Nos. 19-1091 (L), 19-1094

In the United States Court of Appeals
for the Fourth Circuit

COMMON CAUSE, *ET AL.*, *Plaintiffs–Appellees–Cross-Appellants*,

v.

DAVID R. LEWIS, *ET AL.*, *Defendants–Appellants–Cross-Appellees*,

and

NORTH CAROLINA STATE BOARD OF ELECTIONS, *ET AL.*, *Defendants–Appellees.*

On Appeal from the United States District Court
for the Eastern District of North Carolina
Case No. 5:18-cv-00589 (Hon. Louise W. Flanagan)

PLAINTIFFS'-APPELLEES' MOTION TO DISMISS APPEAL OF LEGISLATIVE DEFENDANTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, Plaintiffs–Appellees–Cross-Appellants state that none of the Plaintiffs–Appellees–Cross-Appellants is a publicly held corporation or similar legal entity, and no publicly held corporation or similar legal entity holds 10% or more of any of the Plaintiffs–Appellees–Cross-Appellants. No publicly held corporation or similar legal entity has a direct financial interest in the outcome of this litigation. None of the Plaintiffs–Appellees–Cross-Appellants is a trade association.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

INTRODUCTION

The Court should dismiss Legislative Defendants-Appellants' appeal (No. 19-1091) as moot, and proceed to decide Plaintiffs' cross-appeal (No. 19-1094). Legislative Defendants have appealed the district court's January 2, 2019 decision remanding this matter to state court, contending that the district court had jurisdiction under the "Refusal Clause" of 28 U.S.C. § 1443(2). Specifically, Legislative Defendants contended in their appeal that they "refused" to enact new redistricting plans that comply with state law because enacting such plans would "conflict" with federal law.

Since the appeal was filed, however, the state court has issued a final judgment holding that the 2017 Plans violated the North Carolina Constitution and that there is no conflict with federal law. Ex. D. And Legislative Defendants did not appeal that final judgment. Instead, they chose to enact remedial maps that they contend comply with both state and federal law. Those remedial plans are already being implemented by the State Board of Elections and will govern the 2020 elections no matter what this Court decides as to the propriety of removal. Not only is there no longer any live controversy between the parties with respect to the propriety of removal, but the state court's final judgment would be preclusive on the merits to the extent there was, meaning that a reversal by this Court of the remand order could not possibly affect the outcome of this litigation. Appeals of

remand decisions are moot where the state court has entered final judgment.

Plaintiffs' cross-appeal of the district court's denial of fees under 28 U.S.C. § 1447(c) is not moot, however. There remains a live controversy between the parties as to whether plaintiffs were entitled to fees because Legislative Defendants "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). And a reversal would provide plaintiffs with practical relief, namely, the fees at issue.

Pursuant to this Court's Rule 27(a), counsel for the other parties to the appeal have been informed of the intended filing of this motion. Counsel for Legislative Defendant-Appellants oppose this motion and intend to file a response. Counsel for State Defendant-Appellees the State Board of Elections and its Members consent to this motion and do not expect to file a response.

BACKGROUND

Plaintiffs filed this action in Wake County Superior Court on November 13, 2018. On December 14, 2018, Legislative Defendants removed the action to federal court under the Refusal Clause of 28 U.S.C. § 1443(2). Legislative Defendants asserted that they "refused" to adopt non-partisan remedial plans that comply with the North Carolina Constitution, because adopting such plans supposedly would "conflict" with the federal Voting Rights Act and the Fourteenth and Fifteenth Amendments, and with the federal district court's remedial order in

Covington v. North Carolina. *See Common Cause v. Lewis*, No. 5:18-CV-589-FL, ECF No. 1 (M.D.N.C. Dec. 14, 2018). As Legislative Defendants wrote in their opening brief to this Court, their removal was predicated on the assertion that they "refuse[] . . . to implement Plaintiffs' asserted theories of state law into new redistricting legislation." Leg. Def. Br. at 19.

The district court remanded the action on January 2, 2019. The district court held that Legislative Defendants could not invoke the Refusal Clause as a matter of law, and even if they could, the purported conflicts between state law and federal law were "speculative." Joint Appendix ("JA") 680-87. The district court denied Plaintiffs' motion for fees and costs.

