STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING, et al.,

Defendants.

SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR EXPEDITED DISCOVERY AND TRIAL AND FOR CASE MANAGEMENT ORDER

(OTHR)

Plaintiffs Common Cause, the North Carolina Democratic Party, and 38 North Carolina registered voters respectfully submit this second supplemental brief in support of their Motion for Expedited Discovery and Trial and for Case Management Order (the "Motion to Expedite"). Plaintiffs seek to update this Court on recent developments and to slightly modify the schedule requested in the Motion to Expedite in light of these developments.

1. Plaintiffs filed their initial complaint in this action on November 13, 2018, and filed their amended complaint on December 7, 2018.

2. On November 20, 2018, Plaintiffs filed their Motion to Expedite with the goal of ensuring that, if the challenged districting plans for the state House of Representatives and state Senate (the "2017 Plans") are found unconstitutional, there will be sufficient time to establish new, lawful districts for the 2020 primary and general elections.

3. On December 11, 2018, Plaintiffs filed a supplemental brief in support of the Motion to Expedite. There, Plaintiffs explained that the General Assembly had proposed a revision to N.C. Gen. Stat. § 120-2.4(a) that purports to significantly extend the time that the

General Assembly must be afforded to develop new districting plans if the current ones are struck down. As an update, the General Assembly enacted this revision into law, over the Governor's veto, on December 27, 2018. *See* N.C. Sess. Law 2018-146, Part IV, § 4.7.[1]

4. On December 12, 2018, the trial court administrator of this Court emailed counsel for Legislative Defendants[2] noting that they had not responded to the Motion to Expedite and asking them to advise whether they consented to expedition. The administrator also asked whether Legislative Defendants would consent to a telephonic hearing on the Motion to Expedite.

5. Legislative Defendants did not respond to Plaintiffs' Motion to Expedite. Instead, on December 14, 2018, Legislative Defendants removed this case to federal court.

6. One business day later, Plaintiffs filed an Emergency Motion to Remand. *See* Mem. Supp. Emergency Mot. to Remand at 24, *Common Cause v. Lewis*, No. 18-cv-589, Dkt. 6 (E.D.N.C.), *available at* https://tinyurl.com/ybovpv7w. Plaintiffs explained that the removal was baseless for a multitude of reasons, including because Plaintiffs raise exclusively state law claims.

7. On December 21, 2018, while Plaintiffs' remand motion was pending, Legislative Defendants filed an Answer to the Amended Complaint. *See* Ex. A.

---

[1] Plaintiffs do not believe that this new provision could be lawfully applied to this pending lawsuit (or at all, if a shorter remedial timeline were necessary to cure a constitutional violation).

[2] "Legislative Defendants" are 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.

8. On January 2, 2019, the federal district court granted Plaintiffs' Emergency Motion to Remand and remanded the case to this Court. *See* Ex. B.[3] The clerk of the federal court mailed a certified copy of the remand order to this Court pursuant to 28 U.S.C. § 1447(c), and this Court received the certified remand order on January 7, 2019. Thus, under § 1447(c), this Court has regained jurisdiction and "may . . . proceed with [the] case." 28 U.S.C. § 1447(c); *see also Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 235 n.1 (4th Cir. 2007) ("A remand is effective when the district court mails a certified copy of the remand order to the state court . . . ."); *Wyatt v. Walt Disney World, Co.*, 1999 WL 33117255, at *5-6 (W.D.N.C. July 26, 1999).[4]

9. On January 7, 2019, the State of North Carolina, the State Board of Elections, and its members ("State Defendants") filed their Answer to the Amended Complaint with this Court.

10. Expeditious resolution of this matter remains of the utmost public import for the reasons explained in Plaintiffs' Motion to Expedite. Indeed, Legislative Defendants' removal was a transparent attempt to delay these proceedings in yet another effort to run out the clock.

11. Given that all Defendants have now answered the Amended Complaint, the third bullet in Plaintiffs' proposed schedule—proposing deadlines to brief any motion to dismiss—is moot. *See* N.C. R. Civ. P. 12(b). This case should now be set for discovery and trial.

---

[3] In the remand order, the federal court noted that it would explain its reasoning in an opinion to follow. Ex. B. The federal court issued that opinion on January 7, 2019. *See* Ex. C.

[4] On January 3, 2019, Legislative Defendants filed a motion with the federal court asking the court to delay sending the certified remand order to this Court, based on the erroneous premise that Federal Rule of Civil Procedure 62(a) imposes a 30-day automatic stay on execution of remand orders. *Common Cause*, No. 18-cv-589, Dkt. 46 (E.D.N.C.). But in filing this motion, Legislative Defendants apparently were unaware that the federal court clerk's office had already sent the certified remand order. Legislative Defendants conceded in their motion that jurisdiction would revert to this Court if the certified remand order was mailed to this Court, which has occurred. *See id.* at 2-3 (Legislative Defendants conceding that "jurisdiction over the case is transmitted when '[a] certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court,' 28 U.S.C. § 1447(c)," at which point the "State court [may] proceed with such a case." (quotations omitted)).

12. In light of the delay caused by Legislative Defendants' removal, Plaintiffs respectfully request the following slight modifications to the schedule proposed in the Motion to Expedite. These modifications push back all proposed deadlines by two weeks.

- All document and written discovery shall be completed no later than February 15, 2019. The parties by agreement may continue document or written discovery beyond this deadline, but the Court will not intervene in this voluntary process except in extraordinary circumstances, and the trial date will not be modified because of information obtained through this voluntary process.

- Expert reports shall be served no later than March 1, 2019. Those reports shall include the information stated in Rule 26(b)(4)(A)(2) of the North Carolina Rules of Civil Procedure. Rebuttal expert reports shall be served no later than March 15, 2019. Reply expert reports shall be served no later than March 22, 2019.

- No later than March 22, 2019, the parties shall file a joint proposal to establish deadlines for the exchange of witness lists, exhibit lists, and deposition designations, and for submitting to the Court a joint pre-trial stipulation of facts. On any deadline where the parties cannot agree, they may each describe their respective positions.

- All discovery shall be completed no later than April 12, 2019, and any discovery-related disputes will be heard on an expedited basis and, to the extent reasonable and appropriate, upon notice of less than five days.

- Plaintiffs do not anticipate that this case will be appropriate for summary judgment. If either party desires to file a motion for summary judgment, however, the motion and brief in support shall be filed no later than April 15, 2019. Any opposition shall be filed no later than April 22, 2019.

- Motions in limine and briefs in support shall be filed no later than April 17, 2019. Any oppositions shall be filed no later than April 24, 2019.

- Trial will begin April 29, 2019.

- Plaintiffs and Defendants shall each file their respective proposed findings of fact and conclusions of law seven days after the close of trial.

13. Should the Court wish to have a telephonic or in-person conference to discuss the Motion to Expedite, Plaintiffs remain available to attend at the Court's convenience.

Respectfully submitted this the 10th day of January, 2019.

POYNER SPRUILL LLP

By: Caroline P. Mackie

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
Caroline P. Mackie
N.C. State Bar No. 41512
P.O. Box 1801
Raleigh, NC 27602-1801
(919) 783-6400
espeas@poynerspruill.com

Counsel for Common Cause, the North Carolina Democratic Party, and the Individual Plaintiffs

ARNOLD & PORTER KAYE SCHOLER LLP

R. Stanton Jones*
David P. Gersch*
Elisabeth S. Theodore*
Daniel F. Jacobson*
601 Massachusetts Ave. NW
Washington, DC 20001-3743
(202) 942-5000
stanton.jones@arnoldporter.com

PERKINS COIE LLP

Marc E. Elias*
Aria C. Branch*
700 13th Street NW
Washington, DC 20005-3960
(202) 654-6200
melias@perkinscoie.com

Abha Khanna*
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Common Cause and the Individual Plaintiffs

* *Pro hac vice motions submitted*

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email and by U.S. mail*, addressed to the following persons at the following addresses which are the last addresses known to me:

Amar Majmundar
Stephanie A. Brennan
NC Department of Justice
P.O. Box 629
114 W. Edenton St.
Raleigh, NC 27602
jbernier@ncdoj.gov
Counsel for the State of North Carolina and State Board of Elections and its members

Phillip J. Strach
Michael McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Counsel for the Legislative Defendants

This the 10th day of January, 2019.

