco v. Civil Service Comm'n of City and County of San Francisco*, 2002 WL 1677711 (N.D. Cal. July 24, 2002), an executive order granting racial preferences, *Massachusetts Council of Const. Emp., Inc. v. White*, 495 F. Supp. 220, 221 (D. Mass. 1980. These factual scenarios have nothing to do with this case. By contrast, *Alonzo*, *Cavanaugh*, *Linker*, *Burns*, and *Stephenson* are directly on point.

B. Any Enforcement Requirement is Satisfied.

Even if the word "refusal" and "act" somehow contain an enforcement requirement, Plaintiffs erroneously contend that the legislature does not enforce election laws. This is a double error.

First, state law empowers the General Assembly, through its officers, to represent the State, which includes all its component powers, including its enforcement powers. North Carolina General Statute § 1-72.2 defines the "Speaker of the House of Representatives and the President

Pro Tempore of the Senate, as agents of the State" and provides that, "when the State of North Carolina is named as a defendant…, both the General Assembly and the Governor constitute the State of North Carolina." Another statute, North Carolina General Statute § 120-32.6(b), provides that, in a case where "the validity or constitutionality of an act of the General Assembly…is the subject of an action in any State or federal court," the House Speaker and President Pro Tempore are "agents of the State through the General Assembly," and "the General Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a)." It also affords the General Assembly "final decision-making authority with respect to the defense of the challenged act." *Id.* Under these provisions, the General Assembly asserts the prerogatives of North Carolina as an undivided whole.

The Supreme Court has expressly held that states can "authorize[] the [legislature] to litigate on the State's behalf, either generally or in a defined class of cases," and it cited with approval state laws, worded almost identically with North Carolina's, that "have done just that." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1952 (2019); *see also Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Thus, when the General Assembly's officers removed this case, they acted not in the interests merely of the General Assembly or on their own behalf; they also represented "*the State's interests*." *Virginia House of Delegates*, 139 S. Ct. at 1951 (emphasis added); *see also id.* at 1951–53 (distinguishing the "State's interests" from a legislative body's "own right[s]").

This Court is obligated to honor North Carolina's choice of agents. Plaintiffs' assertion that "the Attorney General alone" represents the State is just wrong. Mot. at 16. As the Supreme Court recognized, although a State *can* empower only its attorney general to represent the State's interests, it also can choose to delegate that power to other agents, including the legislature.

Virginia House of Delegates, 139 S. Ct. at 1952. The mere fact that Plaintiffs can cite a statute authorizing the State Attorney General to represent the State does not in any way negate the *other statutes* that authorize the General Assembly, through its officers, to represent the State and, most importantly, to exercise "final decision-making authority with respect to the defense of the challenged act." N.C. Gen. Stat. § 120-32.6(b). Further, it bears emphasizing that Plaintiffs did not sue the Attorney General; the other defendants are election officials who are *not* delegated any power by statute to represent the State. Although there is no requirement that the party engaging in a refusal be the *sole* representative of the State, it is in fact the situation here that the General Assembly wields that sole power in this case.[5]

Second, the United States Constitution provides that the "legislature" of each state shall prescribe the time, place, and manner of elections for Congress. In addition to election laws prescribing the voting process, the legislature exercises its federal constitutional duty by providing for voting districts for congressional districts. In this manner, it is the legislature, and only the legislature, that "enforces" redistricting laws in this state. It, and it alone, controls the time, place, and manner of voting districts pursuant to an express grant of authority from the United States Constitution.

No other authority in this State "enforces" the time, place and manner of elections as the legislature. To the extent that it could be argued that the "State of North Carolina" exercises such authority, the "State of North Carolina" is *not* a defendant in this case. The only defendant besides the legislature is the State Board of Elections. But the elections board does not "enforce" redistricting laws, it merely *administers* them. As the elections board has made clear in numerous

[5] Notably, this Court did not address these statutes in *Common Cause v. Lewis*, perhaps because it did not have the benefit of the Supreme Court's decision in *Virginia House of Delegates*.

redistricting cases, its sole role is to administer whatever law it is required to administer per the legislature or a court. The legislature, by creating the law pursuant to its authority under the federal constitution to set the time, place, and manner of elections, is the only entity that is "enforcing" the redistricting law under any rational interpretation of the term.