On remand, the three-judge state court panel presided over a trial from July 15, 2019, to July 26, 2019. At trial, Legislative Defendants put on no evidence to establish any federal defense. As the state court later explained in its judgment, "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. *See Common Cause v. Lewis*, 2019 WL 4569584, at *131 (N.C. Super. Sept. 3, 2019). "Notably, Legislative Defendants retained Dr. Jeffrey Lewis, a political scientist from UCLA, who analyzed and provided estimates of the minimum BVAP needed in certain county groupings for African-American-preferred candidates to win, [b]ut Legislative Defendants chose not to have Dr. Lewis testify at trial." *Id.* at

*101 (citation omitted).

On September 3, 2019, the state court issued a unanimous 357-page final judgment for Plaintiffs. Ex. D; *see Common Cause*, 2019 WL 4569584, at *2. The court held that the challenged 2017 state legislative plans violated multiple provisions of the North Carolina Constitution. *Id.* at *2. The court further held that Plaintiffs' state law claims did not conflict with federal civil rights laws. *Id.* at *131.

Specifically, the court "conclude[d] that Legislative Defendants have not established that the VRA justifie[d] the current House or Senate districts or precludes 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 *132. 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.

With respect to Legislative Defendants' argument that the *Covington* remedial order precluded any changes to the 2017 Plans, the state court found that "the *Covington* district court made clear that the 2017 Plans could be challenged on state-law grounds in state court." *Id.* at *130. The state court pointed to the statements by the *Covington* court that its remedial order was without prejudice to future state-law and/or partisan gerrymandering challenges, and the state court held that "[t]hese statements squarely refute Legislative Defendants' contention that the *Covington* remedial order precludes any changes to the 2017 Plans based on state-law violations that a state court may find." *Id.*

Neither Legislative Defendants nor any other defendants appealed the state court's September 3, 2019 final judgment, and the time to appeal has now lapsed.

The state court's judgment did not compel Legislative Defendants to enact remedial plans, but gave Legislative Defendants "the opportunity to draw Remedial Maps in the first instance," affording Legislative Defendants two weeks to enact a remedial plan if they wished. *Id.* at *133-34. Despite having claimed in their removal-related submissions that they would "refuse" to enact remedial plans

that comply with Plaintiffs' state law theories, Legislative Defendants proceeded to enact remedial maps on September 17, 2019, as SL 2019-219 (SB 692) and SL 2019-220 (HB 1020). Legislative Defendants contend that the Remedial Plans both (1) comply with the state-law prohibition on partisan gerrymandering and (2) do not violate federal law. Indeed, in a September 23, 2019 filing with the state court submitting the remedial plans, Legislative Defendants told the state court they had no evidence "on whether the Voting Rights Act's prerequisites could be satisfied" in North Carolina, *i.e.*, no evidence that the Voting Rights Act applied to the remedial plans. *See* Legislative Defendants' Memorandum Regarding House and Senate Remedial Maps and Related Materials, Ex. A at 25.

On October 28, 2019, the state court entered an order approving the Remedial Plans enacted by Legislative Defendants. Among other findings, the court found that "the Remedial Maps comply with the Voting Rights Act and other federal requirements concerning the racial composition of districts." Ex. B at 12. No party has challenged this finding. Plaintiffs have dismissed their state-court appeal of that plan, meaning that the state-court litigation is now completely over. The 2020 elections will go forward under the Remedial Plans.

ARGUMENT

"When a case has become moot after the entry of the district court's judgment, an appellate court no longer has jurisdiction to entertain the appeal."

Mellen v. Bunting, 327 F.3d 355, 363-64 (4th Cir. 2003). A case becomes moot when there is no longer an "actual controversy" between the parties, *Alvarez v. Smith*, 558 U.S. 87, 92 (2009), or where "the parties lack a legally cognizable interest in the outcome," *Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010) (internal quotation marks omitted). "[T]he parties lack such an interest when, for example, [this Court's] resolution of an issue could not possibly have any practical effect on the outcome of the matter." *Id.*

These standards are amply satisfied here.

I. This Appeal Can Have No Practical Effect Because Legislative Defendants Have Enacted New Redistricting Plans That Are Being Used for the 2020 Elections

This appeal is moot because the Legislative Defendants have enacted new state House and state Senate plans in response to the state court's final judgment, and those new plans will govern the 2020 elections regardless of the outcome of this appeal. The state court entered its final judgment invalidating the 2017 Plans on September 3, 2019, and neither Legislative Defendants nor any other defendants appealed that final judgment. Rather, Legislative Defendants chose to enact remedial state House and state Senate Plans that they claimed were compliant with the state court's judgment and interpretation of the state constitution. The General Assembly enacted the 2019 Remedial Plans on September 17, 2019, as SL 2019-219 (SB 692) and SL 2019-220 (HB 1020). On October 28, 2019, the state court

approved the 2019 Remedial Plans for use in the 2020 elections. That decision is now final.