POYNER SPRUILL LLP

Caroline P. Mackie

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Action No. 5:18-CV-589

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE JR; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; CARLTON E. CAMPBELL SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS SENIOR CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON REDISTRICTING; SENATOR RALPH E. HISE, JR., IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE COMMITTEE ON REDISTRICTING; SPEAKER OF THE NORTH CAROLINA HOUSE OF	**ANSWER OF LEGISLATIVE DEFENDANTS AND THE STATE OF NORTH CAROLINA TO AMENDED COMPLAINT**

REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTION AND ETHICS ENFORCEMENT; JOSHUA MALCOLM, CHAIRMAN OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; KEN RAYMOND, SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STELLA ANDERSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; DAMON CIRCOSTA, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; STACY "FOUR" EGGERS IV, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JAY HEMPHILL, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; VALERIE JOHNSON, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; JOHN LEWIS, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT; ROBERT CORDLE, MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS & ETHICS ENFORCEMENT,	)
Defendants.	)

ANSWER OF LEGISLATIVE DEFENDANTS
AND THE STATE OF NORTH CAROLINA TO AMENDED COMPLAINT

Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Speaker of the North Carolina House Timothy R. Moore, and President Pro Tem of the North Carolina Senate,

Philip E. Berger ("Legislative Defendants") and the State of North Carolina[1] (collectively referred to in the Answer as "Defendants") answer plaintiffs' amended complaint as follows:

INTRODUCTION

The location of every district line has political consequences. Where a line is drawn inevitably advantages some voters and disadvantages others. Redistricting is an inherently political process.

For over 200 years, the People of the State of North Carolina have reserved to the General Assembly the constitutional authority to make the inherently political choices regarding the drawing of district lines. For most of our State's history, and until 2011, this constitutional authority was exercised by the Democratic members of the General Assembly.

In 2010, for the first time in North Carolina modern history, voters for Republican candidates—which includes voters registered as Republicans, Democrats, unaffiliated, and with other minor parties—exercised their First Amendment rights to elect a Republican-controlled General Assembly. But only after the Democratic Party obtained a majority on the North Carolina Supreme Court, did Democratic plaintiffs bring a case challenging the General Assembly's constitutional authority to determine the location of district lines. Plaintiffs offer no criteria for how districts must be drawn. Instead, they contend that political decisions regarding the location of district lines must be made by the courts unless the General Assembly draws plans that maximize the political influence of Democratic candidates at the expense of African-American voters and Republicans.

[1] As stated in the Notice of Removal filed on December 14, 2018 (D.E. 1), pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the "State of North Carolina" in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government.

Plaintiffs' standardless, politically-biased theories will result in districting plans that will subject the state to liability under a standing order by a federal court, the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Plaintiffs' theories, if adopted, will also violate the rights of the Legislative Defendants, Republican voters, and Republican candidates under the First and Fourteenth Amendments. Plaintiffs' claims must be rejected.

FIRST DEFENSE

Defendants will necessarily violate the federal court order entered by the United States District Court for the Middle District of North Carolina in *Covington v. North Carolina* if this Court grants the relief requested by plaintiffs.

SECOND DEFENSE

Defendants will necessarily violate the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the United States Constitution if the Court grants the relief requested by plaintiffs.

THIRD DEFENSE

Plaintiffs are asking this Court to punish the Legislative Defendants, voters for Republican candidates, and Republican candidates in the same way plaintiffs contend that the General Assembly has treated Democrats in the challenged plans. They do so by asking this Court to "crack" Republican voters out of districts that currently elect Republican candidates in order to submerge them in a district in which plaintiffs believe it will be more difficult to elect a Republican candidate. Should this Court adopt plaintiffs' standardless and politically-biased theory of liability, it will violate the rights of the Legislative Defendants, Republican voters, and Republican candidates under the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

FOURTH DEFENSE

Plaintiffs are asking this Court to punish the Legislative Defendants, voters for Republican candidates, and Republican candidates in the same way plaintiffs contend that the General Assembly has punished Democrats. They do so by asking this Court to create districts that elect Democratic candidates by removing Republican voters from districts where those voters currently elect a Republican candidate and "packing" them in other districts that already elect Republican candidates. Under plaintiffs' standardless and politically-biased theory of liability, doing so will violate the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

FIFTH DEFENSE

Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to favor their preferred political party at the expense of their non-preferred political party. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution.

SIXTH DEFENSE

Plaintiffs request that the Court grant them a right to reside or vote in districts that are drawn to maximize the political influence of the organizational and individual Democratic plaintiffs at the expense of the Legislative Defendants, voters for Republican candidates, and Republican candidates. Such a request if granted violates the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

SEVENTH DEFENSE

The North Carolina Constitution allows the General Assembly to consider partisan advantage and incumbency protection in the application of its discretionary redistricting

decisions. *Stephenson v. Bartlett*, 355 N.C. 35, 562 SE.2d 377, 390 (N.C. 2002) ("*Stephenson I*"). There is no such thing as a "nonpartisan" districting plan and there is no basis whatsoever for plaintiffs' contention that the General Assembly must draw "non-partisan plans." Any court order prohibiting the Legislative Defendants from considering partisan advantage and incumbency protection would violate the First and Fourteenth Amendments to the United States Constitution and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

EIGHTH DEFENSE

Under the theory of liability described by plaintiffs, a district is always "cracked" whenever the Democratic candidate loses the district (but not when a Republican candidate loses the district). Further, districts in which Democratic voters elect a Democratic candidate are "packed" regardless of the percentage of the Democratic voters in the district (but not so with districts in which voters for Republican candidates elect a Republican candidate). Accordingly, to remedy these supposed violations, the defendants must necessarily adopt districting plans that elect only Democratic candidates where such candidates are not currently being elected, at the expense of the Legislative Defendants, voters for Republican candidates, and Republican candidates, in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I, Secs. 10, 12, 14, and 19 of the North Carolina Constitution.

NINTH DEFENSE

Defendants and the People of North Carolina have been severely prejudiced by Plaintiffs' unreasonable delay in bringing these claims challenging the constitutional authority of the General Assembly to consider partisan affiliation and incumbency in making the inherently political decisions regarding the location of district lines. Plaintiffs' claims are thereby barred by the doctrine of laches.

TENTH DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

ELEVENTH DEFENSE

Plaintiffs have failed to identify any constitutional criteria that the legislature could follow or alternative districting maps that they contend satisfy any such constitutional criteria. Plaintiffs' failure to either identify any such criteria or produce districting maps that comply with their alleged criteria, entitle Defendants to judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P.

TWELFTH DEFENSE

Plaintiffs' standardless, politically-biased theory of liability, if adopted by this Court, will operate as an illegal judicial amendment of the North Carolina Constitution in violation of Article XIII of the North Carolina Constitution.

THIRTEENTH DEFENSE

The constitutional authority to draw state senate and state house districts has been reserved by the People to the General Assembly, subject to the express limitations found only in Article II, Secs. 2, 3, 4, and 5 of the North Carolina Constitution. The 2017 legislative redistricting plans fully comply with these provisions of the State Constitution.

FOURTEENTH DEFENSE

In order to achieve political gain, plaintiffs are asking this Court to usurp the constitutional authority of the General Assembly to draw legislative districts in violation of the separation of powers doctrine, adopted by the People in Article I, Sec. 6 of the North Carolina Constitution.