III. Plaintiffs Interpretation of State Law and Proposed Remedy Creates a Colorable Conflict with Federal Law.

The General Assembly refuses to act on Plaintiffs' demands to dismantle crossover districts and intentionally dilute votes because it would be *inconsistent* with the Fourteenth and Fifteenth Amendments. To understand this *ground* of defense, it is necessary to understand what Plaintiffs have alleged and how those allegations interact with any remedial districting plan that satisfies Plaintiffs' state-law theory.

The political composition of any congressional districts must, in their view, be different, and that means the General Assembly—to comply with their state-law theory—must draw districts with markedly different demographics. Plaintiffs will insist that thousands of maps can satisfy their tastes. But, their pleadings, and the testimony of Plaintiffs' expert Dr. Chen, reveal otherwise. The range of maps to remedy the violation they allege is exceptionally narrow.

Plaintiffs' state-law theory, as stated in their pleadings as opposed to their radically different remand filings, requires the General Assembly to dismantle minority "crossover" districts. Plaintiffs complain that the current map contains two types of districts, neither of which suits their "state-law" propositions. There are districts "packed" with Democratic constituents at high percentages, and there are districts that "crack" Democratic constituents across several districts at low percentages. The "packed" districts, in Plaintiffs' view, have too many Democratic voters; the "cracked" districts have too few. Their assertion is that the North Carolina Constitution

requires a more balanced share of Democratic voters so that the two major political parties have "substantially equal voting power."

The reason those political demographics matter in this context, is that there is an "inextricable link between race and politics in North Carolina." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). African American voters are overwhelmingly Democratic, and the Democratic Party comprises largely African American voters. *Id.* at 225. As a result, to "unpack" the "packed" Democratic districts is to remove African Americans from these districts. The General Assembly has no way of remedying the supposed violation in the manner suggested by Plaintiffs' pleadings without drawing down black voting-age population, or "BVAP." Or else, drawing down Democratic vote share while maintaining current BVAP levels would require astonishing racial precision—requiring the General Assembly to keep African American voters in the districts and segregate the white Democratic constituents out.

The civil-rights implications of enacting and enforcing this remedy are profound. The supposedly packed districts are ones that currently empower North Carolina's African American communities to elect their preferred candidates, a central guarantee of the VRA and (in a more limited way) the Fourteenth and Fifteenth Amendments. CD1 is one such minority crossover district. As discussed in Legislative Defendants' Notice of Removal, Congressman Butterfield of CD1 testified that the appropriate level of BVAP should ideally be 47% but not lower than 45% [D.E. 5 p. 9]. The current BVAP level is just shy of the level at which Congressman Butterfield testified is necessary for black voters to elect their candidate of choice. *Id.* Therefore, the district is protected from being intentionally dismantled under VRA §2. Plaintiffs' own expert, Dr. Chen, illustrates how under Plaintiffs' theory, the crossover district would be dismantled, when in the thousands of simulated plans he produced in *Rucho,* he produced none that produced a district in

the area of CD1 with a BVAP of even 44%. [D.E. 5 at p. 12-13]. In fact, only 262 of Dr. Chen's thousands of maps drew *any* district with a BVAP of at least 40%. *Id.* at p. 13.

That raises a colorable, if not dead-certain, conflict with federal equal rights law in two separate respects.

First, dismantling a crossover district would be inconsistent with the Fourteenth and Fifteenth Amendments (and the VRA). A crossover district is one in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). These districts need not be created on purpose; like any type of district, they can occur naturally by operation of non-racial criteria. However they are formed, the Supreme Court has warned that "a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts…would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Id.* at 24. That is because an intentional state decision to enact legislation with the effect of "minimizing, cancelling out or diluting the voting strength of racial elements in the voting population" violates these constitutional provisions. *Rogers v. Lodge*, 458 U.S. 613, 617 (1982); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481–482 (1997). *Bartlett* warns that this prohibition applies to the deliberate choice to dismantle a performing crossover district just as it does to the deliberate choice to dismantle a performing majority-minority district.

