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

COMMON CAUSE, et al.,	)	
	)	Civil Action No. 5:18-CV-00589
Plaintiffs,	)	
v.	)	
REPRESENTATIVE DAVID LEWIS, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION TO REMAND

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutional Provisions

INTRODUCTION

Legislative Defendants' notice of removal is an egregious and transparent attempt to delay and derail state court proceedings in this case of extraordinary public importance. There is no plausible, good-faith basis for federal subject matter jurisdiction here, and the attempted removal is procedurally defective on its face. This case should be remanded immediately.

Plaintiffs filed this action in North Carolina state court last month asserting exclusively state-law claims under the North Carolina Constitution. Plaintiffs seek to invalidate the state House and state Senate plans enacted by the North Carolina General Assembly in 2017 (the "2017 Plans") on the ground that they violate state constitutional prohibitions against partisan gerrymandering. Plaintiffs promptly asked the state court to expedite the case and hold a trial starting April 15, 2019, to ensure that, if the 2017 Plans are found unconstitutional, there is sufficient time to establish new districts for the 2020 primary and general elections.

When the state court indicated that it might hold a hearing on Plaintiffs' motion to expedite, Legislative Defendants responded by removing the case to this Court. The removal is objectively baseless. Legislative Defendants cannot remove under 28 U.S.C. § 1443(2)'s "refusal clause"—which protects state officials who are forced to choose between enforcing state law and "inconsistent" federal equal-rights laws—for multiple independent reasons. First, the "refusal clause" applies only to state officials' "refusal" to take actions. It does not permit removal by state officials defending enacted legislation against a state constitutional challenge. Second, the "refusal clause" does not permit removal based on speculation that state courts will interpret state law to conflict with federal law. Here, there are a near-infinite number of possible districting plans that simultaneously comply with state law banning partisan gerrymandering and with federal law protecting racial minorities. Third, Legislative Defendants cannot even raise a

Voting Rights Act (VRA) defense in this case, because they expressly said in creating the 2017 Plans that they did *not* believe the VRA's prerequisites were met and thus were *not* attempting to comply with the VRA. Fourth, the federal district court in *Covington v. North Carolin*a, No. 15-cv-399 (M.D.NC.), did not "require" the use of the 2017 Plans in future elections so as to insulate the plans from state law challenges. The *Covington* district court's jurisdiction was limited to addressing whether the 2017 Plans remedied prior violations of federal law.

Legislative Defendants' invocation of 28 U.S.C. § 1441(a) fares no better. Legislative Defendants acknowledge that they lack the consent of all defendants, as § 1446(b)(2)(A) requires. And § 1441(a) does not apply regardless because Plaintiffs assert exclusively state-law claims and Legislative Defendants' purported federal defenses do not create federal question jurisdiction supporting removal under § 1441(a).

Legislative Defendants' removal repeatedly rests on arguments that flatly contradict representations they have made to other federal courts. Legislative Defendants now say that federal courts may hear state constitutional challenges to the 2017 Plans, but they told the U.S. Supreme Court just months ago that any "state-law challenge" to the 2017 Plans "must be filed in state court," and that to allow otherwise would be "a revolution in federalism." Jurisdictional Statement at 30, *North Carolina v. Covington*, No. 17-1364 (U.S.) (filed Mar. 26, 2018) (attached as Ex. G). Legislative Defendants now say they crafted the 2017 Plans to "comply[] with the Voting Rights Act," Notice ¶ 25, but they told the *Covington* district court that they were ignoring the VRA and racial considerations entirely in drawing the 2017 Plans because they lacked "evidence" that the VRA's prerequisites were met, *Covington*, No. 15-cv-399, ECF No. 184-21 at 52 (attached as Ex. E). Given these conflicting representations, Legislative Defendants are judicially estopped from seeking removal. Legislative Defendants fail to offer any

explanation for, or even alert the Court to, their shifting positions.

Legislative Defendants' motive for pursuing this frivolous removal is obvious: to delay and derail expedited proceedings in the state court. In similar circumstances, federal courts have refused to countenance such tactics. When a Pennsylvania legislative leader removed a state-court challenge to that state's congressional map last year, the district court convened an emergency hearing within hours after plaintiffs moved to remand, remanded the case to state court the same day, and subsequently ordered the removing defendant to pay plaintiffs' attorneys' fees and costs. *League of Women Voters of Pa. v. Pennsylvania*, 2018 WL 1787211 (E.D. Pa. Apr. 13, 2018). Plaintiffs respectfully submit that Legislative Defendants' removal here merits a similar response. For the reasons set forth below, this Court should expedite resolution of this motion, promptly remand this case to state court, and award attorneys' fees and costs to Plaintiffs.

BACKGROUND

Plaintiffs are Common Cause, the North Carolina Democratic Party, and 38 North Carolina voters from state House and state Senate districts across North Carolina. They filed this action in the North Carolina Superior Court on November 13, 2018, and filed an Amended Complaint on December 7, 2018. Plaintiffs assert that the state statutes establishing North Carolina's 2017 state House and state Senate districting plans violate the North Carolina Constitution—in particular, its Equal Protection Clause, Art. I, § 19, Free Elections Clause, Art. I, § 10, and Free Speech and Assembly Clauses, Art. I, §§ 12 & 14. *See* Dkt. 1-1 at 67-75. Plaintiffs do not assert any federal constitutional claims or other federal claims.

In line with prior redistricting challenges in North Carolina state courts, Plaintiffs have named as defendants the Speaker of the House Timothy K. Moore, President Pro Tempore of the

Senate Philip E. Berger, Senior Chairman of the House Select Committee on Redistricting David R. Lewis, and Chairman of the Senate Standing Committee on Redistricting Ralph E. Hise, Jr (collectively, the "Legislative Defendants"). Plaintiffs also named 11 other Defendants: the State of North Carolina, the State Board of Elections and Ethics Enforcement, and the State Board's members. Plaintiffs seek an injunction prohibiting use of the 2017 Plans and the installation of new plans that comport with the North Carolina Constitution.