FIFTEENTH DEFENSE

Plaintiffs' politically-biased, standardless theory of liability, is non-justiciable under any provision of the North Carolina Constitution, including Article I, Sec. 19, Article I, Sec. 10, and Article I, Secs. 12 and 14.

SIXTEENTH DEFENSE

Unlike the provision of the Pennsylvania Constitution cited by the plaintiffs, nothing in the North Carolina Constitution states that elections must be "equal." Reading any such term into the North Carolina Constitution would amount to an illegal judicial amendment of the Constitution in violation of Article XIII of the North Carolina Constitution. For this and other reasons, Plaintiffs' claim that the 2017 legislative redistricting plans violate Article I, Sec. 10 of the North Carolina Constitution is not warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

SEVENTEENTH DEFENSE

Neither the Organizational nor the Individual Plaintiffs have standing to bring this action.

EIGHTEENTH DEFENSE

Plaintiffs' are requesting that the Court "punish" and "burden" the Legislative Defendants, Republican candidates, and Republican voters in the same way plaintiffs contend that the General Assembly has "punished" or "burdened" Democratic voters. Plaintiffs' request for equitable relief should therefore be denied because plaintiffs have unclean hands.

NINETEENTH DEFENSE

Plaintiffs' complaint should be dismissed because of their failure to provide a judicially manageable standard or definition for the terms "packed," "cracked," or "non-partisan."

TWENTIETH DEFENSE

Defendants answer the individual allegations of Plaintiffs' Complaint as follows:

"INTRODUCTION"

1. Defendants deny the allegations of paragraph 1.

2. Defendants deny the allegations of paragraph 2.

3. Defendants deny the allegations of paragraph 3.

4. Defendants admit that the Governor lacks the constitutional authority to veto districting bills. In all other respects, Defendants deny the allegations of paragraph 4.

5. Defendants admit that the decision in *Stephenson I* speaks for itself and that the 2017 legislative plans fully and completely comply with the constitutional standards stated therein. In all other respects, Defendants deny the allegations of paragraph 5.

6. Defendants deny the allegations of paragraph 6.

"PARTIES

A. Plaintiffs"

7. Defendants deny that the 2017 Legislative Plans "burden" the ability of Common Cause in any respect and that Common Cause or its members have standing to bring this action. In all other respects, Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 7.

8. Defendants admit that the North Carolina Democratic Party ("NCDP") is a political party as defined under N.C. Gen. Stat. § 163-96, and that registered Democratic voters reside in every legislative district. In all other respects, Defendants deny the allegations of paragraph 8.

9. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Chapman. Defendants admit that election results in House District 100 and Senate District 40 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 9.

10. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff DuBose. Defendants admit that election results in House District 2 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 10.

11. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Gauck. Defendants admit that the district lines for House Districts 17 and 18 and Senate Districts 8 and 9 and the election results in those districts speak for themselves. In all other respects, Defendants deny the allegations of paragraph 11.

12. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Nesbit. Defendants admit that the election results for House District 19 and Senate District 9 speak for themselves. In all other respects Defendants deny the allegations of paragraph 12.

13. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Jordan. Defendants admit that the election results for Senate District 11 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 13.

14. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Gates. Defendants admit that the election results for Senate District 49 speak for themselves. In all other respects Defendants deny the allegations of paragraph 14.

15. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Peters. Defendants admit that the district lines for

Senate District 48 and the election results for that district speak for themselves. In all other respects, Defendants deny the allegations of paragraph 15.

16. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Morton. Defendants admit that the election results for House District 100 and Senate District 37 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 16.

17. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brien. Defendants admit that the election results for House District 102 and Senate District 37 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 17.

18. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Turner. Defendants admit that the election results for House District 38 and Senate District 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 18.

19. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Schaller. Defendants admit that the 2011 versions of House Districts 63 and 64 were not changed in the 2017 House Plan and that election results in House District 64 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 19.

20. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Harper. Defendants admit that the election results for House District 36 and Senate District 17 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 20.

21. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Wischmann. Defendants admit that the election results in House District 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 21.

22. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brown. Defendants admit that the election results in House District 58 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 22.

23. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Oseroff. Defendants admit that the election results for House District 8 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 23.

24. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Jackson. Defendants admit that the election results in House District 103 and Senate District 29 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 24.

25. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Balla. Defendants admit that the election results in House District 34 and Senate District 16 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 25.

26. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Johnson. Defendants admit that the election results for

House District 74 and Senate District 31 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 26.

27. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Wolff. Defendants admit that the election results in House District 37 and Senate District 17 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 27.

28. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Peden-Coviello. Defendants admit that the election results in House District 72 and Senate District 32 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 28.

29. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Barnes. Defendants admit that the election results for House District 113 and Senate District 48 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 29.

30. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Holbrook. Defendants admit that the district lines for House Districts 17 and 18 and Senate Districts 8 and 9 and that the election results in these districts speak for themselves. In all other respects, Defendants deny the allegations of paragraph 30.

31. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff McCracken. Defendants admit that the election results for House District 51 and Senate District 12 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 31.

32. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Dunn. Defendants admit that the election results for House District 104 and Senate District 39 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 32.

33. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Machak. Defendants admit that the election results for House District 109 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 33.

34. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Service. Defendants admit that the election results in House District 34 and Senate District 18 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 34.

35. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Rumph. Defendants admit that the election results for House District 9 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 35.

36. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff McGrigor. Defendants admit that the election results for House District 7 and Senate District 18 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 36.

37. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Bradley. Defendants admit that the election results in

House District 35 and Senate District 14 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 37.

38. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Thomas. In all other respects, Defendants deny the allegations of paragraph 38.

39. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Miller. Defendants admit that the election results for House District 18 and Senate District 8 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 39.

40. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Person. Defendants admit that the election results for House District 43 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 40.

41. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Smith. Defendants admit that the election results for House District 83 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 41.

42. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Sloan. Defendants admit that the election results for House District 67 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 42.

43. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Frey. Defendants admit that the election results in

House District 69 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 43.

44. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Quick. Defendants admit that the election results in House District 59 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 44.

45. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Brown. Defendants admit that the election results for Senate District 26 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 45.

46. Defendants lack knowledge or information sufficient to form a belief about the truth of the allegations regarding Plaintiff Campbell. Defendants admit that the election results in House District 46 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 46.

"B. Defendants"

47. Defendants admit the allegations of paragraph 47.

48. Defendants admit the allegations of paragraph 48.

49. Defendants admit the allegations of paragraph 49.

50. Defendants admit the allegations of paragraph 50.

51. Defendants admit the allegations of paragraph 51.

52. Defendants admit that the power and authority of the North Carolina State Board of Elections and Ethics Enforcement are established by statutes that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 52.

53. Defendants admit the allegations of paragraph 53.

54. Defendants admit the allegations of paragraph 54.

55. Defendants admit the allegations of paragraph 55.

56. Defendants admit the allegations of paragraph 56.

57. Defendants admit the allegations of paragraph 57.

58. Defendants admit the allegations of paragraph 58.

59. Defendants admit the allegations of paragraph 59.

60. Defendants admit the allegations of paragraph 60.

61. Defendants admit the allegations of paragraph 61.

"JURISDICTION AND VENUE"

62. Defendants deny the allegations of paragraph 62.

63. Defendants admit the allegations of paragraph 63.

64. Defendants admit the allegations of paragraph 64.

"FACTUAL ALLEGATIONS

A. National Republican Party Officials Target North Carolina for Partisan Gerrymandering Prior to 2010 Election"

65. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 65.

66. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 66.

67. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 67.

68. Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 68.

"B. Republican Mapmakers Create 2011 Plan from Party Headquarters"

69. Defendants deny that Republicans set out to "entrench" Republicans in power. In all other respects, Defendants lack knowledge or information sufficient to form a belief about the allegations of paragraph 69.

70. Defendants admit that Tom Hofeller, John Morgan, Dale Oldham and Joel Raupe advised Republican Chairs during the 2011 redistricting process and that Fair and Legal Redistricting may have paid Morgan, Raupe and Hofeller. In all other respects, Defendants deny the allegations of paragraph 70.