The intent element of this constitutional violation would be met under these circumstances. That element does not require "any evidence of race-based hatred." *N.C. State Conference of NAACP*, 831 F.3d at 222. Under this Circuit's precedent, a motive to impact one party's political power, where race and politics correlate—as it does in North Carolina— qualifies as racial intent.

Id. Nor would the compulsory order of the state court immunize the resulting redistricting legislation from an intent-based claim. *See Abbot v. Perez*, 138 S. Ct. 2305, 2327 (2018).

Thus, if the General Assembly enacted legislation deliberately "unpacking" the "packed" Democratic Party districts, it would very likely violate these constitutional provisions. That is a *ground* on which the General Assembly *refuses* to enact Plaintiffs' preferred districts into law.

Second, dismantling a crossover district would be inconsistent with the VRA. At least two of the districts Plaintiffs challenge as "packed" with Democratic constituents enable the minority community to elect its preferred candidates. As a result, even unintentionally dismantling them—were that even possible—would create a conflict under VRA § 2. Although no Section 2 plaintiff could force the state to create crossover districts, *see Strickland*, 556 U.S. at 19–20, the Supreme Court in *Strickland* made clear that a state can cite crossover districts in its plan as a defense to a VRA § 2 claim seeking a majority-minority district. *Id.* at 24 ("States can—and in proper cases should—defend against alleged Section 2 violations by pointing to crossover voting patterns and to effective crossover districts.").

These districts are therefore critical under Section 2. That is especially so since separate federal-court rulings have squeezed North Carolina into a tight corner. On the one hand, the *Harris* court found that the State erred in creating majority-minority districts without sufficient evidence of legally significant racially polarized voting to justify 50% BVAP districts. On the other hand, the Fourth Circuit in 2016 found "that racially polarized voting between African Americans and whites remains prevalent in North Carolina." *N.C. State Conference of NAACP*, 831 F.3d at 225. These holdings place the State between the proverbial rock and hard place: Section 2 plaintiffs can cite the Fourth Circuit's finding of severe polarized voting and, presumably, mount evidence to support that finding, and Equal Protection Clause plaintiffs can cite *Harris'* finding that North

Carolina lacks sufficient evidence of legally significant polarized voting to justify 50% BVAP districts. These rulings expose the State to "the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) (quotations omitted).

The 2016 plans, however, navigate the tension between *Harris* and *NAACP* by maintaining a crossover district of near or above 45% BVAP depending on how that term is defined.[6] This district is a shield to VRA § 2 claims by affording the equal opportunity the statute guarantees. It also is a shield to racial-gerrymandering claims because the General Assembly did not use racial data to create it. But Plaintiffs' demand that the General Assembly drop BVAP in this district because it is (in Plaintiffs' view) "packed" with Democratic constituents undermines this proper exercise of "legislative choice or discretion," *Strickland*, 556 U.S. at 23, and exposes the State to a VRA § 2 claim by any plaintiff willing and able to prove legally significant polarized voting. Or else, it exposes the State to an equal-protection claim if the General Assembly uses racial data to target only white voters for removal from this district.

To be sure, the General Assembly did not use racial data during the line-drawing process, but that is irrelevant. VRA protection turns on the actual opportunity a district affords minority voters, not on legislative intent in line-drawing. *See, e.g.*, *Strickland*, 556 U.S at 10; *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986). Indeed, considering racial data during line-drawing creates the very problem necessitating the 2016 redistricting in the first instance, an equal-protection

[6] The any part black voting age population of the 2016 CD1 is nearly 45%. The Hispanic population makes up nearly 7% of the voting age population. If non-citizens are removed from the calculation, the citizen any part black voting age population of CD1 is well within the range advocated by Congressman Butterfield. *See* https://www3.ncleg.gov/GIS/Download/District_Plans/DB_2016/Congress/2016_Contingent_Congressional_Plan_-_Corrected/Reports/DistrictStats/rptStatPack.pdf

violation. What matters, then, is that the district currently exists as a minority crossover district, and it cannot continue to exist as such under Plaintiffs' demand for reduced Democratic vote share.