On November 20, 2018, Plaintiffs moved to expedite the case. Ex. A. The motion explained that deadlines relating to the 2020 elections are quickly approaching—the General Assembly recently set North Carolina's primary for the 2020 elections for March 3, 2020, one of the earliest primary dates in the country. And the filing period for primary nominations will open in less than a year, on December 2, 2019. *Id.* at 3. Plaintiffs thus asked the state court to expedite discovery and pre-trial proceedings and to set trial for April 15, 2019. *Id.* at 4. As Plaintiffs explained, this schedule will "enable a final decision by [the state trial court], appellate review, and a remedial process in advance of the 2020 elections." *Id.*

Shortly thereafter, on November 27, 2018, the Chief Justice of North Carolina assigned a three-judge panel to hear the case. Dkt. 1-1 at 86. On December 12, 2018, the Wake County trial court administrator emailed counsel for the Legislative Defendants noting that they had failed to respond to the motion to expedite and asking them to advise whether they consented to expedition. Ex. B. The state court also asked whether Legislative Defendants would consent to a hearing on the motion to expedite by telephone (rather than in-person). *Id.*

On December 14, rather than respond to Plaintiffs' Amended Complaint and motion to expedite, Legislative Defendants removed the case. Private counsel for Legislative Defendants purported to file this notice of removal on behalf of the State of North Carolina as well, even

though the North Carolina Attorney General's Office accepted service on behalf of the State more than 30 days prior to the removal, Ex. C, and even though the North Carolina Attorney General and the state Elections Board have not to Plaintiffs' knowledge consented to, much less authorized, removal on behalf of the State.

ARGUMENT

"Because removal jurisdiction raises significant federalism concerns," courts "must strictly construe removal jurisdiction." *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 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).

Here, removal jurisdiction is more than doubtful—it is clearly absent. For all the reasons described below, there is no conceivable basis for removing this case under either the "refusal clause" of 28 U.S.C. § 1443(2) or § 1441(a). The federalism concerns with removal, moreover, 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 (1993), federal courts must defer to the "legislative *or* judicial branch" of a state on redistricting matters. *Id.* at 33. "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).

Given the lack of any legitimate basis for removal of this exclusively state-law case, and the serious federalism concerns raised by federal intervention in a state-law redistricting dispute, this Court should promptly remand this case to state court.

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

Under § 1443(2)'s "refusal clause," "state officers can remove to federal court if sued for 'refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights].'" *Stephenson*, 180 F. Supp. 2d at 785 (quoting § 1443(2); brackets in original). Legislative Defendants' attempt to remove under this provision suffers from numerous fatal defects. First, the removal clause does not apply at all because Plaintiffs challenge the enactment of a law, not any "refusal" to act by the removing defendants. Second, the notion that relief in this case would be "inconsistent" with federal equal-rights law is speculative and unrealistic, as this Court and others have held in rejecting the removal of similar state-court redistricting lawsuits under the refusal clause. Third, Legislative Defendants' federal equal-rights law arguments are foreclosed by their own prior positions and common sense. Each of these obstacles dooms removal under the refusal clause.[1]

A. The "Refusal Clause" Does Not Apply Because Plaintiffs Challenge the Enactment of a Law, Not Any "Refusal" to Act by the Removing Defendants

Section 1443(2)'s refusal clause authorizes removal of "civil actions … for refusing to do any act on the ground that it would be inconsistent with [a law providing for equal rights]." 28 U.S.C. §1443(2). The plain text makes clear that this provision authorizes removal only where the underlying civil action challenges a defendant's *refusal* to act, not a defendant's affirmative passage of a law. "By its express language, the remand suit must challenge a *failure* to act or

[1] Legislative Defendants do not assert that the first clause of § 1443(2), the "color of authority" clause, authorizes removal here. Nor could they. That clause applies only to federal officers. *City of Greenwood v. Peacock*, 384 U.S. 808, 815 (1966).

enforce state law (by the defendant)." *City & Cty. of San Francisco v. Civil Serv. Comm'n of San Francisco*, 2002 WL 1677711, at *4 (N.D. Cal. July 24, 2002) (emphasis added). Fourth Circuit precedent confirms the point. Removal under the refusal clause is available to "state officers who *refused* to enforce discriminatory state laws in conflict with [equal rights law] and who were prosecuted in the state courts because of their refusal to enforce state law." *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir. 1966) (emphasis added); *accord City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). The refusal clause thus "protect[s] state officers from being penalized for failing to enforce discriminatory state laws or policies by providing a federal forum in which to litigate these issues." *Detroit Police Lieutenants and Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979); *see Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989) ("The purpose of the 'refusal clause' is to provide a federal forum for suits against state officers who uphold equal protection in the face of strong public disapproval.").

Numerous courts thus have held that, where "the subject of the state-court suit" is "the removing party's *action*, rather than its *inaction*," "the 'refusal to act' clause is unavailable." *Civil Serv. Comm'n*, 2002 WL 1677711, at *4. In *Civil Service Commission*, the district court held that § 1443(2)'s refusal clause did not permit removal because the underlying suit "did not challenge any refusal by the Civil Service Commission to enforce the law," but rather "challenged an affirmative order by the commission." *Id.* And in *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995), the Eighth Circuit held that the "refusal clause" did not permit removal of a state-law defamation claim that the removing defendants claimed conflicted with Title VII, because the removing defendants did "not point out any act that they refused to do." *Id.* at 523.