71. Defendants admit that like all legislation and prior districting plans drawn by both political parties the 2011 plans were initially drawn in private and that work was done at political party facilities. In all other respects, Defendants deny the allegations of paragraph 71.

72. Defendants admit that like all legislation and prior districting plans drawn by both political parties the 2011 plans were initially drawn in private and that work was done at political party facilities; and that draft plans were reviewed by the Redistricting Chairs and some of the Republican members before proposed maps were released to the public. In all other respects, Defendants deny the allegations of paragraph 72.

73. Defendants admit that Art Pope provided legal advice to the Redistricting Chairs. In all other respects, Defendants deny the allegations of paragraph 73.

74. Defendants deny the allegations of paragraph 74.

75. Defendants admit that the citations from the *Dickson* case speak for themselves. In all other respects, Defendants deny the allegations of paragraph 75.

"C. Republicans Enact 2011 Plans to Increase Their Party's Power"

76. Defendants admit that the identity of members of the legislature who voted for the 2011 legislative districting plans are a matter of public record. In all other respects, Defendants denies the allegations of paragraph 76.

77. Defendants admit the allegations of paragraph 77.

"D. The 2011 Plan Gave Republican Super Majorities that were Grossly Disproportionate to Republicans' Share of the Statewide Vote."

78. Defendants admit that the election results in 2012 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 78

79. Defendants admit that the election results in 2012 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 79.

80. Defendants admit that the election results in 2014 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 80.

81. Defendants admit that the election results in 2014 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 81.

82. Defendants admit that the election results in 2016 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 82.

83. Defendants admit that the election results in 2016 speak for themselves. In all other respects, Defendants denies the allegations of paragraph 83.

84. The Defendants admit that the election results for the 2012, 2014 and 2016 general election speak for themselves. In all other respects, Defendants deny the allegations of paragraph 84.

"E. A Federal Court Strikes Down Many Districts as Racially Gerrymandered"

85. Defendants admit that the decisions in *Covington v. North Carolina* speak for themselves. In all other respects, Defendants deny the allegations of paragraph 85.

86. Defendants admit that the decision in *Covington v. North Carolina* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 86.

"F. The General Assembly Enacted the 2017 Plans to Dilute the Voting Power of Democratic Voters and Maximize the Political Advantage of Republicans"

87. Defendants deny the allegations of paragraph 87.

88. Defendants deny the allegations of paragraph 88.

89. Defendants admit that General Assembly staff regularly prepare proposed legislation in "secret" for Democratic or Republican members, that the practice followed by the Redistricting Chairs was consistent with this practice to the extent Dr. Hofeller was hired as a consultant to the chairs, and that Democratic controlled General Assemblies had in the past used their consultants to prepare districting plans in "secret." Defendants admit that the cited transcript speaks for itself. In all other respects, Defendants deny the allegations of paragraph 89.

90. Defendants admit that the statements attributed to Representative Lewis are taken completely out of context, apply to congressional redistricting and not legislative redistricting, and speak for themselves. In all other respects, Defendants deny the allegations of paragraph 90.

91. Defendants admit that the statements transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 91.

92. Defendants admit that the statements transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 92.

93. Defendants admit that the statements and votes transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 93.

94. Defendants admit that the statements of Representatives Lewis and Hise transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 94.

95. Defendants admit that the statements of Representative Lewis transcribed at committee meetings speak for themselves. In all other respects, Defendants deny the allegations of paragraph 95.

96. Defendants admit that various criteria were adopted by the House and Senate Committees and that the record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 96.

97. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 97.

98. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 98.

99. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 99.

100. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 100.

101. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 101.

102. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 102.

103. Defendants admit that the transcribed record speaks for itself. In all other respects, Defendants deny the allegations of paragraph 103.

104. Defendants admit that paragraph 104 lists the criteria adopted by the Committees and that "election data" is the 8th criterion listed. In all other respects, Defendants deny the allegations of paragraph 104.

105. Defendants admit that the decision in *Covington* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 105.

106. Defendants admit that like all legislation, including redistricting legislation passed by Democratic-controlled General Assemblies, the initial draft of the 2017 House Districting Plan was done in a confidential manner and protected by legislative privilege until it was released for public review and comments by the committee chairs. Defendants admit that the hearing transcript speaks for itself. In all other respects, Defendants denies the allegations of paragraph 106.

107. Defendants deny the allegations of paragraph 107.

108. Defendants admit that the proposed House redistricting plan was released on August 21, 2017. Defendants deny that the proposed Senate redistricting plan was released on August 21, 2017, because it was released on August 20, 2017. In all other respects, Defendants deny the allegations of paragraph of paragraph 108.

109. Defendants admit that the statement by Senator Hise cited in paragraph 109 is taken completely out of context and speaks for itself. In all other respects, Defendants deny the allegations of paragraph 109.

110. Defendants deny the allegations of paragraph 110.

111. Defendants deny the allegations of paragraph 111.

112. Defendants deny the allegations of paragraph 112.

113. Defendants deny the allegations of paragraph 113.

114. Defendants deny the allegations of paragraph 114.

115. Defendants deny the allegations of paragraph 115.

116. Defendant admit that any public comments speak for themselves. In all other respects, Defendants deny the allegations of paragraph 116.

117. Defendants admit that the committee votes are a matter of public record and speak for themselves. In all other respects, Defendants deny the allegations of paragraph 117.

118. Defendants admit that the proceedings before the House are a matter of public record that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 118.

119. Defendants admit that the proceedings before the General Assembly are a matter of public record that speak for themselves. In all other respects, Defendants deny the allegations of paragraph 119.

120. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 120.

"G. The *Covington* Court Appoints a Special Master to Redraw Several Districts in the 2017 Plans that Remained Racially Gerrymandered"

121. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 121.

122. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 122.

123. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 123.

124. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 124.

125. Defendants admit that the *Covington* decision speaks for itself. In all other respects, Defendants deny the allegations of paragraph 125.

"H. The 2017 Plans Pack or Crack Plaintiffs and Other Democratic Voters to Dilute Their Votes and Maximize the Political Advantage of Republicans"

126. Defendants deny the allegations of paragraph 126.

127. Defendants deny the allegations of paragraph 127.

"1. The 2017 House Plan Packs and Cracks Democratic Voters"

128. Defendants admit that House Districts 2 and 32 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in the *Covington* case and that Person, Granville, Vance, and Warren Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 128.

129. Defendants deny the allegations of paragraph 129.

"House Districts 4, 14, and 15"

130. Defendants admit that House Districts 4, 14, and 15 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Duplin and Onslow Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 130.

131. Defendants admit that the district lines for House Districts 14 and 15 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 131.

"House Districts 7 and 25"

132. Defendants admit that House Districts 7 and 25 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs'

counsel in *Covington* and that Franklin and Nash Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 132.

133. Defendants admit that the lines for House Districts 7 and 25 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 133.

"House Districts 8, 9, and 12"

134. Defendants admit that House Districts 8, 9 and 12 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Pitt and Lenoir Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 134.

135. Defendants admit that the district lines for House Districts 8, 9, and 12 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 135.

"House Districts 10, 26, 51, and 53"

136. Defendants admit that House Districts 10, 26, 51, and 53 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Greene, Wayne, Sampson, Bladen, Johnston, Harnett and Lee Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 136.

137. Defendants deny the allegations of paragraph 137.

"House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49"

138. Defendants admit that House Districts 11, 33, 34, 35, 36, 37, 38, 39, 40, 41, and 49 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Wake County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 138.

139. Defendants admit that Plaintiffs want the Court to judicially gerrymander all House Districts in Wake County to try and prevent a Republican candidate from winning any of them. In all other respects, Defendants deny the allegations of paragraph 139.

140. Defendants admit that the decision in *N.C. State Conf. of NAACP Branches v. Lewis* speaks for itself. In all other respects, Defendants deny the allegations of paragraph 140.