Moreover, after the lines were drawn, the General Assembly, upon request by Democrats, distributed racial statistics to the Democrats, allowing an analysis of any racial vote dilution issues. No one raised any. That is likely because the initial drawing of CD1, for example, resulted in a crossover district of the sort that plaintiffs' expert in other cases described as providing black voters with an equal opportunity to elect their candidates of choice. That is the correct way of navigating the "competing hazards" of VRA and equal-protection requirements. *Abbott*, 138 S. Ct. at 2315.

For their part, Plaintiffs disclaim any desire for remedial maps that violate the Constitution or the VRA. But that cannot be the relevant point. The General Assembly is entitled to defend its current maps, to dispute Plaintiffs' asserted state-law right to their preferred political demographics, and to resist Plaintiffs' efforts to exert control over the districting process to achieve Plaintiffs' political ends. That Plaintiffs set themselves up as crusaders for equal voting rights and claim to represent the interests of all citizens of all races is no basis to deny the General Assembly its opportunity to dispute those assertions and raise colorable defenses to Plaintiffs' claims.

Section 1443(2) identifies the proper forum for that dispute; it does not pick a winner at this stage. Plaintiffs erroneously demand proof of the General Assembly's defenses as a predicate to the federal removal. This puts the cart before the horse. Like other jurisdictional gateways, Section 1443(2) looks to the *ground* of inconsistency, not where inconsistency is shown or proven, and directs the federal court to resolve the *ground*, if it is colorable. This means that the act itself does not need to "be inconsistent", with federal equal rights law, but that the ground itself is a good faith belief, tested objectively, for removal. *See, White*, 627 F.2d at 587. The General Assembly

is confident that its position will bear out through factual development, but it is sufficient at this stage that it has asserted a colorable *ground* of removal.

IV. *Rucho*'s rejection of partisan gerrymandering claims under federal law does not undermine the removal.

Plaintiffs' argument that this Court should remand the case because of the decision in *Common Cause v. Rucho* is nothing more than a red herring. To begin with, *Rucho* involved a challenge to districts under *federal* constitutional standards. No state constitutional challenge was asserted or even mentioned in that case. The Supreme Court in *Rucho* decided that there are no judicially manageable standards under the *United States* Constitution for policing so-called partisan gerrymandering.

But the instant case involves a *state* law claim of partisan gerrymandering. While the Supreme Court in *Rucho* determined that state constitutions might provide justiciable standards for partisan gerrymandering, it never said that federal courts should abdicate their concurrent jurisdiction with state courts to decide issues of state law when appropriate. Plaintiffs' have completely misstated the issues resolved in the *Rucho* opinion. Plaintiffs state that in *Rucho* the Supreme Court held that federal courts have no jurisdiction over partisan gerrymandering claims "full stop." Pls. Brief at 9. But the "full stop" was over claims of partisan gerrymandering under *federal* law. Nothing in the opinion states that federal courts have no authority to review claims of partisan gerrymandering under state law when the federal court otherwise has jurisdiction over the case. "Full stop" are words added by plaintiffs to the *Rucho* opinion, and they are not in the opinion itself. The plaintiffs here will stop at no lengths to prevent a federal court from reviewing whether the state law claims they are pushing will in fact violate federal law.

Plaintiffs also misstate *Rucho* arguing that because that case held that federal courts cannot adjudicate partisan gerrymandering claims under federal law that "*a fortiari*, they cannot

adjudicate partisan gerrymandering challenges under a state constitution either." (Pls. Mem. at 10) Again, that statement does not derive from any federal case, Supreme Court or otherwise. It is completely made-up by the plaintiffs.