The State Board of Elections and various county boards of elections have begun implementing the new plans as of this filing, and by the time this Court hears oral argument, candidate filing will have closed and the State Board will have already mailed out ballots with candidates running in the new districts. On October 4, 2019, the Executive Director of the State Board filed an affidavit in the state court explaining that, once new districts were enacted, state and local elections officials would begin geocoding the new district boundaries into their databases, a process that takes several weeks. Ex. C ¶¶ 4-6. The State Board will then prepare ballots after candidate filing is complete: for the North Carolina state House and state Senate elections, candidate filing is currently set to close on December 20, 2019. *Id.* ¶ 6. As required under the federal Uniformed and Overseas Citizens Absentee Voting Act, the State Board will begin mailing out ballots at least 45 days before the primary elections. *Id.* ¶ 9. The state House and state Senate primaries are scheduled for March 3, 2020, meaning that the State Board must begin mailing ballots no later than January 18, 2020. *Id.* Early in-person voting for the primaries then begins on February 12, 2020. *Id.* ¶ 11. In short, by the time this Court hears oral argument at the end of January 2020, the State Board will have already sent out ballots with candidates running in the new

districts, and it will be too late to change the districts for the March 2020 primaries.

In these circumstances, this Court's resolution of Legislative Defendants' appeal "could not possibly have any practical effect on the outcome of the matter." *Norfolk*, 608 F.3d at 161; *see also Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 156 (4th Cir. 2012) (dismissing appeal on this basis). Indeed, there is precedent for dismissing this appeal in such circumstances. In *Stephenson v. Bartlett*, state officials removed a redistricting action under the Refusal Clause, and the district court remanded to state court. *See Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 781 (E.D.N.C. 2001). The state officials then appealed the remand order to this Court, while the state court proceedings proceeded in parallel. On April 30, 2001, the North Carolina Supreme Court held that the challenged plans violated the North Carolina Constitution, enjoined use of the plans, and ordered that new plans be adopted for the 2002 elections. *See Stephenson v. Bartlett*, 562 S.E.2d 377, 398 (2002). Several weeks later, this Court granted a motion to dismiss the state officials' appeal of the remand order. *See Stephenson v. Bartlett*, No. 02-01041, ECF No. 64 (4th Cir. May 16, 2002). Dismissal here is warranted too.

II. The State Court's Final Judgment Must Receive Full Faith and Credit

This appeal independently is moot because the state court entered final judgment in this action, and that final judgment must receive full faith and credit by the federal courts.

Pursuant to 28 U.S.C. § 1447(c), "the state court regained jurisdiction when the district court remanded [this case] to state court" on January 2, 2019. *Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 241 (4th Cir. 2007). Section 1447(c) provides that "[t]he State court may . . . proceed with such case" as soon as "[a] certified copy of the order of remand [is] mailed . . . to the clerk of the State court. 28 U.S.C. § 1447(c). This statute is unequivocal and does not provide for any exception for cases where a remand order is appealable. Thus, the state court had jurisdiction when it entered its September 3 final judgment striking down the 2017 Plans and rejecting Legislative Defendants' arguments that Plaintiffs' state law claims conflicted with federal law. Legislative Defendants could have appealed the state court's rejection of their federal defenses all the way to the U.S. Supreme Court, but they chose not to do so. No defendant appealed any aspect of the final judgment, and the judgment accordingly is settled.

Under 28 U.S.C. § 1738, this Court must afford full faith and credit to the state court's judgment. Even if this Court were to determine that the district court's remand order was in error, no authority suggests that that holding would "retroactively deprive[] the state court of jurisdiction." *Bryan*, 492 F.3d at 241 n.5. Even if the removal was proper, this case would be one "over which state and federal courts have concurrent jurisdiction," and not one in which "federal courts

had exclusive jurisdiction." *Id.* at 241. The state court thus had jurisdiction when it entered its final judgment.