"House Districts 16, 46, and 47"

141. Defendants admit that House Districts 16, 46, and 47 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Pender, Columbus and Robeson Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 141.

142. Defendants deny the allegations of paragraph 142.

"House Districts 17, 18, 19, and 20"

143. Defendants admit that House Districts 17, 18, 19, and 20 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that New Hanover and Brunswick Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 143.

144. Defendants admit that the election results in House Districts 17, 19, and 20 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 144.

"House Districts 42, 43, 44, and 45"

145. Defendants admit that House Districts 42, 43, 44, and 45 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and

plaintiffs' counsel in *Covington* and that Cumberland County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 145.

146. Defendants deny the allegations of paragraph 146.

"House Districts 55, 68, and 69"

147. Defendants admit that House Districts 55, 68, and 69 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Anson and Union Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 147.

148. Defendants deny the allegations of paragraph 148.

"House Districts 58, 59, and 60"

149. Defendants admit that House Districts 58, 59, and 60 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Anson and Union Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 149.

150. Defendants deny the allegations of paragraph 150.

"House Districts 63 and 64"

151. Defendants admit that House Districts 63 and 64 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Alamance County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 151.

152. Defendants deny the allegations of paragraph 152.

"House Districts 66, 67, 76, 77, 82, and 83"

153. Defendants admit that House Districts 66, 67, 76, 77, 82, and 83 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Richmond, Montgomery, Stanly, Cabarrus, Rowan, and Davie Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 153.

154. Defendants deny the allegations of paragraph 154.

"House Districts 71, 72, 73, 74, and 75"

155. Defendants admit that House Districts 71, 72, 73, 74, and 75 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Forsyth and Yadkin Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 155.

156. Defendants admit that the district lines in House District 71, 72, 73, 74, and 75 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 156.

"House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107"

157. Defendants admit that House Districts 88, 92, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 157.

158. Defendants deny the allegations of paragraph 158.

"House Districts 108, 109, 110, and 111"

159. Defendants admit that House Districts 108, 109, 110, and 111 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 159.

160. Defendants admit that the district lines for House Districts 108, 109, 110, and 11 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 160.

"House Districts 113 and 117"

161. Defendants admit that House Districts 113 and 117 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Transylvania, Henderson and Polk Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 161.

162. Defendants deny the allegations of paragraph 162.

"House Districts 114, 115, and 116"

163. Defendants admit that House Districts 114, 115, and 116 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Buncombe County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 163.

164. Defendants deny the allegations of paragraph 164.

"2. The 2017 Senate Plan Packs and Cracks Democratic Voters"

"Senate Districts 8 and 9"

165. Defendants admit that Senate Districts 8 and 9 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Bladen, Pender, Brunswick and New Hanover Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 165.

166. Defendants deny the allegations of paragraph 166.

"Senate Districts 10, 11, and 12"

167 Defendants admit that Senate Districts 10, 11, and 12 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Sampson, Duplin, Johnston, Nash, Lee and Harnett Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 167.

168. Defendants deny the allegations of paragraph 168.

"Senate Districts 14, 15, 16, 17, and 18"

169. Defendants admit that Senate Districts 14, 15, 16, 17, and 18 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Wake and Franklin Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 169.

170. Defendants deny the allegations of paragraph 170.

171. Defendants deny the allegations of paragraph 171.

172. Defendants deny the allegations of paragraph 172.

173. Defendants deny the allegations of paragraph 173.

"Senate Districts 24, 26, 27, and 28"

174. Defendants admit that Senate Districts 24, 26, 27, and 28 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Randolph, Guilford, and Alamance Counties are located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 174.

175. Defendants deny the allegations of paragraph 175.

176. Defendants deny the allegations of paragraph 176.

177. Defendants deny the allegations of paragraph 177.

178. Defendants deny the allegations of paragraph 178.

"Senate Districts 37, 38, 39, 40, and 41"

179. Defendants admit that Senate Districts 37, 38, 39, 40, and 41 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Mecklenburg County is located in the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 179.

180. Defendants deny the allegations of paragraph 180.

181. Defendants deny the allegations of paragraph 181.

182. Defendants deny the allegations of paragraph 182.

"Senate Districts 48 and 49"

183. Defendants admit that Senate Districts 48 and 49 are located in a lawful county group mandated by the North Carolina Constitution as conceded by the plaintiffs and plaintiffs' counsel in *Covington* and that Transylvania, Henderson and Buncombe Counties are located in

the constitutionally required county group. In all other respects, Defendants deny the allegations of paragraph 183.

184. Defendants deny the allegations of paragraph 184.

"3. The 2017 Plan Achieved Their Goal in the 2018 Election"

185. Defendants deny the allegations of paragraph 185.

186. Defendants admit that the election results for 2018 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 186.

187. Defendants admit that the election results for 2018 speak for themselves. In all other respects, Defendants deny the allegations of paragraph 187.

188. Defendants deny the allegations of paragraph 188.

"I. The Partisan Gerrymandering of the 2017 Plans Causes Plaintiffs and Other Democratic Voters to be Entirely Shut Out of the Political Process"

189. Defendants deny the allegations of paragraph 189.

190. Defendants deny the allegations of paragraph 190.

191. Defendants deny the allegations of paragraph 191.

192. Defendants deny the allegations of paragraph 192.

193. Defendants deny the allegations of paragraph 193.

194. Defendants deny the allegations of paragraph 194.

195. Defendants deny the allegations of paragraph 195.

196. Defendants deny the allegations of paragraph 196.

"COUNT I

Violation of North Carolina Constitution's Equal Protection Clause, Art. I §19"

197. Defendants incorporate by reference their responses to paragraphs 1 through 196.

198. Defendants admit that Article I, Section 19 of the North Carolina Constitution speaks for itself. In all other respects, Defendants deny the allegations of paragraph 198.

199. Defendants admit that the cited cases speak for themselves. In all other respects, Defendants deny the allegations of paragraph 199.

200. Defendants admit that the cited case speaks for itself. In all other respects, Defendants deny the allegations of paragraph 200.

201. Defendants deny the allegations of paragraph 201.

202. Defendants deny the allegations of paragraph 202.

203. Defendants deny the allegations of paragraph 203.

204. Defendants deny the allegations of paragraph 204.

"COUNT II

Violation of North [sic] Constitution's Free Election Clause, Art. I §5"

205. Defendants incorporate by reference their responses to paragraphs 1 through 204.

206. Defendants admit that Article I, Section 5 speaks for itself. In all other respects, Defendants deny the allegations of paragraph 206.

207. Defendants deny the allegations of paragraph 207.

208. Defendants admit that the decision cited speaks for itself. In all other respects, Defendants deny the allegations of paragraph 208.

209. Defendants deny the allegations of paragraph 209.

210. Defendants deny the allegations of paragraph 210.

211. Defendants deny the allegations of paragraph 211.

"COUNT III

Violation of North [sic] Constitution's Freedom of Assembly, Art. I §§ 12 & 14"

212. Defendants incorporate by reference their responses to paragraphs 1-211.

213. Defendants deny the allegations of paragraph 213.

214. Defendants deny the allegations of paragraph 214.

215. Defendants admit that the cited case speaks for itself. In all other respects, Defendants deny the allegations of paragraph 215.

216. Defendants deny the allegations of paragraph 216.

217. Defendants deny the allegations of paragraph 217.

218. Defendants deny the allegations of paragraph 218.

219. Defendants deny the allegations of paragraph 219.

220. Defendants deny the allegations of paragraph 220.

221. Defendants deny the allegations of paragraph 221.

222. Defendants deny the allegations of paragraph 222.

PRAYER FOR RELIEF

Wherefore, Defendants respectfully request that the Court enter an order and final judgment.

1. dismissing all of Plaintiffs' claims with prejudice;

2. awarding Defendants their costs and attorneys' fees; and

3. providing Defendants with such other and further relief as may be equitable and proper.