And it is completely inconsistent with the law. It is clear that federal courts have jurisdiction to adjudicate state law claims, where the federal court otherwise has jurisdiction, just as state courts have concurrent jurisdiction to decide federal claims where the state courts otherwise have jurisdiction. *See Haywood v. Drown,* 556 U.S. 729, 735 (2009). One need not look any further than *Cavanaugh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), where the state-court plaintiffs asserted that numerous districts in North Carolina's 1980-cycle redistricting plans violated the WCP. The State defended on the ground that implementing the WCP would require the State to violate the VRA. This was a "refusal," so this Court denied the motion to remand. And the federal court ultimately decided the case on *state law* grounds. *Cavanaugh*, 577 F. Supp. at 177.

V. This Case Is Not Barred by Sovereign Immunity.

Plaintiffs' claim sovereign immunity prevents this case from proceeding in federal court and then promptly admit that removal waives sovereign immunity. Pls' Mem. at 26-27. Their argument is that private counsel for Legislative Defendants cannot remove on behalf of the State and cannot waive the State's sovereign immunity. *Id.* at 27. But state law is to the contrary. It provides:

> [I]n any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged, the General Assembly, jointly through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch of the State of North Carolina, and when the State of North Carolina is named as a defendant in such cases, both the General Assembly and the Governor constitute the State of North Carolina.

N.C. Gen. Stat. § 1-72.2(a). It further provides that, "as agents of the state," the State Defendants may hire "private counsel" to represent them in that role. *Id.* 1-72.2(b).

It necessarily follows that they can waive sovereign immunity, as *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002), shows. Plaintiffs read *Lapides* to mean that only "the Attorney General has the power to waive sovereign immunity," Pls.' Mem., at 27, but *Lapides* held, not that only attorneys general in all 50 states may waive immunity, but that the attorney general of Georgia had power to waive immunity because a statute authorized him to represent the state in court. *See* 535 U.S. at 622. That is also true here. A state statute defines the Legislative Defendants as the State and authorizes them to represent the State and hire counsel to that end. That settles the matter.

VI. An Award of Fees Would be Inappropriate.

An award of attorney fees is appropriate only where removal is unsupported by "an objectively reasonable basis." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The only assertion lacking an objectively reasonable basis is Plaintiffs' demand for attorneys' fees. *Cf. Smith v. Psychiatric Sols., Inc.*, 750 F.3d 1253, 1260 (11th Cir. 2014) (noting the well-established rule that a frivolous motion for sanctions is itself sanctionable).

Plaintiffs' purported amazement at the Legislative Defendants' removal here is clearly theatrical. This is the third time in four redistricting cycles removal has been sought in a case like this. It succeeded in *Cavanaugh*. Although it failed in *Stephenson*, the Court called the case a "close call." 180 F. Supp. 2d at 785. It was entirely predictable and reasonable that this avenue, especially given the appeal pending in *Common Cause*, would be tried again here.

In fact, Plaintiffs fail to cite a single analogous case where attorneys' fees were awarded. Their reliance on *Nies v. Town of Emerald Isle*, 2013 WL 12159366 (E.D.N.C. Mar. 27, 2013) and

Int'l Legware Grp., Inc. v. Americal Corp., 2010 WL 3603784 (E.D.N.C. Sept. 8, 2010), could not be further off base. The cases did not involve the VRA, any racial issues, or Section 1443(2), and the removing party acted under Section 1441 without any objective basis for removal. That is simply not the case here.

Plaintiffs do practically nothing to explain why Legislative Defendants' objective basis for removal is absent. They instead speculate about motive, contending that the Legislative Defendants intended to delay the case. First of all, the test is *objective*, not subjective. Secondly, the Legislative Defendants removed the case only two weeks after Plaintiffs filed their Complaint. By contrast, Plaintiffs waited three years from the 2016 plan's enactment to file their case. Their delay is neither this Court's nor North Carolina's emergency. Moreover, the Federal Rules allow time for parties to decide whether to remove. The Legislative Defendants were justified in using that time to assess their options, including by ensuring that removal was supported by precedent. As shown above, it is. Finally, this court found that the prior removal in *Common Cause v. Lewis* did not warrant a fee award. With that decision on appeal and no guidance yet from the Fourth Circuit on these issues, a fee award in this case would be wholly inappropriate.

CONCLUSION

The Court should deny Plaintiffs' motion to remand.

Respectfully submitted the 21st day of October, 2019.

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