This Court held in *Bryan* that state court final judgments entered on remand must receive full faith and credit by federal courts, even if an appellate court later determines that the remand was improper. In *Bryan*, the district court had remanded to state court a claim that this Court held on appeal was properly removed. *Id.* at 235. This Court vacated the remand order and directed the district court to dismiss the claim on the merits. *Id.* In the meantime, in the ongoing state court proceedings following remand, the state court declined to give res judicata effect to the federal district court's merits dismissal. *Id.* This Court then considered whether the federal court was bound under Full Faith and Credit by the state court's decisions on remand. The Court held that, "[i]n cases where the state court has in a final order" resolved an issue, "the Full Faith and Credit Act requires federal courts to respect that state court order," even if, as in *Bryan*, this Court had held that the case should never have been remanded. *Id.* at 239. Although the order at issue in *Bryan* was interlocutory, here, the state court indisputably issued a final judgment, and therefore this appeal cannot alter that final judgment or disturb the full faith and credit to which it is entitled.

Other federal courts of appeals have unanimously held as much. The Fifth Circuit has held that "*final* state court judgments would not be affected by a

successful appeal of a remand order," because "if the state case has proceeded to judgment, . . . the parties are bound by res judicata" and the federal courts are bound by the full faith and credit statute. *Sykes v. Texas Air Corp.*, 834 F.2d 488, 490, 491 n.10 (5th Cir. 1987). The Tenth Circuit similarly has held that the appeal of a remand order "becomes moot" if the case reaches final disposition in state court, since under "the clear language of [§ 1447(c)], the parties may continue the litigation in state court immediately upon the state court's receiving notice of the remand order," regardless of whether the remand order is appealable. *Dudley-Barton v. Serv. Corp. Int'l*, 653 F.3d 1151, 1152–53 (10th Cir. 2011). And the Ninth Circuit held just last year there is "no authority supporting th[e] position" that the reversal of a remand order "would retroactively strip the state court of jurisdiction and void the proceedings in the state court." *California v. Clay*, 709 F. App'x 466, 467 (9th Cir. 2018). The court dismissed the appeal of a remand order as moot given that the state court had entered final judgment, holding that "nothing in section 1447(d) indicates that the state court's judgment would be voided if we reversed the district court's remand order." *Id.*; *see also, e.g.*, *Nevada v. Hobson*, 934 F.2d 324, 1991 WL 92320 (9th Cir. 1991).

This Court has even dismissed an appeal as moot where the state court entered final judgment before the district court had even remanded. In *Virginia v. Banks*, 498 F. App'x 229 (4th Cir. 2012), this Court dismissed an appeal as moot

where a state criminal case was removed, and the state court nonetheless proceeded while the removal was pending in the district court and even though no remand order was entered, and then entered a final judgment of conviction. *Id.* at 231. This Court held that "[t]here is no remedy this court or the district court can provide under these circumstances." *Id.*

Under this unanimous precedent, the plain text of Section 1447(c) and the Full Faith and Credit Statute, and bedrock principles of federalism, the state court's final judgment is controlling. A holding by this Court that the removal was justified would have no practical effect because the federal courts are bound by the state court final judgment. There no longer is a live controversy with respect to the issues raised in Legislative Defendants' appeal.

III. The State Court's Holding That There is No Conflict with Federal Law is Law of the Case

In addition to the fact that this Court is bound by the state court's final judgment, the state court's specific holdings that there is no conflict between Plaintiffs' state law claims (and the Remedial Plans) and federal law are now law of the case. "The law-of-the-case doctrine provides that in the interest of finality, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009)). "Once a court has established the law of the case,

it must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal." *Everett v. Pitt Cty. Bd. of Educ.*, 788 F.3d 132, 142 (4th Cir. 2015) (quoting *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999).

Here, the state court held in its September 3, 2019 judgment that "[t]he *Covington* remedial order does not preclude North Carolina courts from invalidating the 2017 Plans for violations of state law and ordering the creation of new plans." *Common Cause*, 2019 WL 4569584, at *131. And the court held that "there is no conflict with federal civil rights laws." *Common Cause*, 2019 WL 4569584, at *131 (capitalization omitted). The court held that "Legislative Defendants introduced no evidence at trial to establish that any of the three *Gingles* factors . . . is present in any area of the State or any particular districts," and that "Legislative Defendants' failure to present any evidence to establish that the Gingles factors are met is fatal to any Section 2 defense under the VRA." *Id.* (internal quotation marks omitted). The court held that "Legislative Defendants also have not established any defense under the Fourteenth or Fifteenth Amendment," as those defenses suffered from multiple "fatal defect[s]." *Id.* In the state court's subsequent October 28, 2019 order approving the Remedial Plans, the court held that "the Remedial Maps comply with the Voting Rights Act and other federal requirements concerning the racial composition of districts." Ex. B at 12.

Legislative Defendants did not appeal the state court's final judgment and have not challenged its holding that the Remedial Plans comply with federal law.

Given the court's holdings, it is now law of the case that there is no conflict between Plaintiffs' state law claims—or the Remedial Plans—and federal law. This Court is bound by those holdings, and those holdings preclude any basis for removal jurisdiction under 28 U.S.C. § 1443(2). *See Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 285 (4th Cir. 1998) (state court holding constituted law of the case); *Jones v. Sears Roebuck & Co.*, 301 F. App'x 276, 285-86 (4th Cir. 2008) (same).

IV. Legislative Defendants Are No Longer "Refusing" to Enact New Redistricting Plans That Comply with State Law

Finally, this appeal is independently moot, and there is no longer any live controversy between the parties, because Legislative Defendants are no longer "refusing" to enact remedial state House and state Senate plans that comply with Plaintiffs' state law claims.

Legislative Defendants' entire removal was predicated on their assertion that they "refuse[] . . . to implement Plaintiffs' asserted theories of state law into new redistricting legislation." Leg. Def. Br. at 19. Legislative Defendants argued that the state court would have to afford them an opportunity to create new plans if it struck down the prior plans, and that "the General Assembly can *refuse* that opportunity." *Id.* at 26 (emphasis in original). In other words, Legislative

Defendants' removal and their appeal to this Court were based on the supposition that they would "refuse" to adopt remedial plans that comply with state law, because they believed that adopting such plans would conflict with federal law.

But Legislative Defendants did not "refuse that opportunity" to enact new plans. When the state court struck down the 2017 Plans and gave Legislative Defendants two weeks to enacted remedial plans if they wished, Legislative Defendants availed themselves of the opportunity. They enacted the Remedial Plans on September 17, 2019, without any suggestion that doing so violated federal law. Indeed, Legislative Defendants stated in their submission of the Remedial Plans to the state court that they had no evidence "on whether the Voting Rights Act's prerequisites could be satisfied" in North Carolina. *See* Ex. A at 25. Legislative Defendants thus enacted Remedial Plans that they asserted both complied with the state law ban on partisan gerrymandering and federal law.

Legislative Defendants' appeal is moot, and/or they have waived their grounds for removal, because there no longer is any "refusal" as necessary to remove under the Refusal Clause. The Refusal Clause applies to "'state officers who refused to enforce' state laws." *Baines v. City of Danville, Va.*, 357 F.2d 756, 759 (4th Cir. 1966)); *see also City of Greenwood, Miss v. Peacock*, 384 U.S. 808, 824 n.22 (1966). Given Legislative Defendants' enactment of the Remedial Plans

that they contend comply with state law, there indisputably is no state law or state constitutional provision that Legislative Defendants refuse to enforce anymore.

Relatedly, Legislative Defendants have waived their argument that enacting Remedial Plans that comply with state law would violate the VRA or the federal constitution. The state court allowed Legislative Defendants to "submit briefing" on whether the VRA imposed requirements for the composition of remedial districts, *see* 2019 WL 4569584, at *136-37, but Legislative Defendants chose not to submit such a brief. Instead, they claimed upon enactment of the Remedial Plans that they had no "affirmative evidence" that the VRA applied. Ex. A at 25. Legislative Defendants have forfeited their claims that enacting new plans that comport with state law would violate federal civil rights law.

V. The Court Should Dismiss without Vacating the Opinion Below

This Court should dismiss Legislative Defendants' appeal as moot without vacating the opinion below. "[V]acatur of the lower court's judgment is warranted only where mootness has occurred through happenstance." *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003). Legislative Defendants' appeal clearly did not occur through "happenstance," *id.*, but rather because the state court entered final judgment and Legislative Defendants then chose to enact remedial plans. Moreover, the state court's judgment underlies Plaintiffs' cross-appeal of the denial of fees and costs, which remains live.

CONCLUSION

This Court should dismiss the appeal of Legislative Defendants-Appellants, and proceed to decide Plaintiffs-Appellees' cross-appeal seeking reversal of the district court's denial of fees and costs under 28 U.S.C. § 1447(c).

Dated: November 18, 2019

Respectfully submitted,

/s/ Elisabeth S. Theodore

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CERTIFICATE OF COMPLIANCE

The foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 27(d)(2) because it contains 4,176 words, excluding those parts of the motion exempted by Federal Rule of Appellate Procedure 32(f). The motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ *Elisabeth S. Theodore*
Elisabeth S. Theodore

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on November 18, 2019, I caused the foregoing to be filed via ECF, and service was accomplished on all counsel of record by that means.

/s/ *Elisabeth S. Theodore*
Elisabeth S. Theodore