Respectfully submitted this 21st day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: /s/ Phillip J. Strach
Phillip J. Strach (N.C. Bar No. 29456)
Michael D. McKnight (N.C. Bar No. 36932)
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
Phil.strach@ogletree.com
Michael.mcknight@ogletree.com
Attorneys for Legislative Defendants and the State of North Carolina

BAKER & HOSTETLER, LLP

Mark E. Braden*
(DC Bar #419915)
Richard Raile*
(VA Bar # 84340)
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5403
rraile@bakerlaw.com
mbraden@bakerlaw.com
Telephone: (202) 861-1500
Facsimile: (202) 861-1783

Attorneys for Legislative Defendants and the State of North Carolina
**Notice of Appearance under Local Rule 83.1 forthcoming*

CERTIFICATE OF SERVICE

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

Dated this the 21st day of December, 2018.

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

By: Phillip J. Strach
Phillip J. Strach (N.C. Bar No. 29456)
Michael D. McKnight (N.C. Bar No. 36932)
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
Telephone: 919.787.9700
Facsimile: 919.783.9412
Phil.strach@ogletree.com
Michael.mcknight@ogletree.com
Attorneys for Legislative Defendants and the State of North Carolina

EXHIBIT B

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

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; EDWIN M. SPEAS, JR.; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR.,	)	ORDER
Plaintiffs,	)	
v.	)	
REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

SO ORDERED, this the 2nd day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge

EXHIBIT C

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

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; EDWIN M. SPEAS, JR.; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	MEMORANDUM OPINION

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

This matter came before the court on plaintiffs' emergency motion for remand (DE 5). On January 2, 2019, the court granted the motion, remanded the matter to state court, and denied plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c).[1] The court memorializes herein its reasoning for this decision.

STATEMENT OF THE CASE

Plaintiffs commenced this action in Superior Court of Wake County on November 13, 2018, and filed amended complaint on December 7, 2018, asserting that districting plans enacted by the North Carolina General Assembly in 2017 for the North Carolina House of Representatives and Senate (the "2017 Plans") are unconstitutional and invalid under the North Carolina Constitution. Plaintiffs seek the following relief from the state court, sitting as a three-judge panel:

a. Declare that each of the 2017 Plans is unconstitutional and invalid because each violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Equal Protection Clause, Art. I, § 19; Free Elections Clause, Art. I, § 5; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14;

b. Enjoin Defendants, their agents, officers, and employees from administering, preparing for, or moving forward with the 2020 primary and general elections for the North Carolina General Assembly using the 2017 Plans;

c. Establish new state House and state Senate districting plans that comply with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new state House and state Senate districting plans comporting with the North Carolina Constitution in a timely manner;

d. Grant Plaintiffs such other and further relief as the Court deems just and appropriate.

[1] Also now pending before the court is a Motion For Order Confirming Applicability of Stay of Judgment under Rule 62(a) (DE 45), which the court will address by separate order.

(Am. Compl. p.75).[2]

Plaintiffs are Common Cause, the North Carolina Democratic Party, and 38 individual registered Democrat voters. Defendants Representative David R. Lewis; Senator Ralph E. Hise, Jr.; Speaker of the House Timothy K. Moore; and President Pro Tempore of the North Carolina Senate Philip E. Berger, are members of the North Carolina Senate and House named in their official capacities (collectively, the "Legislative Defendants"). Additional defendants are the State of North Carolina, the North Carolina State Board of Elections and Ethics Enforcement, and individual officers and members of the North Carolina State Board of Elections and Ethics Enforcement (collectively, the "State Defendants").[3]

On December 14, 2018, the Legislative Defendants filed a notice of removal in this court. The notice of removal states that it is filed also on behalf of the State of North Carolina in the following respect: "Pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the 'State of North Carolina' in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government." (Notice of Removal (DE 1) at 3 n. 1).[4] The notice of removal is signed by counsel who has entered an appearance on behalf of the Legislative Defendants. (Id. at 16; Notices of Appearance (DE 2,

[2] A copy of plaintiffs' amended complaint is filed at docket entries 1 and 32 (DE 1, 32). For ease of reference, page numbers in citations to documents in the record specify the page number showing on the face of the underlying document rather than the page number specified in the court's electronic case filing (ECF) system.

[3] In their response to the motion to remand, the State Defendants note prior changes and ongoing uncertainty in the composition and membership of the North Carolina State Board of Elections and Ethics Enforcement. Because these changes do not impact the analysis herein, the court adheres to individual State Defendants' names as referenced in the original complaint, and as reflected in the court's docket, in the caption of this order, for ease of reference.

[4] All subsequent filings by the Legislative Defendants in this court have been made also on behalf of the State of North Carolina in this manner, such that references in this opinion to filings or arguments made by the Legislative Defendants are to be understood as including the specification that they are made also on behalf of the State of North Carolina in the respect quoted above in the text.

3)). Attached to the notice of removal are copies of the state court pleadings and certain documents filed in state court,[5] as well as the Legislative Defendants' state court notice of filing of notice of removal.

Plaintiffs filed an emergency motion to remand on December 17, 2018. In support of the motion, plaintiffs filed a memorandum attaching the following documents: 1) acceptance of service filed in state court on November 19, 2018, on behalf of the State Defendants; 2) plaintiffs' motion filed in state court on November 20, 2018, for expedited discovery and trial and for case management order; 3) emails between state trial court administrator and counsel; and 4) certain district court and Supreme Court filings made in Covington v. North Carolina, No. 15-CV-399 (M.D.N.C.) ("Covington").

On December 18, 2018, the court set a December 28, 2018, deadline for any responses to the motion to remand. The Legislative Defendants filed an answer to the complaint on December 21, 2018. On the same date, the State Defendants moved for extension of time to answer.

On December 28, 2018, the State Defendants responded to the motion to remand, stating that they agree the matter should be remanded.[6] That same date, the Legislative Defendants filed a response in opposition to remand, attaching documents filed in Covington, and two other cases: 1) Dickson v. Rucho, 11 CVS 16896 (Superior Court of Wake County), and 2) Stephenson v. Bartlett, 4:01-CV-171-H (E.D.N.C.). Plaintiffs replied in support of remand on December 30, 2018, relying

[5] Legislative Defendants filed on December 20, 2018, an amended Exhibit 1 to their notice removal that includes an additional document filed in state court on November 20, 2018, comprising a motion by plaintiffs' for expedited discovery and trial and for case management order.

[6] The State of North Carolina, through its response, also "objects to the removal" where it "purports to be on behalf of the State of North Carolina," noting that "[t]he Attorney General reserves the right to challenge, in an appropriate setting, the interpretation of [N.C. Gen. Stat.] § 1-72.2 that the Legislative Defendants appear to be advancing . . . . [b]ut the Court need not address those unsettled state-law issues to rule on Plaintiffs' Motion to Remand." (State Defendants' Resp. (DE 39) at 2 n. 2)

upon a North Carolina Senate hearing transcript.

On January 2, 2019, the court granted plaintiffs' motion to remand, stating:

> This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

(Order (DE 44) at 3).

COURT'S DISCUSSION

A. Standard of Review

In any case removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). "The burden of establishing federal jurisdiction is placed upon the party seeking removal." Mulcahey v. Columbia Organic Chemicals Co., 29 F.3d 148, 151 (4th Cir. 1994). "Because removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction." Id. "If federal jurisdiction is doubtful, a remand is necessary." Id.; see Palisades Collections LLC v. Shorts, 552 F.3d 327, 336 (4th Cir. 2008) (recognizing the court's "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand").

B. Analysis

The Legislative Defendants rely upon two independent statutory provisions as a basis for removal, which the court will address in turn below.

1. 28 U.S.C. § 1443(2)

The Legislative Defendants assert that removal is appropriate under a subsection of 28 U.S.C. § 1443 that provides for removal of state-court actions against a defendant "for refusing to do any act on the ground that it would be inconsistent with" any "law providing for equal rights." (Notice of Removal ¶ 6).