Similarly, in *Detroit Police Lieutenants*, the Sixth Circuit held that the refusal clause did not apply because "no one has attempted … to punish [the defendants] for refusing to do any act

inconsistent with any law providing equal rights," and in fact "it is the plaintiff here who claims that the rights of its members are being violated by the actions of the defendants." 597 F.2d at 568. And in *Massachusetts Council of Construction Employers, Inc. v. White*, 495 F. Supp. 220 (D. Mass. 1980), the court held that § 1443(2)'s refusal clause did not permit removal of a state-court suit challenging a state statute and the mayor's issuance of executive orders, because "the defendants' actions, rather than their inaction, are being challenged." *Id.* at 222; *see also, e.g.*, *McQueary v. Jefferson Cty., Ky.*, 819 F.2d 1142, at *1-3 (6th Cir. 1987) (unpublished) (state officials who were sued for firing employees could not invoke § 1443(2) because they were not being sued for "refusing to do any act inconsistent" with federal law); *New York v. Horelick*, 424 F.2d 697, 703 (2d Cir. 1970) (remanding because "Petitioners are not being prosecuted for refusing to enforce any law of the State or ordinance of the City of New York"); *Wolpoff v. Cuomo*, 792 F. Supp. 964, 968 (S.D.N.Y. 1992) (the refusal clause does not allow "legislators who are sued because of the way they cast their votes[] to remove their cases to federal courts").

Here, Plaintiffs' lawsuit does not challenge any refusal by Legislative Defendants (or any other defendant) to act. Instead, this suit challenges the affirmative enactment of discriminatory state statutes in violation of the state constitution. Plaintiffs are not accusing Defendants of "refus[ing] to enforce discriminatory state laws," *Baines*, 357 F.2d at 772, but rather of enacting such laws.

Moreover, the *removing defendants* have no authority to "refuse" to enforce state laws at all—they are legislators. "The North Carolina Constitution clearly assigns the enforcement of laws to the executive branch," and "[t]he General Assembly retains no ability to enforce any of the laws it passes." *Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015) (holding that only state election officials enforce state election laws in North Carolina). Legislative

Defendants thus cannot remove under § 1443(2) under the theory that they are being sued for refusing to enforce state law. As in *Detroit Police Lieutenants*, "no one has attempted … to punish [the removing defendants] for refusing to do any act inconsistent with any law providing equal rights," and in fact "it is the plaintiff[s] here who claim[] that [their own rights and] the rights of [their] members are being violated by the actions of the defendants." 597 F.2d at 568. Under these circumstances, the plain text of the "refusal clause" bars removal.

Legislative Defendants simply ignore the refusal clause's "refusal" requirement, asserting that the only requirement is the existence of a "conflict" with federal law. Notice ¶¶ 6-7. This is wrong. The "conflict" test only applies in the first place if a removing defendant has first satisfied § 1443(2)'s predicate refusal to act requirement, which Legislative Defendants have not and cannot. *E.g.*, *Civil Serv. Comm'n*, 2002 WL 1677711, at *4 ("Even if there had somehow been a 'refusal to act,' defendants would still have to show a 'colorable conflict …'"); *Greenberg*, 889 F.2d at 421 (identifying refusal to act—denial of incorporation petition—and then analyzing whether refusal was pursuant to federal law); *News-Texan, Inc. v. City of Garland, Tex.*, 814 F.2d 216, 217-19 (5th Cir. 1987) (identifying refusal to act—refusal to disclose names of candidates for city manager—and then analyzing whether refusal was pursuant to federal law).[2] In any event, as explained below, the "conflict" requirement is not met here.

[2] In *Brock v. Cavanagh*, 577 F. Supp. 176 (E.D.N.C. 1983), the court permitted removal of a lawsuit against the state on the ground that its redistricting plan violated the state constitution's whole county provision, after the U.S. Attorney General had refused to preclear the whole county provision because it violated federal law. But that case did not involve removal by *state legislators* who were being sued for enacting a law; it involved removal by state election officials who would have to enforce a state constitutional amendment that the U.S. Attorney General had already found violated federal law. *Wolpoff*, 792 F. Supp. 968 n.7 (discussing *Brock*). And the *Brock* court did not address the Fourth Circuit's holding in *Baines*, 357 F.2d at 772, that § 1443(2)'s refusal clause applies only to refusals to act.

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' enactment of their chosen districts constituted "refusing to do [an] act" under § 1443(2), that provision still would not support removal. Legislative Defendants cannot establish, as § 1443(2) requires, that they chose to enact the 2017 Plans—rather than alternative maps that comply with the state constitution—"on the ground" that any alternative map "would be inconsistent" with federal equal rights laws. Legislative Defendants say that there is a "colorable conflict" between their federal and state-law duties. Notice ¶ 7. But there are trillions of possible maps that Legislative Defendants could have enacted when they redistricted in 2017. The notion that Legislative Defendants could not have enacted a map that simultaneously complied with federal and state law is ludicrous on its face. Other legislative bodies in other states have had no difficulty doing so. Courts routinely hold that simply invoking federal law and making speculative, unsupported assertions that federal law required some action does not permit removal under § 1443(2). Here, moreover, Legislative Defendants are foreclosed from arguing that they created the 2017 Plans to comply with the VRA because they publicly disclaimed any reliance on the VRA at the time they created the 2017 Plans.

1. It Is Plainly Possible to Draw Maps in North Carolina That Simultaneously Comply with State and Federal Law

Legislative Defendants assert that Plaintiffs' state constitutional claims seek to compel them to violate the federal Voting Rights Act, the Fourteenth Amendment Equal Protection Clause, and the Fifteenth Amendment. Dkt. 1 at ¶ 6-10. But to defend the enactment of the 2017 Plans on the ground of a "conflict" between state-law and federal-law duties—*i.e.*, that to comply with federal law, Legislative Defendants *had* to violate state law in creating the 2017 Plans—Legislative Defendants would have to show that there is *no* plan that would simultaneously satisfy state constitutional requirements and federal law. And without such a

showing, Legislative Defendants cannot establish that the state court's interpretation and application of state law in this case would require Legislative Defendants to adopt a remedial plan that violates federal law. Legislative Defendants do not even attempt to make a "colorable" showing of such a conflict, and accordingly they may not remove under § 1443(2). This Court and others have repeatedly rejected removals of similar state court redistricting lawsuits under § 1443(2) on the ground that it is speculative at best that state law would compel a conflict with federal law.

In *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), a case strikingly similar to this one, plaintiffs challenged North Carolina's state House and Senate districts under the North Carolina Constitution, including on grounds of "partisan gerrymandering." *Id.* at 781. Just like here, the defendants removed under § 1443(2), arguing that the suit sought to compel them to act in violation of the VRA and federal equal-protection guarantees. *Id.* at 785. This Court, after observing that "it is not entirely clear what the defendants refuse to do" to trigger § 1443(2) in the first place, *id.*, concluded that in any event 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.* Indeed, 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.* (internal quotation marks and alterations omitted). Given this fact, the "plaintiffs' exclusive reliance on state law," and "the court's obligation to strictly construe removal statutes against removal," this Court concluded that the "removal … [was] inappropriate." *Id.*

The Seventh Circuit similarly rejected a removal of a redistricting lawsuit under § 1443(2)'s refusal clause. In *Sexson v. Servaas*, 33 F.3d 799, 804 (7th Cir. 1994), as here, the removing defendants argued that "federal law was implicated because their redistricting plan was in accordance with the Voting Rights Act," and "any attack on their plan therefore violated the Voting Rights Act." *Id.* at 804. Criticizing this theory as "tenuous," the court of appeals explained that "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 Voting Rights Act established broad boundaries which no state apportionment law could contravene," 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.* "It simply does not follow, therefore, that because the defendants' apportionment plan complied with the Voting Rights Act, the plaintiffs' attack on that plan necessarily threatened federal law." *Id.*

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 and remanded the case for the same reason. 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 Voting Rights Act." *Id.* at *1 (citing *Sexson*, 33 F.3d at 803-04; *Stephenson*, 180 F. Supp. 2d at 784-85). 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 what remedy would apply if a state-law violation were found, "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; *see also Taylor v. Currie*, 386 F. Supp. 2d 929, 937 (E.D. Mich. 2005) ("The court will not allow Defendants to take haven in federal court [pursuant to § 1443(2)] under the guise of providing equal protection for the citizens of Detroit but with a goal of perpetuating their violation of a non-discriminatory state law.").

The reasoning of these myriad decisions is directly applicable here. Plaintiffs are not seeking to impact minority populations in a way that would violate federal law, and Legislative Defendants have no basis to assume or assert that among the trillions of potential remedial plans, there are none that could simultaneously satisfy state and federal law. Even if this Court were to credit Legislative Defendants' assertions that they drew the 2017 Plans to comply with both the VRA and federal equal protection guarantees (and they did not, *see infra*), "[i]t simply does not follow … that because the defendants' apportionment plan complied with" these federal requirements, "[P]laintiffs' attack on that plan necessarily threaten[s] federal law." *Sexson*, 33 F.3d at 804. To the contrary, just like in *Stephenson*, "[P]laintiffs are 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." 180 F. Supp. 2d at 785. Legislative Defendants offer no non-speculative basis to conclude otherwise.

As Judge Howard rightly observed in *Stephenson*, if Legislative Defendants' theory of § 1443(2) were accepted, it would mean that "any state constitutional attack on [a] state's redistricting plans would necessarily raise a federal issue" and be subject to removal, because state officials will always be able to speculate that altering the current plans could raise VRA or equal protection concerns. *Id.* at 784. "To allow removal" on such a theory "would give defendants the power to select the forum in which [every redistricting] claim is litigated. Under such circumstances, the court must … remand the case back to state court." *Id.* at 786.

2. The Voting Rights Act Did Not Require Legislative Defendants to Enact Districting Plans that Violate the State Constitution

While Legislative Defendants' assertion (Notice ¶ 25)that they drew the 2017 Plans to "comply[] with the Voting Rights Act" would not support § 1443(2) removal even if true, in fact that assertion is false. In drawing the 2017 Plans, Legislative Defendants expressly told the three-judge federal district court overseeing the remedial process that they did *not* draw the 2017 Plans to comply with the VRA, because they had assessed that the VRA did not apply. They explained: "Data regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans" because "[n]o information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts." Notice of Filing, *Covington*, No. 15-cv-399, ECF No. 184 at 10 (attached as Ex. D). Legislative Defendants explained that they did not consider race specifically because they did "not believe [they could] develop a strong enough basis in evidence that the third [*Thornburg v. Gingles*, 478 U.S. 30 (1986)] factor is present to justify drawing districts on the basis of race." Ex. E at 52. Satisfaction of the third *Gingles* factor is a "prerequisite[]" to application of the VRA. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

After telling one federal court that they did not even use data regarding race and *did not* draw any districts to comply with the VRA, Legislative Defendants cannot now argue to this Court that they *did* draw districts to comply with the VRA. Judicial estoppel, not to mention the integrity of the judicial system, precludes this argument. Judicial estoppel applies where: (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (internal quotation marks omitted). Here, Legislative

Defendants' position that they did not apply state law because they sought "to comply with the Voting Rights Act," Notice ¶ 25, is clearly inconsistent with their statements in *Covington*. The *Covington* court relied on their statements by allowing implementation of the 2017 Plans, *see Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018), and it would be unfair and an abuse of the "judicial machinery" for Legislative Defendants to obtain removal on the theory that they enacted the 2017 Plans to comply with the VRA. *See New Hampshire*, 532 U.S. at 750-51.

Indeed, whatever their intent at the time of the 2017 redistricting, Legislative Defendants are estopped from putting on any defense in this case that the VRA does apply to North Carolina's state legislative districts or requires any particular map. To present a VRA defense, Legislative Defendants would need to establish that the *Gingles* factors are met, *Cooper*, 137 S. Ct. at 1472, but Legislative Defendants told the *Covington* court that they concluded the third *Gingles* factor was not met anywhere in the state, Ex. D at 10. Thus, while Legislative Defendants now claim that they will "present[] evidence demonstrating that House District 32 is a minority 'crossover' district," Notice ¶ 21, Legislative Defendants are estopped from asserting that the VRA applies to House District 32, or any other district. *See Cooper*, 137 S. Ct. at 1472.[3]

3. The Fourteenth and Fifteenth Amendments Did Not Require Legislative Defendants to Enact Districting Plans that Violate the State Constitution

Legislative Defendants fare no better in arguing that complying with state constitutional provisions prohibiting discrimination would compel violating the Fourteenth and Fifteenth Amendments. Notice ¶¶ 23-24, 35. Their suggestion is as absurd as it is offensive.

[3] Plaintiffs take no position as to whether Legislative Defendants' assessment of the third *Gingles* factor was correct. The salient point is that Legislative Defendants cannot rely on the VRA to defend their redistricting decisions.

To establish a Fourteenth or Fifteenth Amendment violation, there must be *intentional* discrimination. A districting plan violates those provisions only if the mapmakers engaged in (1) racial gerrymandering by "*intentionally* assigning citizens to a district on the basis of race without sufficient justification," or (2) "*intentional* vote dilution" by "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (alterations and internal quotation marks omitted) (emphases added); *see also Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 602-03 (4th Cir. 2016).

It was plainly possible for Legislative Defendants to simultaneously draw maps in 2017 that (1) did not intentionally disadvantage Democratic voters in violation of state law and (2) did not intentionally place voters into districts on the basis of race or intentionally dilute the voting strength of minorities. Legislative Defendants' claim that they were *required* to seek partisan advantage in 2017 in violation of state law to avoid intentionally discriminating against minorities—and that *any* alternative map "would be inconsistent" with federal equal protection requirements, 28 U.S.C. § 1443(2)—is frivolous on its face.

Nor will any remedy in this case violate the Fourteenth or Fifteenth Amendment. There are only two entities that could develop or adopt remedial districting plans: the North Carolina General Assembly or the courts. "[N]o one" would seriously suggest that the North Carolina state courts would "act[] with invidious intent" in drawing remedial plans. *Abbott*, 138 S. Ct. at 2328 (denying equal protection challenge to plan initially drawn by court). Nor would anyone suggest that the North Carolina courts would interpret the North Carolina Constitution to deliberately compel the General Assembly to dilute minority voting strength in drawing districts. And nothing in the relief that Plaintiffs seek would result in voters being "intentionally assign[ed] … to a district on the basis of race" to dilute their voting strength. *Id.* at 2314.

Legislative Defendants' invocation of the Fourteenth and Fifteenth Amendments is especially perverse because it is Plaintiffs, not Legislative Defendants, who seek relief from intentional discrimination in this case. As in *Detroit Police Lieutenants*, § 1443(2) removal is impermissible where it is plaintiffs whose "rights … are being violated by the actions of the defendants," not the other way around. 597 F.2d at 568. Indeed, far from complying with federal law, courts have repeatedly concluded that the General Assembly's recent election-related statutes have violated federal anti-discrimination laws by discriminating against racial minorities. *See, e.g.*, *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016); *Cooper*, 137 S. Ct. 1455; *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

4. The *Covington* Remedial Order Provides No Basis for Removal

Legislative Defendants' argument that the *Covington* remedial order provides a basis for removal under § 1443(2) is equally frivolous and contrary to their prior representations in federal court. Legislative Defendants assert that the *Covington* district court "ordered" the "entire" 2017 Plans to be used in future North Carolina elections, and that altering those districts would contravene the court's mandate. Notice ¶¶ 32-34. That is not true. The *Covington* court did not purport to hold that the remedial plans it approved must be used even if they violate state law. To the contrary, at the explicit urging of Legislative Defendants, the U.S. Supreme Court held that the district court had remedial authority *only* to cure violations of federal law, not state law. *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018). Legislative Defendants even argued that any state constitutional challenges to the 2017 Plans would have to be brought in separate state-court proceedings.

During the *Covington* remedial phase, the plaintiffs argued that the 2017 Plans violated the North Carolina Constitution's prohibition on mid-decade redistricting. Legislative

Defendants responded that the district court lacked jurisdiction to hear a state constitutional challenge to the 2017 Plans, and the U.S. Supreme Court agreed. The Supreme Court held that "[t]he District Court's remedial authority was … limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts." *Covington*, 138 S. Ct. at 2554. "Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, *its proper role in North Carolina's legislative districting process was at an end*." *Id.* at 2555 (emphasis added). Thus, the *Covington* district court had no authority to order anything other than a cure for the federal racial gerrymandering violations.

In securing this holding, Legislative Defendants argued to the U.S. Supreme Court that "any state-law challenge" to the 2017 Plans "must be filed in state court, where state judges familiar with the state constitution can address the unsettled question[s]" of state law. Ex. G at 30. Legislative Defendants even pointed to a then-pending separate state-court case challenging the 2017 Plans as an improper mid-decade redistricting, asserting that the "state-court lawsuit underscores" that "the federal court should not have adjudicated state-law claims." *Id.*[4] Again, having persuaded the Supreme Court that state-law challenges to the federal court's order implementing the 2017 Plans can and should be heard in state court, Legislative Defendants are estopped from arguing that state-law challenges in state court create a "conflict" with the federal court's order implementing the 2017 Plans. *New Hampshire*, 532 U.S. at 750-51; *see also infra*

[4] In that separate state-court challenge, the state court has since ruled for the plaintiffs and ordered changes to certain districts in the 2017 Plans for purposes of the 2020 elections. *See N.C. State. Conf. of NAACP Branches v. Lewis*, 18 CVS 2322 (N.C. Super. 2018). Legislative Defendants never argued that the *Covington* court's mandate prohibited the state trial court's decision, and did not even appeal the trial court's ruling. In other words, far from "refusing" to alter the 2017 Plans on the theory that alterations would violate federal law, Legislative Defendants are currently *planning on* altering the 2017 Plans to comply with a different provision of state law.

§ III (explaining that Legislative Defendants' prior arguments estop them from seeking a federal forum for this case at all, not just under § 1443(2)).

Estoppel aside, the federal court order approving the 2017 Plans as consistent with the federal constitution does not prohibit state courts from considering whether those plans violate the state constitution. Federal courts are forbidden from interfering with "state judicial supervision of redistricting." *Growe*, 507 U.S. at 34. And the *Covington* district court did not "f[i]nd" that the 2017 Plans were "necessitated by the Equal Protection Clause of the federal Constitution," as Legislative Defendants falsely assert. Notice ¶ 29. There are "infinite variations" of districting plans in North Carolina that would cure the unlawful racial gerrymanders, *Sexson*, 33 F.3d at 804, and the *Covington* court merely found that the 2017 Plans were among those infinite variations. Plaintiffs' state-law challenges in this case would conflict with the *Covington* remedial order only if the state court *ordered* Legislative Defendants to engage in *intentional* racial gerrymandering, which will not happen.

As for Legislative Defendants' assertion that they had to engage in partisan gerrymandering to avoid engaging in racial gerrymandering, Notice ¶ 38, it is entirely possible for state legislatures to redistrict without engaging in partisan *or* racial gerrymandering. The notion that state legislatures face a choice of having to do one or the other is absurd.

II. There Is No Plausible Basis for Removal Under 28 U.S.C. § 1441

Controlling precedent bars Legislative Defendants' alternative argument for removal under 28 U.S.C. § 1441(a), because Legislative Defendants lack the consent of the other defendants and because Plaintiffs' claims arise under state law, not federal law.

A. Legislative Defendants Did Not Obtain the Consent of Other Defendants

Under 28 U.S.C. § 1446(b)(2)(A), where removal occurs "solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal

of the action." As the Fourth Circuit has held, "all defendants must consent to removal" under § 1441(a). *Mayo v. Bd. of Educ. of Prince George's Cty.*, 713 F.3d 735, 741 (4th Cir. 2013). Legislative Defendants concede that they lack consent from all defendants here. Notice ¶ 47. There are fifteen defendants, including the State Board of Elections and its members, who are responsible for administering elections. Dkt. 1-1 at 103-04. Legislative Defendants have not obtained consent to removal from the State Board or any of its members.[5]

Legislative Defendants appear to argue that consent is unnecessary because they have not removed "solely" under § 1441(a). Notice ¶ 47 (quoting 28 U.S.C. § 1446(b)(2)(A)). But if this Court concludes that § 1443(2) does not authorize removal, any removal would be "solely" under § 1441(a) and therefore subject to § 1446's unanimity requirement. *Moore v. Svehlak*, 2013 WL 3683838, at *6 (D. Md. July 11, 2013) (holding that "§ 1443 does not authorize the removal of this action to federal court," and "[t]herefore, pursuant to 28 U.S.C. § 1446(b)(2)(A), removal is based 'solely under [28 U.S.C. §] 1441(a),' and the rule of unanimity applies"); *accord Nappier v. Snyder*, 728 F. App'x 571, 574-75 & n.2 (6th Cir. 2018) (holding that § 1442 did not authorize removal and then applying unanimity requirement to the removing defendant's alternative argument under § 1441(a)). Indeed, the unanimity requirement for § 1441(a) removals would be a dead letter if defendants could evade it simply by citing *inapplicable* alternative removal provisions. Legislative Defendants cite no authority from any court ever declining to apply the unanimity requirement to a § 1441(a) removal.

[5] Although private counsel for Legislative Defendants purport to seek removal on behalf of the State of North Carolina in addition to the four state legislators, Plaintiffs dispute that counsel has authority to do so. *See infra*. Regardless, removal under § 1441(a) requires unanimous consent, which is undisputedly lacking here.

B. This Court Lacks Subject Matter Jurisdiction

Section 1441(a) would not support removal even if Legislative Defendants had obtained unanimous consent. "[T]he removal statute allows defendants to remove a case to federal court only if 'the district courts of the United States have original jurisdiction' over it." *Lontz v. Tharp*, 413 F.3d 435, 439 (4th Cir. 2005) (quoting § 1441(a)). Legislative Defendants assert that there is federal question jurisdiction in this case, Notice ¶ 40, but Plaintiffs do not assert any claims "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331. Plaintiffs assert claims *exclusively* under the North Carolina Constitution. Dkt. 1-1 at 171-79. Under the well-pleaded complaint rule, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), there is no federal question jurisdiction.

Legislative Defendants contend that a state-court holding that state law requires the legislature to draw fair maps would "violate the federal constitutional rights of registered Republicans and voters for Republican candidates," and that "Plaintiffs seek an interpretation of the North Carolina Constitution that will necessarily result in an unconstitutional burden on the federal First and Fourteenth Amendment rights of North Carolina voters." Notice ¶ 40. These are quintessential *defenses*—Legislative Defendants say they intend to argue that state-law relief is barred by federal law. But "it is … settled law that a case may *not* be removed to federal court on the basis of a federal defense," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987), because "[a] defense that raises a federal question is inadequate to confer federal jurisdiction," *Merrell Dow*, 478 U.S. at 808. "Under the firmly settled well-pleaded complaint rule … merely having a federal defense to a state law claim is insufficient to support removal, since it would also be insufficient for federal question jurisdiction in the first place." *Lontz*, 413 F.3d at 439. Construing the relevant provisions of the North Carolina Constitution would not require a court to construe any federal law. That is fatal to removal under § 1441(a).

Legislative Defendants nonetheless contend that this Court has jurisdiction because Plaintiffs' claims "necessarily depend[] on resolution of a substantial question of federal law." Notice ¶ 40 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 28 (1983)). That is incorrect. Under *Franchise Tax Board* and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005), "federal jurisdiction over a state law claim will lie [only] if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Each of those requirements precludes jurisdiction here.

To begin with, the "substantial question" doctrine does not create an exception to the critical distinction between federal *claims* and federal *defenses*. A federal issue is not "necessarily raised" unless it is an "essential element" of the plaintiff's "claim." *Grable*, 545 U.S. at 315. The *Grable* exception is for state causes of action where the state rule of decision turns on federal law, not for state causes of action where there might be a federal defense. As the Fourth Circuit has explained, if "the *elements* of each of the claims depend only on the resolution of questions of state law," there is no jurisdiction under *Franchise Tax Board* or its progeny, and the case cannot be removed. *Pinney v. Nokia, Inc.*, 402 F.3d 430, 445 (4th Cir. 2005) (emphasis added). Legislative Defendants make no argument, nor could they, that the *elements* of Plaintiffs' claims under the state constitution depend on resolution of questions of federal law. *See Hall v. Levinson*, 2016 WL 6238518, at *3 (E.D.N.C. 2016) (Flanagan, J.).

In any event, the federal-law defense that Legislative Defendants say they will raise—that any remedy will "necessarily result" in a "burden" on other voters in violation of the federal constitution—is insubstantial and will not actually be disputed in this case. Notice ¶ 40.

Plaintiffs' complaint simply seeks fair maps that comply with the North Carolina Constitution. Dkt. 1-1 at 75. Defendants can easily draw fair maps that comply with the North Carolina Constitution and do not unconstitutionally "burden" the voters of either party. *See supra*.

Finally, a federal court resolution of this state constitutional challenge to a state redistricting statute is not "consistent with congressional judgment about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313. The Supreme Court requires "federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.

Legislative Defendants also argue that there is original jurisdiction supporting removal because "federal law in this area so pervasively regulates the redistricting process that it completely preempts" state law. Notice ¶ 42. No court anywhere has ever held anything of the sort, and in fact that is exactly the opposite of what the law actually is. "[T]he Constitution leaves with the States primary responsibility for apportionment of their … state legislative districts." *Growe*, 507 U.S. at 34.

III. Legislative Defendants Are Estopped from Arguing that Federal Courts Should Adjudicate State-Law Challenges to the 2017 Plans

While the removal is improper under §§ 1443(2) and 1441(a) for all of the reasons explained above, remand is independently required because Legislative Defendants are judicially estopped from asserting that federal court is an appropriate forum to hear state-law challenges to the 2017 Plans. Estoppel not only bars the specific arguments in the removal notice, as explained above, *see supra* § I.B, but also bars the Legislative Defendants from seeking removal at all. Estoppel exists "to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." *Lowery v. Stovall*, 92 F.3d 219, 223 (4th

Cir. 1996) (internal quotation marks omitted). If ever there were a case where these purposes would be served, it is this one.

During the *Covington* remedial phase, the plaintiffs argued that the 2017 Plans violated the state constitutional prohibition on mid-decade redistricting, as well as another state constitutional provision regarding splitting counties. In response, Legislative Defendants asserted repeatedly—first to the district court, then to the U.S. Supreme Court—that state-law challenges to the 2017 Plans could proceed only in state court. For instance, they said:

- "In short, any state-law challenge must be filed in state court, where state judges familiar with the state constitution can address the unsettled question[s]" of state law. Ex. G at 30.
- "[T]he district court lacked jurisdiction to consider plaintiffs' state law challenges." *Id.* at 7.
- "[F]ederal courts have no power to enjoin state districts on state-law claims, especially novel ones." *Id.* at 15.
- "The district court … lacked jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds." *Id.* at 29.
- "[T]he federal court should not have adjudicated state-law claims." *Id.* at 30.
- "[F]ederal courts do not even have the power to entertain *state-law* challenges to state districting laws." Emergency App. for Stay at 21, *Covington*, No. 17A790 (U.S.) (filed Jan. 24, 2018), *available* at goo.gl/EJ4pLK.
- A federal district court is "foreclosed from ruling on contested issues of state law," since "an unsettled issue of state law … is more appropriately directed to North Carolina courts, the final arbiters of state law." Legislative Defs.' Resp. to Pls.' Objections, *Covington*, No. 15-cv-399, ECF No. 192 at 51 (internal quotation marks omitted) (attached as Ex. F).
- Federal courts "must defer to the North Carolina courts on" the issue of whether the 2017 Plans violate the state constitution. *Id.*
- It would be "a revolution in federalism" to allow federal courts to adjudicate state-law challenges to a state legislative map. Br. Opposing Mot. to Affirm at 11, *Covington*, No. 17-1364 (U.S.) (filed May 15, 2018) (attached as Ex. H).

Legislative Defendants prevailed on these arguments. The *Covington* district court declined to rule on the plaintiffs' challenges under the state constitution's Whole County

Provision because the objections presented unsettled questions of state law as applied to the 2017 Plans. *Covington*, 283 F. Supp. 3d at 446. And while the district court did address the state constitutional provision on mid-decade redistricting because it considered the issue well-settled, the U.S. Supreme Court reversed and held that the district court exceeded its remedial authority in addressing any state-law objections to the 2017 Plans. 138 S. Ct. at 2554.

Legislative Defendants made all of the above assertions within the last year, and about the very redistricting plans at issue in this case. Their demand now for a federal forum to adjudicate state-law challenges to the 2017 Plans is the epitome of "blowing hot and cold as the occasion demands" and "wanting to have [their] cake and eat it too." *Lowery*, 92 F.3d at 223 (internal quotation marks omitted). It is an abuse of the judicial process and should not be countenanced by this Court.

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

Beyond Legislative Defendants' inability to establish grounds for removal under § 1443(2) or § 1441(a) and the fact that they are estopped from seeking removal, 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 2017 Plans, 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).

This Court need not take Plaintiffs' word for it. As just mentioned, Legislative Defendants themselves told the U.S. Supreme Court in *Covington* that the federal courts "lacked jurisdiction to enjoin the State from using the 2017 Plan[s] on state-law grounds." Ex. G at 29. They also told the Supreme Court that, under *Pennhurst*, "[t]he Eleventh Amendment forbids federal courts from enjoining [the 2017 Plans] on state-law grounds." *Id.* at 28.

To be sure, a properly filed removal notice on behalf of the State would waive sovereign immunity, *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002), and private counsel for Legislative Defendants has purported to file this notice of removal on behalf of the State. Dkt. 1 at 3. But private counsel for Legislative Defendants does not represent the State, cannot remove on behalf of the State, and cannot waive the State's sovereign immunity. State law authorizes the Attorney General to represent the State and state agencies in "any court … or tribunal in any cause or matter, civil or criminal." N.C. Gen. Stat. § 114-2(1), (2). Under *Lapides*, that means that the Attorney General has the power to waive sovereign immunity. *See* 535 U.S. at 621-22 (explaining that the state official with the power to represent the State in court is the official with the power to validly waive sovereign immunity). To Plaintiffs' knowledge, the Attorney General has never consented to removal on behalf of the State, and Legislative Defendants do not suggest otherwise in their notice of removal, even though they bear the burden of establishing removal jurisdiction. *Mulcahey*, 29 F.3d at 151. Legislative Defendants assert that both they *and* the executive branch are "considered 'the State of North Carolina'" in actions like this one challenging the constitutionality of North Carolina statutes, Notice at 3 n.1, but the provision they cite does not authorize Legislative Defendants to

unilaterally waive sovereign immunity and it does not authorize private counsel to represent the State of North Carolina in court, *see* N.C. Gen. Stat. § 1-72.2.

Moreover, even if private counsel had the power to remove on behalf of the State, that removal would *still* be invalid (and thus this Court would lack jurisdiction because of the absence of a waiver of sovereign immunity) because it was untimely. The State accepted service on November 13, Ex. C; private counsel purported to remove on behalf of the State 31 days later, on December 14, Notice at 1. But "[e]ach defendant shall have 30 days after receipt by or service on that defendant ... to file the notice of removal." 28 U.S.C. § 1446(b)(2)(B).[6]

This Court need not decide the quintessentially state-law question of who represents the State because neither § 1443(2) nor § 1441(a) authorizes removal regardless of who represents the State. But the prospect of a dispute over this issue reinforces the need for remand. Because this Court must "resolve all doubts in favor of remand," *Korzinski*, 326 F. Supp. 2d at 706, any doubt about whether state sovereign immunity was waived here requires remand.

V. 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). That is the case here.

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, if the 2017 Plans are found unconstitutional, there is sufficient time to implement remedial plans for the 2020 primary and general elections. Ex. A at 1-3. On numerous occasions this decade, North Carolinians have had

[6] The notice of removal incorrectly states that the State accepted service on November 20. Notice ¶ 2.

to vote in unconstitutional state and federal districts because court challenges did not conclude in sufficient time to implement remedial maps before the next election. *See id.* That is already a risk here, as deadlines for the 2020 elections are quickly approaching due to the actions of Legislative Defendants. Legislative Defendants recently moved up the timeline for the 2020 elections, with the window for candidates to file for primary nominations now scheduled to open on December 2, 2019, and the primaries now scheduled for March 3, 2020. *Id.* And, in an effort to make it more difficult to complete a remedial process in this case in time for the 2020 primary elections, Legislative Defendants just last week passed a new law that purports to significantly extend the time that they must be afforded to develop new districting plans if the current ones are struck down. Dkt. 1-1 at 185-87. Legislative Defendants' removal is another attempt to run out the clock.

Given the clear lack of removal jurisdiction here, and the urgent need to expedite the state court proceeding to ensure that there can be new, lawful districts in place for the 2020 elections, this Court should remand this matter immediately. Any delay in remanding this case would reward Legislative Defendants' tactics and abuse of the judicial process, and would place North Carolina voters at severe risk of again having to vote in districts that violate their constitutional rights. Plaintiffs respectfully request that, if Legislative Defendants are afforded an opportunity to respond to this motion, they be given at most two days. *See, e.g.*, *League of Women Voters of Pa.*, 2018 WL 1787211, at *1-2 (remanding partisan gerrymandering lawsuit to state court after emergency hearing convened hours after plaintiffs filed emergency remand motion).

VI. Plaintiffs Are Entitled to Attorneys' Fees Under 28 U.S.C. § 1447(c)

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." "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where

the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.* A party seeking fees need not establish that a notice of removal was frivolous. *See id.*

Here, the court should award fees because Legislative Defendants' notice of removal is objectively unreasonable for the reasons described above, and because the objective evidence indicates that the removal was timed to cause maximum delay and disruption. The removal "works the precise injustice that the Supreme Court in *Martin* was concerned with: namely, that the defendant may use removal to 'delay[] resolution of the case, impose[] costs on [the plaintiff] and waste[] judicial resources." *Nies v. Town of Emerald Isle*, 2013 WL 12159366, at *5 (E.D.N.C. Mar. 27, 2013) (quoting *Martin*, 546 U.S. at 140). Plaintiffs filed this lawsuit on November 13, 2018, Dkt. 1-1 at 72, and filed a motion to expedite on November 20, 2018, Ex. A. Rather than removing promptly or responding to the motion to expedite, Legislative Defendants did nothing. On December 12, 2018, the state court emailed counsel for Legislative Defendants noting that they had not responded to the motion to expedite and asking them to advise whether they consented to expedition and to advise of their position on a telephone hearing on the motion to expedite. Ex. B. Two days later, Legislative Defendants unreasonably removed the case to federal court, withdrawing jurisdiction from the state court just as it was planning to rule on the motion to expedite and set a schedule in this case. The Court should impose fees to deter such unreasonable removals in the future.

CONCLUSION

For the foregoing reasons, the Court should immediately remand this case to state court and award attorneys' fees and costs to Plaintiffs.

DATED: December 17, 2018

Respectfully submitted,

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**Pro Hac Vice motions forthcoming*.

CERTIFICATE OF SERVICE

I hereby certify that on this date, December 17, 2018, 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. I further certify that simultaneously with this filing via CM/ECF, I caused the foregoing document to be served by electronic mail on all counsel of record for all Defendants in the Superior Court case.

DATED: December 17, 2018

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