Section 1443 provides in its entirety as follows:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (emphasis added).

This "statute . . . has been described as a text of exquisite obscurity." Baines v. City of Danville, Va., 357 F.2d 756, 759 (4th Cir. 1966) (en banc) (internal quotations omitted). The Supreme Court and the Fourth Circuit both interpreted the meaning of the provisions of § 1443 in separate cases in 1966, where each court observed, with respect to the quoted text emphasized above:

> The refusal language was added by amendment in the House with the explanation that it was intended to enable state officers who refused to enforce discriminatory state laws in conflict with Section 1 of the Civil Rights Act of 1866 and who were prosecuted in the state courts because of their refusal to enforce state law, to remove their proceedings to the federal court.

Id. at 772; see City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 824 n.22 (1966). Since that

time, it appears that neither the Supreme Court nor the Fourth Circuit has interpreted the "refusing" clause in subsection (2).

In Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983), a three-judge panel of this court held that a state court action "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans as precleared on April 30, 1982, by the Attorney General," was properly removed to this court under the "refusal" clause of § 1443. Id. at 179-180. By contrast, in Stephenson v. Bartlett, 180 F. Supp. 2d 779 (E.D.N.C. 2001), this court held that a state court action "challenging the redistrict plans proposed by the North Carolina General Assembly" was not properly removed to this court under the "refusal" clause of § 1443. Id. at 781, 785-786. Two other federal district courts have held that state court actions challenging legislative district plans were not properly removed under the "refusal" clause of § 1443. See Brown v. Fla., 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002); Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992).

Against this legal background, applicability of § 1443 to plaintiffs' action is doubtful for several reasons. First, plaintiffs' state court action is not brought against the Legislative Defendants "for refusing to do" anything. 28 U.S.C. § 1443(2). Rather, plaintiffs challenge an action already completed, in the form of the 2017 Plans, as "unconstitutional and invalid." (Am. Compl. p. 75). Legislative Defendants are "necessary parties" in any such suit where "the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action." N.C. Gen. Stat. § 120-32.6; see N.C. R. Civ. P. 19(d). Plaintiffs' prayer for injunctive relief further reinforces this point, where they seek to enjoin defendants from "administering, preparing for, or moving forward with the 2020 primary and

general elections . . . using the 2017 plans," which not a legislative activity. (Am. Compl. ¶ 75). Finally, they do not seek an injunction compelling the Legislative Defendants to act, but rather call upon the state court to establish new plans "if the North Carolina General Assembly fails to" do so. (Id.) (emphasis added). In such circumstances, as this court already has observed, "it is not entirely clear what the defendants refuse to do." Stephenson, 180 F. Supp. 2d at 785.

Second, plaintiffs' action is not removable by the Legislative Defendants because they have only a legislative role, rather than a law enforcement role. The Supreme Court, the Fourth Circuit en banc, and other federal courts have recognized that the "refusal" clause of § 1443 was intended to apply to "state officers who refused to enforce" state laws. Baines, 357 F.2d at 759 (emphasis added); see Peacock, 384 U.S. at 824 n.22 (noting clause was "intended to enable State officers . . . refusing to enforce" state laws in reference to federal equal protection laws). Indeed, one federal court has stated that "the privilege of removal is conferred . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 302 F. Supp. 309, 311-12 (S.D. Ind. 1969) (emphasis added); see also Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992) ("It is untenable to argue . . . that Congress intended that the statute could or should be used by legislators sued solely because of their refusals to cast votes in a certain way."). While such interpretations have been expressed in dicta, they raise sufficient doubt regarding applicability of § 1443 to state legislators to preclude removal jurisdiction here.

Third, as this court found in Stephenson, here also "it is unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law," and "any implication of the refusal clause is speculative." 180 F. Supp. 2d at 785. Thus, as in

Stephenson, "plaintiffs are merely 'seeking an alternative apportionment plan which also fully complie[s] with federal law but varie[s] from the defendants' plan only in its interpretation of state law.'" 180 F. Supp. 2d at 785 (quoting Sexson v. Servaas, 33 F.3d 799, 804 (7th Cir. 1994)) (brackets in original).

In sum, it is doubtful that § 1443 applies to confer removal jurisdiction in this case. Arguments raised by the Legislative Defendants in favor of removal under § 1443 are insufficient to overcome this doubt. At the outset, the court notes that the Legislative Defendants cite no case in which state legislators were permitted to remove to federal court under the refusal clause in a suit challenging enactment of state redistricting law. Cases cited by the Legislative Defendants are all inapposite on the basis of one or several factors set forth above.

For example, the Legislative Defendants cite to Cavanagh, where this court permitted removal of a state court suit challenging enactment of North Carolina redistricting law. But, Cavanagh does not discuss removal by state legislators; rather, it describes the action as "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans." 557 F. Supp. at 176 (emphasis added). Nor does Cavanagh mention the enforcement limitation described in Peacock and Baines. See, e.g., Wolpoff, 792 F.Supp. at 968 (distinguishing Cavanagh on this basis in remanding legislator's removal of state suit challenging districting plan).

The Legislative Defendants also rely upon Alonzo v. City of Corpus Christi, 68 F.3d 944 (5th Cir. 1995), where the court affirmed removal of a state suit challenging a city's method of electing city council members, where the city alleged a colorable conflict between a prior federal consent decree and the relief sought in state court. Legislative Defendants argue that they are in an

analogous position to the defendants in Alonzo. But, Alonzo is distinguishable on multiple critical fronts. In Alonzo, the plaintiffs' suit was described as a challenge "of the City's use of [the existing] system in its elections," and thus the City properly removed under the refusal clause. 68 F.3d at 946. Alonzo did not discuss the "refusal" element as it applies to legislators in contrast to officials who enforce or implement state law. Alonzo would only be analogous to the instant case if the State Defendants in addition to the Legislative Defendants had sought removal under § 1443, but here the State Defendants oppose removal. Furthermore, the federal consent decree in Alonzo, "mandate[d]" a specific existing "5-3-1 system" in elections, whereas the federal law applicable here does not mandate the specific existing apportionment to the exclusion of no others. See North Carolina v. Covington, 138 S.Ct. 2548, 2555 (2018) ("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.").

The Legislative Defendants similarly rely upon a series of federal cases from the 1970s in which school boards were permitted to remove state-law challenges to school desegregation plans. None of these, however, were removed by legislators or state actors who did not enforce or implement legislation. Indeed, the first of these, Burns, opined that the "refusal" clause of § 1443 conferred the "privilege of removal . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." 302 F.Supp. at 311-12. In Burns, defendant state officials and school board members were "threatened with punishment for contempt if they disobey the order of a state court and refuse to undo their actual and contemplated transfer of teachers on the

ground that to do so would be inconsistent with such federal law." Id. at 312 (emphasis added).[7] Comparison to the instant case is inapt, on both fronts, where plaintiffs do not seek to enjoin Legislative Defendants directly, and where Legislative Defendants are not charged with implementing or enforcing their own legislation. See Wright v. North Carolina, 787 F.3d 256, 262-63 (4th Cir. 2015).

The Legislative Defendants cite several cases for the proposition that removal is appropriate where there is a "colorable conflict between state and federal law." White v. Wellington, 627 F.2d 582, 587 (2d Cir. 1980); e.g., Alonzo, 68 F.3d at 946; New Haven Firefighters Local 825 v. City of New Haven, No. CIV.3:04CV1169(MRK), 2004 WL 2381739, at *1 (D. Conn. Sept. 28, 2004). As an initial matter, this statement of the type of conflict required is a stretch of the language of the removal statute, which references in its text inconsistency only between the act being refused and federal equal protection law. See 28 U.S.C. § 1443(2) (permitting removal of a state civil action "for refusing to do any act on the ground that it would be inconsistent with such [federal equal protection] law") (emphasis added). This distinction is important in the instant context, where it is doubtful there has been a refusal to act within the application of this removal provision on the part of the Legislative Defendants. Where a refusal to act is itself doubtful and uncertain, any conflict

[7] Other school board cases cited by defendants are similar. See, e.g., Mills v. Birmingham Bd. of Ed., 449 F.2d 902, 904 (5th Cir. 1971) (plaintiff teacher sought "to enjoin the Board from transferring her" and obtained the requested injunction from state court prior to removal by defendants); Linker v. Unified Sch. Dist. No. 259, Wichita, Kan., 344 F. Supp. 1187, 1189 (D. Kan. 1972) (plaintiffs sought to enjoin defendant school district from "operating under" and "implement[ing]" a desegregation plan); Bridgeport Ed. Ass'n v. Zinner, 415 F. Supp. 715, 717 (D. Conn. 1976) (plaintiff teachers and association claimed that alleged that three appointments were made by defendant school board and officials in violation of municipal law and contract); Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo, 477 F. Supp. 691, 692 (W.D.N.Y. 1979) (plaintiff teachers sought and obtained state court order "restraining the Board from taking any action" in carrying out teacher hiring and promotions).

between such refusal and federal law also is uncertain. See Stephenson, 180 F.Supp. 2d at 785.

In any event, the cases cited by the Legislative Defendants illustrating a "colorable conflict between state and federal law" are inapposite, because they do not involve a purported conflict between a state constitution and the federal constitution,[8] much less in a state where, as here, the state supreme court has already pronounced that "compliance with federal law is . . . an express condition to the enforceability of every provision in the State Constitution." Stephenson v. Bartlett, 355 N.C. 354 , 375 (2002). In such circumstances, the court adheres to its earlier analysis in Stephenson, finding the purported conflict uncertain and speculative. The court recognizes the detailed arguments on the merits advanced by both the Legislative Defendants and plaintiffs' regarding whether plaintiffs' "view" or "interpretation" of state law can be reconciled with federal law and Covington. (Leg. Defs' Opp. (DE 42) at 14). For purposes of the present jurisdictional determination, however, under which doubts must be resolved in favor of remand, and where it is already doubtful that § 1443(2) applies at all to Legislative Defendants, it suffices that it is uncertain and speculative whether the ultimate relief sought in plaintiffs' complaint in the form of new plans "comporting with the North Carolina Constitution" would conflict with federal law. (Am. Compl. p. 75); see Stephenson, 180 F.Supp.2d at 785.

For all the reasons stated above separately and in combination, Legislative Defendants have

[8] See, e.g., White, 627 F.2d at 585 (plaintiffs asserted violations of a "city charter and civil service rules and regulations, all having the force of state law"); Alonzo, 68 F.3d at 945 (plaintiffs asserted violations of Texas Equal Rights Amendment and Voting Rights Act); Greenberg v. Veteran, 889 F.2d 418, 420 (2d Cir. 1989) (plaintiffs asserted violation of "Village Law," state statute, and First Amendment, against city official); New Haven Firefighters Local 825, 2004 WL 2381739 at *1 (plaintiffs asserted violations of the "Charter of the City of New Haven and New Haven's Civil Service Rules and Regulations"); Buffalo Teachers Fed'n, 477 F. Supp. at 692 (plaintiffs asserted claims, and state court entered injunction, pursuant to "the New York State Education Law" and "the terms of [a] collective bargaining agreement").

.

not demonstrated that removal under 28 U.S.C. § 1443 is proper under the circumstances of this case.

2. 28 U.S.C. § 1441(a)

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court." 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Under the "well-pleaded complaint rule," "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California, 463 U.S. 1, 10 (1983). "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Plaintiffs' action falls squarely within this jurisdictional limitation. Plaintiffs assert solely state law claims under the North Carolina Constitution. Although defendants have asserted a conflict with federal law as a defense to plaintiffs' claims, "it is now 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). Indeed, in both Cavanagh and Stephenson, this court determined that state constitutional redistricting challenges did not arise under federal law, despite defendants' assertion of a conflict with federal law. Cavanagh, 577 F. Supp. at 180; Stephenson, 180 F. Supp. 2d 783-784. In light of this law, removal jurisdiction under § 1441(a) is doubtful.

The Legislative Defendants, nonetheless, contend that federal law is "necessarily raised" here because demonstrating compliance with federal law is an "affirmative element" plaintiffs' claim

or a "prima facie" claim under the North Carolina constitution. "[E]ven where a claim finds its origins in state rather than federal law," the Supreme Court has "identified a special and small category of cases in which arising under jurisdiction still lies." Gunn v. Minton, 568 U.S. 251, 258 (2013). "That is, federal jurisdiction over a state law claim will lie 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." Id.

The premise of Legislative Defendants' argument is flawed, however, because federal law is not an "affirmative element" of plaintiffs' claim or a prima facie case under the North Carolina Constitution. Legislative Defendants rely upon the North Carolina Supreme Court's statement in Stephenson that "compliance with federal law is not an implied, but rather an express condition to the enforceability of every provision in the State Constitution." 355 N.C. at 375. But, a reference to an "express condition to enforceability" is not the same as an element of a claim or prima facie case, and Stephenson says nothing about the elements of a claim or prima facie case under the State Constitution. Moreover, as this court suggested in Stephenson, interpreting all state constitutional redistricting claims in this manner as arising under federal law would result without limitation in "perpetual federal intrusion" in an area where federal-state balance has been carefully crafted by Congress and the Supreme Court. See, e.g., Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.").

Defendants also rely upon N. Carolina by & through N. Carolina Dep't of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 147 (4th Cir. 2017), as an example of a state law claim removable because of a necessary federal question. That case, however, is instructively

distinguishable, where it involved a claim of "state ownership of navigable waters." Id. at 147. In finding jurisdiction, applying a body of Supreme Court precedent in that area of law, the court recognized that "navigability for title" was "governed by federal law" Id. (citing United States v. Utah, 283 U.S. 64 (1931); PPL Montana, LLC v. Montana, 565 U.S. 576 (2012)). "[T]he question of navigability was thus determinative of the controversy, and that is a federal question." Id. (quoting Utah, 283 U.S. at 75). Here, there is no comparable body of Supreme Court precedent stating that the redistricting claims raised by plaintiffs necessarily must be resolved only by reference to federal law.

Therefore, the Legislative Defendants have not met their burden of demonstrating removal jurisdiction under 28 U.S.C. § 1441(a). In sum, where the court lacks jurisdiction under both grounds asserted by the Legislative Defendants, remand is required.[9]

3. Costs and Expenses

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

> 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. Conversely, when an objectively reasonable basis exists, fees should be denied. In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c).

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). Plaintiffs have not demonstrated that

[9] Because the court finds jurisdiction lacking under the removal provisions asserted by the Legislative Defendants, the court does not reach additional arguments plaintiffs raise in support of remand, including procedural defect in removal under § 1441(a); sovereign immunity under Penhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); and judicial estoppel.

they are entitled to costs and expenses, including attorney fees, under the circumstances of this case. The Legislative Defendants did not lack an objectively reasonable basis for seeking removal. Their removal petition sets forth in detail their grounds for removal and they have comprehensively briefed the issues arising from their removal, including with reference to a wide range of case law.

Plaintiffs suggest that an award of fees is warranted because Legislative Defendants' timed their removal to cause "maximum delay and disruption." (Pls' Mem. at 29). However, Legislative Defendants' did not act outside of the time limits set forth in the removal statute. They exercised their rights under that law to assert grounds for removal to this court, and they followed this court's order for expedited briefing on plaintiffs' motion to remand.

In sum, the court declines in its discretion to award costs and expenses in light of both the substance and timing of the removal petition.

CONCLUSION

Based on the foregoing reasons, the court granted plaintiffs motion to remand and denied plaintiffs' request for costs and expenses.

SO NOTICED, this the 7th day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge