Nos. 19–1091(L), 19–1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMON CAUSE, et al.,

Plaintiffs–Appellees–Cross-Appellants

v.

DAVID R. LEWIS, et al.;

Defendants–Appellants–Cross-Appellees,

and

THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT et al.,

Defendants.

Appeal from the United States District Court
For the Eastern District of North Carolina
No. 5:18-cv-00589
The Honorable Louise W. Flanagan

Opening Brief of Defendants–Appellants–Cross-Appellees

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CORPORATE DISCLOSURE STATEMENT

Defendants–Appellants–Cross-Appellees are David R. Lewis, Senior Chairman of the North Carolina House Select Committee on Redistricting; Ralph E. Hise, Jr., Chairman of the North Carolina Senate Committee on Redistricting; Timothy K. Moore, Speaker of the North Carolina House of Representatives; Philip E. Berger, President Pro Tempore of the North Carolina Senate; the North General Assembly; and the State of North Carolina.

None of the Defendants–Appellants–Cross-Appellees is a publicly held corporation, and no publicly owned parent corporation owns any stock in any of the Defendants–Appellants–Cross-Appellees. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Defendants–Appellants–Cross-Appellees are not trade associations.

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PRELIMINARY STATEMENT

In the Civil Rights Act of 1866, Congress enacted a unique federal policy of subjecting certain civil-rights questions to federal-court jurisdiction, even when raised as defenses. The "refusal" clause of that provision, now codified at 28 U.S.C. § 1443(2), contains sweeping language. It authorizes any "defendant" capable of violating "any law providing for equal rights" to remove state-court "civil actions or criminal prosecutions" brought "for [the defendant's] refusing to do any act on the ground that it would be inconsistent with such law." 28 U.S.C. § 1443(2).

Then, in the Civil Rights Act of 1964, Congress added a right of immediate appeal from remand orders rejecting removal under this provision. *See* 28 U.S.C. § 1447(d). Congressmembers cited the "special problem" present in "voting cases" as one basis for immediate appellate scrutiny. 110 Cong. Rec. 2773 (1964) (Lindsay). And they placed particular faith in the courts of appeals to "breathe life into" and "give meaning to" this provision. *Id.* at 2770 (Kastenmeier). They expected the appellate courts to reject "nullifying interpretations" that would render Section 1443 "practically useless"—which they feared was resulting from the "absolute finality given to…remand orders of district judges," *id.* at 6955 (Dodd). Congress also rejected suggestions that Section 1443 itself be made more narrow and specific; it stood by the 1866

language (as later revised) "because…the many and varied circumstances which can and do arise in civil rights matters" justified not "specify[ing] with precision the kinds of cases which ought to be removable" and "allowing the courts to consider the statute" as written in 1866, with its "rather technical nature." *Id.* at 6956 (Dodd).

This case presents one of the varied circumstances directly covered by Section 1443's text—which reaches any *defendant*, *refusal*, and *ground* of *inconsistency* with federal *equal-rights law*. North Carolina has faced five years of extensive, complex Voting Rights Act-related litigation, and the State is currently subject to a federal-court order mandating the use of state house and senate redistricting plans enacted in 2017 under federal-court supervision. The plans are the outcome of multiple Supreme Court and federal-district-court decisions discerning the thorny path between protecting minority equal electoral opportunity under the Voting Rights Act (VRA) and maintaining racial neutrality under the Equal Protection Clause. The "competing hazards" of liability under these provisions are difficult to navigate, *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) (quotations omitted), and it took North Carolina until 2017 to strike the right balance.

Then, in 2018, the state-court plaintiffs ("Plaintiffs") brought this action in North Carolina Superior Court, demanding yet another redistricting, less

than two years before the 2020 census. Their case presses a novel theory of partisan fairness under the North Carolina Constitution and demands radical changes in the demographics of the house and senate plans. The removing parties are officers of the North Carolina General Assembly who represent that body here in their official capacity (collectively, the "General Assembly"). The General Assembly is a state actor capable of violating *law providing for equal rights* and is the real-party *defendant* in a state-court *civil action*. The General Assembly *refuses* to enact Plaintiffs' preferred districting plans into law (which would require an *act* of the General Assembly itself) and to administer them in future elections (which North Carolina, represented here by the General Assembly's named officers, must conduct through administrative *action*).

And the *ground* of this refusal is an asserted *inconsistency* with federal *equal-rights law*. Plaintiffs' demand for new districts directly conflicts with the federal court's order mandating use of the 2017 districts in future elections. Moreover, Plaintiffs' demanded new districts must be, by consequence of their radically changed demographics, of markedly different racial composition, requiring North Carolina to dismantle performing minority crossover districts. Dismantling them on purpose would violate the Fourteenth and Fifteenth Amendments; dismantling them even unintentionally would subject North Carolina to colorable VRA liability. Section 1443(2) therefore entitles the

General Assembly to a federal forum to resolve these disputes of core federal importance.

The district court agreed that the General Assembly's "removal petition sets forth in detail their *grounds* for removal." JA690 (emphasis added). But, in remanding anyway, the court replaced the plain statutory text with a rule of construction. Starting from the premise that doubt favors remand, it proceeded to dismantle the statute piece by piece. The statutory term *defendant* became "law enforcement" officer. JA682. It read into the term *any act* an "enforcement limitation." JA683. The court ignored the term *ground* entirely and required more than "*grounds* for removal," JA690; it instead found the "uncertain" merit of the General Assembly's defenses dispositive. JA685–86. Even though it "recognize[d] the detailed arguments on the merits advanced by" both sides, JA686, it concluded that a federal forum is not available to resolve those very arguments.

The decision renders the statute unrecognizable. Section 1443(2) affords a federal forum for these federal disputes. Because "[t]he petition to remove is analogous to a pleading," *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980), the statute does not render their ultimate resolution in the removing party's favor the gateway to federal court. Reading the clause, as the district court did, to reach "only the clearest federal issues" would deny federal jurisdiction

"where it is most appropriate," when defenses raise "subtle" questions and "difficult issue[s]." *Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 723 (D. Conn. 1976). The federal courts may not close their doors simply because Plaintiffs assert that the General Assembly's position is wrong.

Because removal was proper under Section 1443, the Court should vacate the district court's order remanding the case to state court and order the court to proceed to adjudicate this cause of action, including the General Assembly's defenses, on the merits.

JURISDICTIONAL STATEMENT

The General Assembly asserted jurisdiction in the district court under 28 U.S.C. §§ 1441(a) and 1443(2).[1] The district court had (and this Court has) jurisdiction to decide whether it had jurisdiction. *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 352 (4th Cir. 1998).

The district court's remand order is appealable under 28 U.S.C. § 1447(d), which provides: "[A]n order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

[1] The current statutory language of 28 U.S.C. § 1443, its original language in the Civil Rights Act of 1866, and its language in the Revised Statutes of 1874 are included with other pertinent legal authorities in the attached addendum of legal authorities, cited here as "ALA."

The district court issued its remand order, which creates the right to appeal, on January 4, 2019. The General Assembly filed a timely notice of appeal on January 22, 2019. *See* Fed. R. App. P. 4; JA698.

STATEMENT OF ISSUES

1. Whether the General Assembly, whose officers represent the State of North Carolina itself and are sued in their official capacity, qualifies as a *defendant* entitled to Section 1443(2) removal.

2. Whether *any act* under Section 1443(2) includes an *act* of the General Assembly.

3. Whether the General Assembly, whose officers represent North Carolina as an undivided whole, can *refuse* an administrative or enforcement *act* under Section 1443(2).

4. Whether the *inconsistency* requirement of Section 1443(2) is satisfied by a colorable *ground* of inconsistency.

5. Whether the *inconsistency* requirement is met under the facts of this case.

6. Whether Plaintiffs established their estoppel defense to removal.

7. Whether the General Assembly, whose officers represent North Carolina as an undivided whole, can waive sovereign immunity.

STATEMENT OF THE CASE

I. Factual Background

A. In 2011, new census data required the General Assembly to redraw its house and senate districts to comply with the Equal Protection Clause's one-person, one-vote principle. In that redistricting, the General Assembly interpreted the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that VRA § 2 imposes a "majority-minority" rule, *id.* at 17, to require the creation of majority-minority districts with a black voting-age population, or "BVAP," of at least 50%. Accordingly, the General Assembly included 28 majority-minority house and senate districts in the 2011 plans. The Department of Justice Voting Rights Section precleared the 2011 plans under VRA § 5.

B. In May 2015, residents of the respective majority-minority districts filed suit in the Middle District of North Carolina, *see Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), alleging that the General Assembly's VRA-compliance goal tainted the redistricting with suspect racial intent. "Since the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability." *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quotations omitted). On the one hand, if

racial considerations are "predominant," the redistricting law is subject to strict scrutiny under the Equal Protection Clause. *See Miller v. Johnson*, 515 U.S. 900, 911–17 (1995). On the other, ignoring race may result in districts that "provide[] less opportunity for racial minorities to elect representatives of their choice." *Abbott*, 138 S. Ct. at 2315 (quotations omitted).

The *Covington* plaintiffs alleged that the General Assembly erred in the first respect by drawing 28 majority-minority districts for predominantly racial reasons. They also contended that districts were insufficiently tailored under the VRA to satisfy strict scrutiny because (they claimed) a 50% BVAP target was not necessary to afford the African American communities in these regions an equal opportunity to elect their preferred candidates. The *Covington* plaintiffs presented an expert report by political-science professor Dr. Allen Lichtman opining that African American voters in North Carolina are able to elect "candidates of their choice in districts that are 40 percent or more African American…in their voting age population." *See* JA506.

The Middle District of North Carolina ("the *Covington* court") ultimately sided with the *Covington* plaintiffs. It held both that race predominated and that a 50% BVAP target was not justified on the record before the General Assembly in 2011, which did not contain sufficient evidence of legally significant polarized voting to justify the majority-minority target. The

Covington court found that, although voting in North Carolina *is* racially polarized, the General Assembly did not sufficiently assess in 2011 whether that polarization was "legally significant" by analyzing whether the minority community might be able to elect its preferred candidates in districts below 50% BVAP with the aid of some white "crossover" voters. 316 F.R.D. at 167–69.

The *Covington* court, however, made "no finding that the General Assembly acted in bad faith or with discriminatory intent," and it did not "reach the issue of whether majority-minority districts could be drawn in any of the areas covered by the current districts under a proper application of the law"—i.e., with proof of legally significant polarized voting. *Id.* at 124 n.1. In other words, the State simply erred in navigating the difficult, "competing hazards of liability." *Abbott*, 138 S. Ct. at 2315. The Supreme Court affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

C. The federal injunction against 28 house and senate districts necessitated new maps. The *Covington* court afforded the General Assembly an opportunity to enact remedial maps, and the General Assembly did so. Because "[n]o information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts," the General Assembly did not consider race at the time of

crafting district lines. JA101. But, as a result of the General Assembly's race-neutral goals, approximately two dozen house and senate districts in regions with high concentrations of African American residents were drawn at BVAP levels near or above 40%, the range Dr. Lichtman identified as sufficient to afford African Americans an equal opportunity to elect their preferred candidates. *See* JA46 (identifying these districts). The General Assembly relied on Dr. Lichtman's findings and introduced his reports into the legislative record in support of the 2017 plans as a basis for contending that the remedial plans properly preserved minority electoral opportunity—without resort to suspect racial line-drawing.[2]

In addition to redrawing the 28 invalidated districts and many adjacent districts, the 2017 plans also adjusted districts in Wake and Mecklenburg Counties.

D. The General Assembly presented the 2017 plans to the *Covington* court, which partially accepted and partially rejected them. *See Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018). The *Covington* court rejected four remedial districts to which the *Covington* plaintiffs objected because it found them insufficiently altered from their 2011 forms to serve as

[2] *See* North Carolina General Assembly, Senate Bill 691, 2017 Senate Floor Redistricting Plan, https://www.ncleg.net/Sessions/2017/s691maps/s691maps.html

effective remedial districts. *Id.* at 429–42. The *Covington* court also rejected the changes in Wake and Mecklenburg Counties, even though no objection was lodged against those changes on the ground of their not sufficiently addressing equal-protection violations; instead, the *Covington* court found that these changes violated the North Carolina Constitution. *Id.* at 442–47. The *Covington* court adopted districts drawn by a special master insofar as it was dissatisfied with the General Assembly's remedial maps, but it adopted the remaining remedial legislatively drawn districts. *Id.* at 458.

It then issued a final order, stating: "the Court will approve and adopt the remaining remedial districts in the 2017 Plans for use in future elections in the State." *Id.* It also stated: we "approve and adopt the State's 2017 Plans, as modified by the Special Master's Recommended Plans, for use in future North Carolina legislative elections." *Id.* It further stated: "We direct Defendants to implement the Special Master's Recommended Plans." *Id.* The "Defendants" under that order included the General Assembly's officers. *Id.* at 416.

E. The Supreme Court affirmed in part and reversed in part. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018). It held that the *Covington* court properly exercised authority to review the remedial legislative plans (rather than require the *Covington* plaintiffs to plead and prove a new claim) and that its rejection of four remedial districts as insufficiently altered from their 2011

configurations was not clearly erroneous. *Id.* at 2554. It therefore affirmed the portion of the *Covington* court's order requiring the use of the 2017 plans' remedial districts in future elections. That portion therefore retains full force and effect to this day.

But the Supreme Court held that the *Covington* court committed clear error in rejecting the changes in Wake and Mecklenburg Counties because this rejection had "nothing to do with" the plaintiffs' claim that "they had been placed in their legislative districts on the basis of race." *Id.* at 2554. The Supreme Court therefore reversed the order as to Wake and Mecklenburg Counties. That reversal, however, affected only districts in those counties; as to all other portions of North Carolina, the *Covington* court's order was affirmed. *See id.*

II. Procedural History

On November 13, 2018, Plaintiffs (represented by the *Covington* plaintiffs' lawyers) filed this case in North Carolina Superior Court. They challenge the 2017 plans under North Carolina's Equal Protection, Free Elections, and Free Speech and Assembly Clauses. They contend the 2017 plans "crack" and "pack" Democratic Party voters and thereby concentrate their votes in some districts and minimize their voting strength in others. They assert a state constitutional right to "an equal opportunity to translate their

votes into representation." JA295 (quotations omitted). Plaintiffs sued officers of the General Assembly in their official capacity, the North Carolina State Board of Elections and Ethics Enforcement and its officers in their official capacity, and the State of North Carolina. JA231. Plaintiffs filed an amended complaint on December 7. JA332.

One week later, the General Assembly removed the case to the Eastern District for North Carolina. JA40. The removal notice cited 28 U.S.C. §§ 1441(a) and 1443 as alternative bases for removal. Under Section 1443, the removal notice represented conflicts between Plaintiffs' asserted state-law theories and federal law because (1) districts Plaintiffs challenge include those mandated for use in future elections by the *Covington* court and (2) Plaintiffs' assertion that the "packed" districts must lose Democratic vote share to satisfy the North Carolina Constitution would require new maps that drop BVAP in those districts, given the close correlation between race and political affiliation in North Carolina. JA46–52.

On December 17, 2018, Plaintiffs filed an emergency motion to remand and for attorneys' fees. JA67. They claimed that removal was not proper under Sections 1441 and 1443, that representations made in the *Covington* litigation estopped Plaintiffs from seeking removal, and that North Carolina's sovereign

immunity barred federal-court adjudication of Plaintiffs' state-law claims against North Carolina and the General Assembly.

On January 2, 2019, the district court granted the motion in part and denied it in part. JA673. In its memorandum opinion (issued on January 7), the court concluded that the General Assembly's right to remove is "doubtful" under Section 1443(2) for three reasons: (1) Plaintiffs challenge an "already completed" action, the 2017 plans, negating any *refusal* by the General Assembly, JA681; (2) the General Assembly's officers do not qualify for removal because they are "legislative" officers with no "law enforcement role," JA682; and (3) the inconsistency cited between state and federal law was (it believed) "speculative," JA682 (quotations omitted). The court "recognize[d] that detailed arguments on the merits advanced by both" sides regarding the asserted inconsistency, but concluded that, because "doubts must be resolved in favor of remand," the dispute did not satisfy Section 1443(2).[3] JA686. "Arguments raised by the Legislative Defendants in favor of removal under § 1443 are insufficient to overcome this doubt." JA683. The court did not reach Plaintiffs' estoppel and sovereign-immunity arguments. JA689.

[3] Because the Court lacks jurisdiction over the General Assembly's Section 1441(a) argument, *see Davis v. Glanton*, 107 F.3d 1044, 1047 (3d Cir. 1997), this brief does not address the district court's ruling on that basis of removal.

The court, however, denied Plaintiffs' demand for attorneys' fees, concluding that "[t]he Legislative Defendants did not lack an objectively reasonable basis for seeking removal." JA690. Quite the opposite, "[t]heir 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." *Id.* According to the court, the General Assembly's officers properly "exercised their rights under…law to assert grounds for removal to this court." *Id.*

On January 22, 2019, the General Assembly filed a notice of appeal from the remand order under 28 U.S.C. § 1447(d). JA698. On January 23, 2019, Plaintiffs cross-appealed from the district court's denial of their motion for attorneys' fees. JA701.

The ruling presented in this appeal is the district court's January 2 order granting remand as explained by its January 7 memorandum opinion. JA 671; JA674.

SUMMARY OF ARGUMENT

This case does not occur on a blank slate. It is just the latest challenge to North Carolina's legislative redistricting plans, and the districts under attack reflect an equilibrium the General Assembly achieved with the federal courts as to the proper balance between the State's VRA and equal-protection

obligations. This state-court action threatens that equipoise and creates a host of issues identified by Congress over 150 years ago as core matters of federal concern.

Removal is proper under the "refusal" clause of 28 U.S.C. § 1443(2). Plaintiffs brought this action to obtain, not only an injunction against the 2017 plans, but also new plans that comply with their asserted theory of state constitutional law. That is a demand for affirmative cooperation from North Carolina in the form of new legislation that must be enacted and administered. The General Assembly can (and does) *refuse* to enact Plaintiffs' preferred legislation, and North Carolina—spoken for here by the General Assembly and its named officers—can and does *refuse* to administer it. The *ground* for that refusal is a colorable *inconsistency* between Plaintiffs' preferred redistricting plans, as reflected in their complaint, and *federal law providing for equal rights*—including a federal-court order mandating that the current districts be used in all future elections. The elements of removal, as stated in the statute, are satisfied.

The district court erroneously read additional requirements into the text. It concluded that the General Assembly's *refusal* to enact Plaintiffs' preferred legislation fails to qualify as "enforcement" action, even though the statute references *any act*, including an *act* of the General Assembly. The court also

found that the General Assembly's officers fail to qualify as "law enforcement officers," even though the statute covers any *defendant* capable of state action (i.e., who can violate *any law providing for equal rights*)—which the General Assembly plainly is.

Further, the district court found the General Assembly's alleged *inconsistency* "uncertain," but barely addressed it. The court substituted a rule of construction for plain statutory text, finding its doubt on the General Assembly's ultimate ability to succeed on its defenses sufficient for remand. But Section 1443(2) requires only a *ground* of inconsistency, not proof at this stage. "The petition to remove is analogous to a pleading." *White*, 627 F.2d at 587. The General Assembly satisfied that standard with a "petition set[ting] forth in detail their *grounds* for removal." JA690 (emphasis added).

The dispute over the merit of the General Assembly's defenses is for another day. It is sufficient now that they are colorable. Most obviously, the *Covington* court's final order, which enforces the Equal Protection Clause, mandates that the General Assembly use the 2017 plans in future elections. That alone presents a colorable ground of inconsistency. Moreover, Plaintiffs' complaint inveighs against the political demographics of the 2017 plans, calling many districts "packed" with Democratic constituents. Of necessity, remedying that would-be defect would require removing African American

voters from those districts, given the inextricable link between race and politics in North Carolina. That course of action would, in turn, dismantle performing minority-crossover districts. Dismantling them on purpose would violate the Fourteenth and Fifteenth Amendments; dismantling them even unintentionally would subject North Carolina to colorable Voting Rights Act liability. Section 1443(2) entitles the General Assembly to a federal forum to resolve these disputes of core federal importance that directly impact the equilibrium reached after years of federal-court litigation.

Plaintiffs' other objections to removal fare even worse. Their estoppel positions (which the General Assembly had no obligation to anticipate or plead around) rely on prior representations by the General Assembly that are in no way inconsistent with its assertions here and which otherwise fail the estoppel test. And their position that sovereign immunity bars removal is risible. The General Assembly itself exercises the "sovereign power" of the state, which it can waive. *State ex rel. Ewart v. Jones*, 21 S.E. 787, 787 (N.C. 1895). Plaintiffs cannot colorably claim to assert the General Assembly's own sovereignty against it. State law empowers the General Assembly to represent North Carolina in state and federal court, and this authorizes waiver of immunity, which would be effectuated by a successful removal.

STANDARD OF REVIEW

This Court reviews questions concerning removal to federal court *de novo*. *Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 203 (4th Cir. 2006).

This Court reviews questions of statutory interpretation *de novo*. *United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

ARGUMENT

I. Removal Is Proper Under 28 U.S.C. § 1443(2)'s "Refusal" Clause

The "refusal" clause of Section 1443(2) entitles the General Assembly to a federal forum for this case. That provision authorizes "the defendant" to remove a "civil action[]" "for refusing to do any act on the ground that it would be inconsistent with" a "law providing for equal rights." 28 U.S.C. § 1443(2), ALA1.

Those elements are satisfied. The General Assembly is plainly a *defendant*, since its officers have been sued in their official capacities and, in those capacities, represent the entire body. *See, e.g.*, *Adams v. Ferguson*, 884 F.3d 219, 225 (4th Cir. 2018) ("[S]uits against state officers generally represent only another way of pleading an action against an entity of which an officer is an agent.") (quotations omitted). The General Assembly *refuses* both to implement Plaintiffs' asserted theories of state law into new redistricting legislation and to enforce any plan a state court may otherwise impose under Plaintiffs' criteria. Both of these refusals qualify as omissions, choices not to act. And both are

omissions *to do any act* because: (1) to codify Plaintiffs' state-law theory into a new redistricting plan would require, in the strictest sense, an *act* of the General Assembly, and (2) to enforce a plan would require the affirmative *act* of implementation, which the State of North Carolina (represented here by the General Assembly and its officers) would be required to accomplish. Further, the *ground* for the General Assembly's refusal is that Plaintiffs' preferred districting plans would, if enacted and implemented, be *inconsistent* with *law providing for equal rights*, the Equal Protection Clause, the Fifteenth Amendment, and the Voting Rights Act. *See Greenberg v. Veteran*, 889 F.2d 418, 423 (2d Cir. 1989) (allowing Section 1443(2) removal under the Equal Protection Clause); *Cavanagh v. Brock*, 577 F. Supp. 176, 180 (E.D.N.C. 1983) (Voting Rights Act and Equal Protection Clause). Removal is therefore proper.

The district court found the General Assembly's removal right "doubtful" only because it read new, atextual requirements into the statute. First, it concluded that a refusal to undo an act "already completed" and replace it with a new one is not a *refusal*. JA681. Second, it concluded that the General Assembly's "legislative role" disqualifies its officers from coverage under the statute, which it read to reach only "law enforcement" officers. JA682. And third, it believed the General Assembly's asserted conflict between Plaintiffs' state-law theory and federal law does not qualify under the refusal

clause because its merit remains "uncertain." JA685–86. Each holding is legally erroneous.

A. The General Assembly Has *Refused* an *Act*

Although Plaintiffs challenge the 2017 plans as "unconstitutional and invalid," that is not the sum total of their case. They also demand that the state court "order that new, fair maps be used for the 2020 elections." JA335. Unlike a case seeking only an injunction prohibiting state action—such as an injunction against a restraint on speech—Plaintiffs' cause of action will require affirmative state cooperation to achieve their full panoply of hoped-for relief. JA408 (demanding "new state House and state Senate districting plans that comply with the North Carolina Constitution").

A *refusal* under § 1443(2) can come in the form of the "removing defendant's refusal to follow plaintiff's interpretation of state law because of a good faith belief that to do so would violate federal law." *White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980) (quotations omitted). Accordingly, it is well established that opposition to enacting and administering a new legislative regime is a *refusal* under Section 1443(2).

In *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995), plaintiffs brought a state-law challenge to a city's 5-3-1 school-board districting plan; the city refused to adopt "some other system" compliant with the

plaintiffs' state-law theory. *Id.* The city's ground for refusal was that a federal-court consent decree in VRA litigation ratified the 5-3-1 system and that departing from it would violate the consent decree. The Fifth Circuit concluded that this rejection of plaintiffs' state-law arguments was a *refusal* and affirmed Section 1443(2) removal.

Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983), reached a similar result. The state-court plaintiffs there asserted that numerous districts in North Carolina's 1980-cycle redistricting plans violated the North Carolina Constitution's whole-county provision. The State defended on the ground that implementing the whole-county provision into a new map would require the State to violate the VRA. This too was a *refusal*. *See also Voketz v. City of Decatur, Ala.*, 5:14-cv-540, ALA13, DE 24 at 7–17 (N.D. Ala. Aug. 19, 2014) (granting Section 1443 removal in action seeking new districting scheme).

Indeed, Plaintiffs' demand for new redistricting legislation directly parallels the relief sought in desegregation cases—where refusal to create a new regime (in violation of federal law requiring desegregation) has repeatedly been held to amount to a refusal warranting removal under Section 1443(2). *See, e.g.*, *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 437 F.2d 1143, 1144 (7th Cir. 1971); *Linker v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 344 F. Supp. 1187, 1195 (D. Kan. 1972); *Mills v. Birmingham Bd. of Ed.*, 449 F.2d 902, 905 (5th Cir.

1971); *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691, 694 (W.D.N.Y. 1979). Thus, just as state officials who "refuse to undo their actual and contemplated transfer of teachers" have satisfied the refusal element, *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 312 (S.D. Ind. 1969), so too does the General Assembly, which refuses to enact and administer Plaintiffs' new plans. *See also Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 719–22 (D. Conn. 1976) (discussing these cases).

The *refusal* in this case is no different. First, the General Assembly can (and does) refuse to enact Plaintiffs' preferred plans. Second, North Carolina, represented here by the General Assembly's officers, can and does refuse to administer them.

1. The General Assembly *Refuses* To Enact Plaintiffs' Preferred Plans

The General Assembly's choice not to enact Plaintiffs' preferred plans is a *refusal*. It mirrors in all material respects the refusals in *Alonzo* and *Cavanagh*. In both cases, the plaintiffs desired new redistricting plans to conform with their theories of state law, the enactment of which would be a legislative prerogative.

In rejecting this position, the district court concluded that the *refusal* element reaches only a choice not to "use" or "enforce," rather than enact, the Plaintiffs' alternative redistricting scheme. JA684. That it not at all clear from

the above-cited cases, none of which distinguish the act of legislating from the act of administering the demanded relief. If the district court's interpretation were correct, some type of analysis of the various defendants (e.g., school boards and city councils) and their respective legislative versus administrative functions would have been necessary. These cases draw no such distinction.

More importantly, the statute's plain language is to the contrary. *See United States v. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003) (statutory interpretation "begin[s] with the language of the statute" and "must cease if the statutory language is unambiguous" (quotations omitted)). Section 1443(2) does not limit refusal to any enforcement context; it references a refusal "to do *any act*." 28 U.S.C. § 1443(2) (emphasis added). "[T]he phrase 'any act' should be read literally, without limitation." *Bridgeport Ed. Ass'n*, 415 F. Supp. at 722; *see also White*, 627 F.2d at 586 ("We adopt generally the analysis of *Bridgeport Ed. Ass'n v. Zinner*"). New legislation codifying Plaintiffs' preferred districts would be, in the strictest sense, an *act* of the General Assembly. An *act* includes any "exertion of power," any "deed," and, in fact, any "result of public deliberation, or…decision of a prince, legislative body, council, court of justice," such as "an *act* of parliament, or of congress." American Dictionary of the English Language ("Webster's 1860") 15 (1860) (emphasis in original); *see also* American Dictionary of the English Language, Webster's Dictionary of

1828—Online Edition ("Webster's 1828")[4] (same); 1 Oxford English Dictionary ("Oxford") 123 (2d ed. 1989) ("Something transacted in council, or in a deliberative assembly; hence, a decree passed by a legislative body."). Although the term is also broad enough to include executive enforcement actions as well, the word *any* denotes "indifference as to the particular one or ones that may be selected." 1 Oxford 538. Thus, that additional meaning does not negate the statute's reach to legislative *acts*.

The district court also believed that, because Plaintiffs do not necessarily demand a legislatively enacted map on pain of contempt—they seek, in the alternative, a court-implemented map—there can be no *refusal*. JA682, JA684–85. But this also reads new words into the statute. A *refusal* can occur as a matter of plain language without a threat of contempt. The term means "[t]o deny a *request*, demand, *invitation*, or command; to decline to do or grant what is *solicited*, *claimed*, or commanded." Webster's 1860 at 927 (emphasis added); *see also* Webster's 1828[5] (defining "refusing" as "[d]enying; declining to accept; rejecting").

The direct object of *refusing to do* is *any act*; the statute does not tie a refusal to a particular punishment. Here, the *act* of legislation can be refused.

[4] http://webstersdictionary1828.com/Dictionary/act.

[5] http://webstersdictionary1828.com/Dictionary/refusing.

Plaintiffs ask for a state-court-drawn map "if the North Carolina General Assembly fails to enact" their preferred map. JA408. The term *fails* here could as easily be *refuses*. Under state law, the state court must (if Plaintiffs win) afford the General Assembly an "opportunity to enact new redistricting plans" implementing Plaintiffs' state-law theory. *Stephenson v, Bartlett*, 562 S.E.2d 377, 398 (N.C. 2002). The General Assembly can *refuse* that opportunity. *See* 13 Oxford 495 (defining "refuse" to include "[t]o decline to take or accept (something offered or presented)" as in "he refoysitt [that] curtassy" (using quoting usage from circa 1425)). Moreover, if Plaintiffs are successful and the General Assembly does not enact new legislation, the state court will seize the General Assembly's sovereign function and enact redistricting plans of its own, substituting itself as North Carolina's legislature and exercising the people's sovereignty in the General Assembly's stead. *See, e.g.*, *Stephenson*, 562 S.E.2d at 398. That invasion of core sovereign prerogative surely satisfies any coercive element that might be implied in (but is by no means obvious from) the term *refuse*.

2. North Carolina, Represented by the General Assembly's Officers, *Refuses* To Administer Plaintiffs' Preferred Plans

A second *refusal*, supporting an independent basis of removal under Section 1443(2), is North Carolina's refusal to administer Plaintiffs' preferred redistricting plans, whoever enacts them. This qualifies even under the district

court's stilted reading of Section 1443(2) because the court recognized that a state can refuse to undertake an executive *act*. It erred on this point because it failed to appreciate that the General Assembly's officers represent North Carolina as an undivided whole for this purpose.

Even if Section 1443(2) contains an enforcement limitation, the General Assembly's officers—the Speaker of the House and President Pro Tempore of the Senate—represent and litigate on behalf of North Carolina in this case, and North Carolina can refuse to administer a new redistricting plan. The district court conceded as much in addressing *Cavanagh v. Brock*, which "describes the action" at issue in that case "as 'seeking declaratory and injunctive relief restraining the State of North Carolina from *implementing* the reapportionment plans." JA683 (quoting 557 F. Supp. at 176, 179) (emphasis added by the district court). A state can *refuse* to implement a redistricting scheme, even one enacted by a court, so North Carolina here is no different from North Carolina in *Cavanagh* and no different from the City of Corpus Christi in *Alonzo*. Moreover, a state's refusal to implement and administer a court-ordered regime would certainly be punishable by contempt.

The General Assembly speaks for North Carolina by virtue of North Carolina General Statute § 1-72.2, which defines the "Speaker of the House of Representatives and the President Pro Tempore of the Senate, as agents of the

State" and provides that, "when the State of North Carolina is named as a defendant…, both the General Assembly and the Governor constitute the State of North Carolina." Another statute, North Carolina General Statute § 120-32.6(b), provides that, in a case where "the validity or constitutionality of an act of the General Assembly…is the subject of an action in any State or federal court," the House Speaker and President Pro Tempore are "agents of the State through the General Assembly," and "the General Assembly shall be deemed to be the State of North Carolina to the extent provided in G.S. 1-72.2(a)." It also affords the General Assembly "final decision-making authority with respect to the defense of the challenged act." *Id.* Under these provisions, the General Assembly asserts the prerogatives of North Carolina as an undivided whole.[6]

Because North Carolina is "able to designate agents to represent it in federal court," *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013), the district

[6] The North Carolina Attorney General and the State Board of Elections and Ethics Enforcement apparently believe Section 1-72.2 does not empower the General Assembly to represent North Carolina because it also empowers the Governor to do so. But that empowerment in no way detracts from the very same statute's empowerment of the General Assembly. The General Assembly, not the Attorney General, possess "final decision-making authority," and the Attorney General is bound to honor its wishes because the General Assembly is the Attorney General's "client." N.C. Gen. Stat. § 120-32.6(b). Moreover, the statute expressly contemplates representation by "both" the legislative and executive branches, empowering the General Assembly to represent the State as an undivided whole. N.C. Gen. Stat. § 1-72.2(a).

court should have deferred to this state-law designation. It erred in failing to appreciate what party is responsible for the *refusal* at issue. This was odd because it stated elsewhere in its opinion that "[a]ll…filings by the Legislative Defendants in this court have been made also on behalf of the State of North Carolina…." JA677. The General Assembly's officers do not, for purposes of this case, exercise "only a legislative role"; they act for the State itself, which can as easily refuse to administer a redistricting plan as to legislate one.

B. The General Assembly, Which Speaks for the State Itself, Qualifies as a *Defendant* Capable of Violating *Equal-Rights Law*

The district court committed a similar error in concluding that the "action is not removable by the Legislative Defendants because they have only a legislative role, rather than a law enforcement role." JA682. This is doubly wrong.

1. The General Assembly Is a *Defendant* Capable of State Action

The holding again ignores the statute. None of the operative words—*defendant*, *refusing*, *any act*, *ground*, *inconsistency*, or *equal-rights law*—contain an executive-enforcement limitation. A *defendant*, of course, is any "person sued in a civil proceeding or accused in a criminal proceeding," *Defendant*, Black's Law Dictionary (10th ed. 2014), and the General Assembly was sued in this case through its named officers. Further, as discussed, *any act* includes a

legislative act. And, although the requirement of a *ground* of *inconsistency* with *equal-rights law* implies a state-action requirement, legislation constitutes state action as much as does executive enforcement. *See The Civil Rights Cases*, 109 U.S. 3, 11 (1883). Accordingly, nothing in the statute's text implies an executive-enforcement limitation.

The district court read an "enforcement limitation" into this text from decisions holding that the "refusal" clause "was intended to apply to 'state officers who refused to enforce' state laws." JA682 (quoting *Baines v. City of Danville, Va.*, 357 F.2d 756, 759 (4th Cir. 1966)); *see also City of Greenwood, Miss v. Peacock*, 384 U.S. 808, 824 n.22 (1966). But these cases reference only the above-described state-action requirement; they do not support an executive-officer requirement when state action is otherwise involved (or, to be precise, *refused*). In limiting the statute to "state officers," these precedents distinguish (1) state officers (who qualify) from federal officers (who do not), *Peacock*, 384 U.S. at 824 n.22, and (2) state officers (who qualify) from private citizens (who do not), *Baines*, 357 F.2d at 772. Potential distinctions between and among officers within the state governments were not at issue in those cases. Thus, although some language in *Baines* references state officers' "refusal to enforce state law," 357 F.2d at 772, that loose verbiage does not control. *Stare decisis* depends on what is before a court, and "the language and general expressions

in an opinion should be limited to the particular facts and issues involved and must be construed in light of the issues presented and considered." *Mut. Benefit Health & Accident Ass'n v. Bowman*, 99 F.2d 856, 858 (8th Cir. 1938); *see also Ameur v. Gates*, 759 F.3d 317, 324 (4th Cir. 2014) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." (quoting *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012))); *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944) ("It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."); *United States v. Nolan*, 136 F.3d 265, 269 (2d Cir. 1998). In fact, the district court conceded that the statements it relied on are "dicta." JA682.

Indeed, most of the enforcement language in controlling precedent concerns the "color of authority" clause of Section 1443(2), which the Supreme Court has distinguished from the "refusal" clause. *See Peacock*, 384 U.S. at 824 n.22. In discussing that distinct clause, the Supreme Court observed that, although the current version references "any act under color of authority," its 1866 predecessor referenced "any arrest or imprisonment or other trespasses or wrongs" under color of legal authority. *Id.* at 821 (quoting Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (1866)). Because "[t]he language…is pre-eminently the language of enforcement" and because

subsequent codifications and revisions were intended to be stylistic, not substantive, the "color of authority" clause reaches "federal officers, seeking to enforce the broad guarantees of" equal-rights law. *Id.* at 822. That explains the Supreme Court's focus on enforcement in *Peacock*.

But the "refusal" clause never contained that enforcement language; it has always referenced "any act." Civil Rights Act of 1866, ch. 31, § 3; ALA2–3. The statutory reference to "any arrest or imprisonment or other trespasses or wrongs" was contained solely in the "color of authority" clause, so the reasoning of *Peacock* does not reach the "refusal" clause.[7] To the contrary, the use of differing language in adjacent provisions signals different meanings. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (internal quotation marks and citation omitted)). Moreover, the Supreme Court has interpreted the "color of authority" and "refusal" clauses differently, reading the former to reach federal officers and the latter to reach state officers. *Peacock*, 384 U.S. at 824 & n.22.

[7] *Peacock* and *Baines* both addressed the "refusal" clause in only a cursory fashion, focusing predominantly on the "color of authority" clause.

So there is no reason for any executive-officer limitation in the "color of authority" clause to transfer to the "refusal" clause.[8]

The only other authority the district court cited for its executive-officer limitation is *Wolpoff v. Cuomo*, 792 F. Supp. 964 (S.D.N.Y. 1992), a case concluding that an action against individual "legislators" could not be removed under Section 1443. But, in that case, the legislators "strenuously object[ed]" to removal by their co-defendant and were entitled to immunity. 792 F. Supp. at 965. That immunity prevented federal-court adjudication of the action. The court had no occasion to consider a case like this, where a legislative body willingly seeks removal.

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[8] Possibly, the long-since-repealed 1866 statute's coverage of "any officer, civil or military, or other person" carries forward to the currently in-force "refusal" clause, but a legislative officer is an *officer*, not to mention a *person*. *See Officer*, Black's Law Dictionary (10th ed. 2014) ("Someone who holds an office of trust, authority, or command"); 1 U.S.C. § 1 ("'officer' includes any person authorized by law to perform the duties of the office"); N.C. Gen. Stat. § 147-1 ("public officers of the State are legislative, executive, and judicial"); N.C. Gen. Stat. § 147-2 (defining "legislative officers" to include "Fifty Senators; One hundred and twenty members of the House of Representatives; [and] A Speaker of the House of Representatives."); N.C. Gen. Stat. § 14-16.6 (criminalizing assault on "any legislative officer…"); N.C. Gen. Stat. § 14-16.7 (criminalizing threats to same); *McCullough v. Scott*, 109 S.E. 789, 793 (N.C. 1921) ("State officers are those whose duties concern the state at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the state." (quotation omitted)); *Luther v. Borden*, 48 U.S. (7 How.) 1, 1 (1849) (referencing "members of the Legislature, and other officers"); *Chouteau v. Molony*, 57 U.S. (16 How.) 203, 209 (1853) (referencing an "officer, whether executive, legislative, judicial, or special").

Moreover, *Wolpoff* held only that Congress did not "intend[] that the statute could or should be used by legislators sued solely because of their refusals to cast votes in a certain way." *Id.* at 968; JA682 (quoting this language). That holding may make sense, given that legislators' individual votes on legislation are not state action. But *equal-rights law* does prevent legislative bodies from enacting certain laws. *The Civil Rights Cases*, 109 U.S. at 11. Thus, the individual legislators' individual votes in *Wolpoff* are not analogous. The General Assembly does not "cast votes in a certain way"; it *acts* through legislation. That is state action, and *Wolpoff* does not address it.

Ultimately, the district court's ruling on this point, as on others, was one of "doubt," not of statutory interpretation. JA682. It cited the absence of case law allowing "legislators" to remove under Section 1443(2) as a principal basis of this doubt. JA683. But the analysis, even with the presumption against removal, requires interpreting the statute. This is not like a "fair warning" qualified-immunity analysis that looks to factually analogous precedent.[9] The statute itself controls and determines what is and is not a doubtful basis of removal, and the district court barely referenced it.

Besides, numerous analogous legislative officers or entities, such as school boards and city councils, have removed cases (or been allowed to try)

[9] *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

under Section 1443(2). *See, e.g.*, *Buffalo Teachers Fed'n*, 477 F. Supp. at 694 (city board of education); *Bridgeport Ed. Ass'n*, 415 F. Supp. at 720 (school-board officials); *Burns*, 302 F. Supp. at 311–12 (board of school commissioners); *Sexson v. Servaas*, 33 F.3d 799, 803 (7th Cir. 1994) (city council). The General Assembly is no different.

2. North Carolina, Represented by the General Assembly's Officers, Possesses an Enforcement Role

In any event, the district court was wrong that the General Assembly has "only a legislative role, rather than a law enforcement role," for reasons stated above. The General Assembly's officers do not participate as individual legislators. In representing the General Assembly, they "constitute the State of North Carolina," which they represent as an undivided whole. N.C. Gen. Stat. § 1-72.2(a); N.C. Gen. Stat. § 120-32.6(b). The district court therefore failed to appreciate the unique status of these defendants under state law, which includes an enforcement role.

C. There Is a Colorable *Inconsistency* Between Plaintiffs' State-Law Theory and Federal *Law Providing for Equal Rights*

There are multiple "colorable conflict[s]" between Plaintiffs' state-law theory and federal *equal-rights law*. *White*, 627 F.2d at 586–87. And it is not entirely clear that the district court disagreed. It rejected the colorable-conflict test applied in other circuits, improperly substituting a rule of construction—

that removal statutes are narrowly construed—for the statutory language itself—which requires only a *ground*, not proof, of *inconsistency*—and thereby rejected the *grounds* the General Assembly offered.

But the General Assembly's *grounds* of removal are just that: colorable positions that Plaintiffs' state-law theory cannot be implemented in North Carolina's redistricting plans consistent with federal civil-rights law. First, the 2017 plans are mandated by a federal-court order enforcing the Equal Protection Clause, and Plaintiffs seek a state-court order requiring North Carolina to violate that mandate. Second, Plaintiffs' theory of partisan fine-tuning requires radical alterations of the racial composition of numerous legislative districts, creating plain conflict with North Carolina's duties under the Equal Protection Clause, the Fifteenth Amendment, and the VRA. The General Assembly therefore refuses to implement Plaintiffs' theory on the *ground* of its *inconsistency* with federal *equal-rights law*.

1. The District Court Applied the Wrong Standard

The district court misconstrued the governing test in rejecting a "colorable conflict" standard. JA685. The court apparently concluded that "*the act*" itself must "be inconsistent" with federal equal-rights law, *id.*, and therefore found it insufficient that the General Assembly's "advanced"

"detailed arguments" that "plaintiffs' 'view' or 'interpretation' of state law" cannot be "reconciled with federal law," JA686.

But the district court ignored the word *ground*. The statute does not restrict removal to cases where *inconsistency* is shown or proven; it authorizes removal where a *ground* of *inconsistency* is alleged. This points to "a good faith belief," albeit "tested objectively"—in other words, a colorable-basis test. *White*, 627 F.2d at 587. In this sense, *ground* means "that which supports any thing"—as in "[t]his argument stands on defensible *ground*"—and "primary reason, or original principle"—as in "the *grounds* of his complaint." Webster's 1860 at 522. That is, the term references "a circumstance on which an opinion, inference, argument, statement, or claim is founded, or which has given rise to an action," including "what is alleged" as a "valid reason" or "justifying motive"—as in "my grounds for doing so shall soon be stated explicitly." 6 Oxford 876 (quoting usage from 1895); *id*. ("Hee refus'd; his grounds I know not." (quoting usage from 1657)).

By predicating removal on a *ground*, not proof, of inconsistency, Congress identified the federal courts as a proper forum for adjudicating colorable federal defenses. "The petition to remove is analogous to a pleading." *White*, 627 F.2d at 587. The statute subjects properly identified

issues to federal-court jurisdiction; it does not render resolution of those issues in the removing party's favor a predicate to jurisdiction.

The statute therefore extends federal jurisdiction, which would normally reach only claims, to "particular federal defense[s]" deemed sufficiently core to the federal scheme to justify federal jurisdiction. *Bridgeport Ed. Ass'n*, 415 F. Supp. at 723 n.7. The statute reaches beyond "the most dramatic circumstance[s]" or conflicts "apparent on the face of [state] statutes." *Id.* at 722–23. It also reaches "subtle cases" because they too merit federal resolution.[10] That is why the weight of authority favors a "colorable conflict" standard, not a standard of solid proof at the removal stage. *Greenberg*, 889 F.2d at 421–22; *Alonzo*, 68 F.3d at 946.

The district court rejected this approach because it viewed it as conflicting with the principle that removal statutes are to be construed narrowly. Were a "colorable conflict" standard applied, it said, "doubts" would incorrectly be resolved in favor of removal. JA685–86. That was erroneous. The principle that doubt favors remand is one of construction and cannot replace the plain language itself. *See Davidson Transfer & Storage Co. v.*

[10] For example, the district court observed that the North Carolina Supreme Court will not construe the State's Constitution as being in conflict with federal law. JA686. But the North Carolina Supreme Court may have a different notion of what federal law requires than the federal courts will have. Section 1443 directs the question itself to federal, not state, courts.

Teamsters Pension Tr. Fund of Philadelphia & Vicinity, 817 F.2d 1121, 1124 (4th Cir. 1987) ("a rule of…construction does not allow a court to disregard the plain language of the statute"). Under the plain language, a *ground* triggers a removal right, so a principle of construction cannot override the term *ground* by requiring an actual showing of inconsistency. A colorable-conflict test honors the plain language; the district court ignored it.

2. There Is a Colorable *Inconsistency* Between Plaintiffs' Demand for New Maps and the *Covington* Court's Order Mandating Use of Existing Maps

The General Assembly refuses to act on Plaintiffs' demand to enact or administer "new…districting plans," JA408, because that would violate a federal court order enforcing the Equal Protection Clause. A conflict between state law and a federal-court order enforcing equal-protection law qualifies as a colorable conflict under Section 1443(2). *See, e.g.*, *Buffalo Teachers Fed'n*, 477 F. Supp. at 694; *Armeno v. Bridgeport Civil Serv. Comm'n*, 446 F. Supp. 553, 558 (D. Conn. 1978) ("[T]he state officer defendant caught between conflicting requirements of state law and a federal injunction can always remove pursuant to the 'refusal to act' clause of s 1443(2).").

For example, in *Alonzo*, the court found a conflict between a federal consent decree requiring a city's use of one districting map and the plaintiffs' advocacy for "some other system" because it would place the city in the

"'intolerable position' of having to choose which of the conflicting court orders to follow in upholding its residents' civil rights." The court reasoned if the "case were decided by the state court in favor of the plaintiffs," then "*[a]ny challenge* of the City's use of [the federal court-ordered] system in its elections necessarily implicates the rights of all voters…and could change the balance of rights that the federal court found required the 5-3-1 system." 68 F.3d at 946 (emphasis added).

This case is no different. The *Covington* court's final judgment ordered North Carolina to use in future elections many of the districts challenged in this case. After 28 districts were invalidated because race (i.e., the goal of creating majority-minority districts) predominated and the General Assembly did not collect sufficient data to justify the majority-minority goal, the *Covington* court supervised the General Assembly's enactment of the very districts challenged here. The *Covington* court supplemented a handful of those districts with districts drawn by a special master. That package—the legislatively drawn and special-master-supplemented districts—was adopted by the *Covington* court for future elections. *Covington*, 283 F. Supp. 3d at 458.

The district court misconstrued the *Covington* ruling by holding that it does "not mandate the specific existing apportionment to the exclusion of no others." JA684. Nothing could be more contrary to the *Covington* order:

"Therefore, the Court will approve and adopt the remaining remedial districts in the 2017 Plans for use in future elections in the State." *Id*. The *Covington* court reiterated: "We direct Defendants to implement the Special Master's Recommended Plans." *Id.* There is no difference between the order in *Alonzo* mandating a "specific" districting map and this order, which also mandates a specific districting map.

The district court's only basis for disagreement was an out-of-context squib from the Supreme Court's partial reversal on appeal, where it stated "[o]nce 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." *Covington*, 138 S. Ct. at 2555. But that holding had nothing to do with the defense raised here. The Supreme Court did not hold that a federal district court cannot order a state to use specific legislative districts; in fact, it affirmed the *Covington* order requiring North Carolina to use certain districts drawn by the special master. Instead, the Supreme Court held that gratuitous redistricting changes the *Covington* court imposed in parts of the state unaffected by its equal-protection liability ruling (i.e., in Wake and Mecklenburg Counties) were beyond the scope of its remedial authority. This simply meant that special-master proposals having "nothing to do" with the liability ruling could not be enforced. But the districts

within the *Covington* court's purview could be, and were, ordered for future use. That is why the Supreme Court "affirmed in part and reversed in part." *Id.* at 2555. It affirmed on the ground relevant here.

Besides, this very dispute illustrates the need for a federal forum. The General Assembly's defense depends on an interpretation of two federal-court opinions, one of which directly mandates the use of a court-ordered redistricting map. Interpreting those opinions—and, if appropriate, relieving North Carolina of its obligation to comply with a federal-court order—should be the province of the federal courts, and the analysis should be conducted at a stage where a full understanding of Plaintiffs' demanded relief (their characterizations of which have been a moving target) and the General Assembly's defenses have been fully developed.

3. There Is a Colorable *Inconsistency* Between Plaintiffs' Preferred Redistricting Maps and the Civil War Amendments and Voting Rights Act

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

Although Plaintiffs insisted in their remand filings that they only object to the General Assembly's (alleged and unproven) partisan intent, they in fact want more from this case than repentance in legislators' hearts and minds. They want a map constituted very differently from the maps they challenge. The political composition of districts must, in their view, be different, and that means the General Assembly—to comply with their state-law theory—must draw districts with markedly different demographics. Plaintiffs will insist that trillions of maps can satisfy their tastes. (If they are so indiscriminate, why is the current map not to their liking?) But their pleadings reveal otherwise. The range of maps to remedy the violation they allege is exceptionally narrow.

Plaintiffs' state-law theory, as stated in their pleadings as opposed to their radically different remand filings, requires the General Assembly to dismantle minority "crossover" districts. Plaintiffs complain that the current map contains two types of districts, neither of which suits their state-law propositions. There are districts "packed" with Democratic constituents at high percentages, and there are districts that "crack" Democratic constituents across several districts at low percentages. *See, e.g.*, JA337 (identifying district as "packed"); JA339 (same); JA340 (same); JA341 (same), *see also* JA338 (identifying various districts as "cracked"); JA339 (same); JA340 (same); JA341 (same). The "packed" districts, in Plaintiffs' view, have too many

Democratic voters; the "cracked" districts have too few. Their assertion is that the North Carolina Constitution requires a more balanced share of Democratic voters so that the two major political parties have "substantially equal voting power," JA401 (quotations omitted), or, in other words, so that "all voters have an equal opportunity to translate their votes into representation," JA403; JA404 (quotations omitted).

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

The civil-rights implications of enacting and enforcing this remedy are profound. The supposedly packed districts are ones that currently empower North Carolina's African American communities to elect their preferred candidates, a central guarantee of the VRA and (in a more limited way) the Fourteenth and Fifteenth Amendments. Because (1) BVAP in these districts is near or above 40% and (2) voting patterns reflected in Dr. Lichtman's reports enable African American-preferred candidates to win in districts near or above 40% BVAP, they qualify as performing minority "crossover" districts. Plaintiffs do not explain how Democratic constituents can be removed without drawing down BVAP. Nor would any such explanation make sense when tampering with Democratic vote share necessarily means tampering with the minority community's electoral prospects. Plaintiffs' theory means BVAP can only go down in these districts.

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

a. Dismantling a crossover district would be inconsistent with the Fourteenth and Fifteenth Amendments (and the VRA). A crossover district is one in which "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."

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

The intent element of this constitutional violation would be met under these circumstances. That element does not require "any evidence of race-based hatred." *N.C. State Conference of NAACP*, 831 F.3d at 222. Under this Circuit's precedent, a motive to impact one party's political power, where race and politics correlate—as it does in North Carolina— qualifies as racial intent. *Id.* Nor would the compulsory order of the state court immunize the resulting

redistricting legislation from an intent-based claim. *See Abbot v. Perez*, 138 S. Ct. 2305, 2327 (2018).

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

b. Dismantling a crossover district would be inconsistent with the VRA. Many of the districts Plaintiffs challenge as "packed" with Democratic constituents enable the minority community to elect its preferred candidates. *See Voketz*, 5:14-cv-540, ALA 13–23, DE 24 at 7–17 (affirming removal where state-law theory created colorable conflict with Section 2 due to local demographics).

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

These districts are therefore critical under Section 2. That is especially so since separate federal-court rulings have squeezed North Carolina into a tight corner. On the one hand, the *Covington* court found that the State erred in creating majority-minority districts without sufficient evidence of legally significant racially polarized voting to justify 50% BVAP districts. On the other hand, this Court in 2016 found "that racially polarized voting between African Americans and whites remains prevalent in North Carolina." *N.C. State Conference of NAACP*, 831 F.3d at 225. These holdings place the State between the proverbial rock and hard place: Section 2 plaintiffs can cite the Fourth Circuit's finding of severe polarized voting and, presumably, mount evidence to support that finding, and Equal Protection Clause plaintiffs can cite *Covington*'s finding that North Carolina lacks sufficient evidence of legally significant polarized voting to justify 50% BVAP districts. These rulings expose the State to "the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017) (quotations omitted).

The 2017 plans, however, navigate the tension between *Covington* and *NAACP* by maintaining approximately two dozen crossover districts of near or above 40% BVAP. These districts are a shield to VRA § 2 claims by affording the equal opportunity the statute guarantees. They also are a shield to racial-

gerrymandering claims because (1) the General Assembly did not use racial data to create them and (2) they maintain BVAP levels identified by Dr. Lichtman's reports as appropriate to afford racial equality in voting at current levels of polarized and crossover voting. But Plaintiffs' demand that the General Assembly drop BVAP in these districts because they are (in Plaintiffs' view) "packed" with Democratic constituents undermines this proper exercise of "legislative choice or discretion," *Strickland*, 556 U.S. at 23, and exposes the State to a VRA § 2 claim by any plaintiff willing and able to prove legally significant polarized voting. Or else, it exposes the State to an equal-protection claim if the General Assembly uses racial data to target only white voters for removal from these districts.

To be sure, the General Assembly did not use racial data during the line-drawing process, but that is irrelevant. VRA protection turns on the actual opportunity a district affords minority voters, not on legislative intent in line-drawing. *See, e.g.*, *Strickland*, 556 U.S at 10; *Thornburg v. Gingles*, 478 U.S. 30, 62 (1986). Indeed, considering racial data during line-drawing creates the very problem necessitating the 2017 redistricting in the first instance, an equal-protection violation. What matters, then, is that the districts currently exist as minority crossover districts, and they cannot continue to exist as such under Plaintiffs' demand for reduced Democratic vote share.

Moreover, after the lines were drawn, the General Assembly did consider race; the General Assembly entered Dr. Lichtman's reports into the legislative record and concluded that the VRA was satisfied because of the many districts with BVAP in the range Dr. Lichtman identified as necessary to preserve minority electoral opportunity. That is the correct way of navigating the "competing hazards" of VRA and equal-protection requirements. *Abbott*, 138 S. Ct. at 2315.

c. The district court had no serious response to these grounds of defense. It did not address the Fourteenth or Fifteenth Amendments or the VRA, distinguish the discrete defenses, or even mention the "inextricable link between race and politics in North Carolina." *N.C. State Conference of NAACP*, 831 F.3d at 214. Instead, it cursorily called the General Assembly's grounds "speculative." JA682. Failing to address the General Assembly's *grounds* of removal, the district court closed the door without properly applying the colorable-basis standard.

The district court relied on several decisions, *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002), and *Sexson v. Servaas*, 33 F.3d 799 (7th Cir. 1994), which denied removal under Section 1443(2) to redistricting defendants. But these decisions are not on point because none involved a state-law theory with specific,

probable racial impact. The *Stephenson* plaintiffs challenged legislative redistricting plans, drawn in 2001, under the North Carolina Constitution's whole-county provisions, and the VRA defense that the State "cannot comply with the state constitution because of its effect on the voting rights of specified constituent groups" was, in that instance, speculative: there is no direct correlation between county lines and racial groups (or at least none identified in *Stephenson*). 180 F. Supp. 2d at 786.[11] Similarly, the alleged conflict in *Brown v. Florida* was simply that the same congressional districting plans were challenged both in state and federal court, and the State had "not refused to take any action based on [its] understanding of what federal law requires or permits." *Brown*, 208 F. Supp. 2d. at 1351.[12] Moreover, the state-law requirements asserted in *Sexson*, like those asserted in *Stephenson*, concerned compactness and political-subdivision integrity. *Sexson*, 33 F.3d at 800. There being no apparent correlation between racial demographics and those criteria, the defense was merely that an attack on "an apportionment plan" that

[11] The *Stephenson* plaintiffs, in opposing removal, presented "proposed redistricting plans that adopt the proposed minority districts enacted by the General Assembly" to demonstrate consistency between state law and the VRA. JA645. Plaintiffs here have not done that here.

[12] There was a partisan-gerrymandering claim in *Brown*, but the defendant only raised a Section 1441 argument predicated specifically on that legal theory. *See* 208 F. Supp. 2d at 1346.

"conforms with federal law" necessarily "seeks to transgress federal law."[13] *Id.* at 804.

This case is different. The General Assembly does not assert that "any state constitutional attack on the state's redistricting plans would necessarily raise a federal issue under the Voting Rights Act." *Stephenson*, 180 F. Supp. 2d at 785. It instead asserts that Plaintiffs' specific state-law theory under the specific demographics of North Carolina's legislative districts will very likely, if not certainly, create a discrete conflict under *equal-rights law*. This case is like *Voketz* and *Cavanagh*, not like *Stephenson*, *Brown*, and *Sexson*.

d. For their part, Plaintiffs disclaim any desire for remedial maps that violate the Constitution or the VRA. But that cannot be the relevant point. The General Assembly is entitled to defend its current maps, to dispute Plaintiffs' asserted state-law right to their preferred political demographics, and to resist Plaintiffs' efforts to exert control over the districting process to achieve Plaintiffs' political ends. That Plaintiffs set themselves up as crusaders for equal voting rights and claim to represent the interests of all citizens of all races

[13] *Sexson* is irrelevant for the additional reason that removal was granted in that case, and remand was warranted only after "the defendants had essentially abandoned their affirmative defense" at trial. 33 F.3d at 803. The court expressly disclaimed any view on whether remand was proper in the first instance. *Id.* at 803 n.2.

is no basis to deny the General Assembly its opportunity to dispute those assertions and raise colorable defenses to Plaintiffs' claims.

Section 1443(2) identifies the proper forum for that dispute; it does not pick a winner at this stage. Plaintiffs erroneously demand proof of the General Assembly's defenses as a predicate to the federal forum (and, remarkably, claim anything short of that proof is "objectively baseless"). This puts the cart before the horse. Like other jurisdictional gateways, Section 1443(2) looks to the *ground* of inconsistency and directs the federal court to resolve the *ground*, if it is colorable. The General Assembly is confident that its position will bear out through factual development, but it is sufficient at this stage that it has asserted a colorable *ground* of removal.

II. Judicial Estoppel Does Not Apply

Plaintiffs argued below that judicial estoppel bars the General Assembly's defenses and have signaled that they intend to press this position on appeal. The defense to removal is meritless.

As an initial matter, because the burden to plead and prove judicial estoppel falls on Plaintiffs, the General Assembly had no obligation to anticipate and plead around it. *See Bartels By & Through Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 681 (4th Cir. 2018). Moreover, "[a]s an equitable doctrine, judicial estoppel is invoked in the discretion of the district

court and with the recognition that each application must be decided upon its own specific facts and circumstances." *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998). Accordingly, if the Court were to conclude that estoppel is somehow relevant to this appeal and not plainly barred as a matter of law (as shown below), the proper course of action would be to remand to allow the district court to resolve the matter in the first instance. *See, e.g. Hill v. Coggins*, 867 F.3d 499, 510 (4th Cir. 2017), *cert. denied,* 138 S. Ct. 1003 (2018).

The elements of judicial estoppel are: (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation," and that position "must be one of fact as opposed to one of law or legal theory," (2) "the prior inconsistent position must have been accepted by the court," and (3) "the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage." *Zinkand v. Brown*, 478 F.3d 634, 638 (4th Cir. 2007) (quotations omitted). Plaintiffs cannot establish any of these elements.

A. Plaintiffs first cite the General Assembly's assertions in *Covington* that a state-law challenge to districts redrawn in 2017 would be viable only in state court. They claim this contradicts its current assertion that a federal

forum is appropriate for this case. The argument fails under every single estoppel element.

First, these were statements "of law or legal theory"; estoppel requires a statement "of fact." *Zinkand*, 478 F.3d at 638.

Second, there is no inconsistency. The *Covington* statements concern the *Covington* plaintiffs' "state-law complaints about districts that had never before been challenged in [the *Covington*] litigation," JA182, in other words, districts in Wake and Mecklenburg Counties that the *Covington* Court did not "hold…were racially gerrymandered," JA203. Properly understood, the General Assembly's *Covington* position was not that the remedial districts were immune from state-law objection in federal court, but that the Wake and Mecklenburg County alterations were outside the *Covington* court's purview. Further, the General Assembly did not even hint that any remedial districts could be challenged under state-law principles in conflict with federal law or that, if faced with a conflict between federal law and a proposed interpretation of state law, they would waive their right to removal. All of that was outside the dispute in *Covington* because the events giving rise to those questions did not occur for over a year after the General Assembly made these representations.

Third, there was not (and could not have been) an intent to mislead the *Covington* court about the General Assembly's intentions on defending the districts beyond Wake and Mecklenburg Counties because no such defense was contemplated, or even foreseeable, at the time.

Fourth, the Supreme Court did not adopt the argument Plaintiffs attribute to the General Assembly. It held, applying a clear-error standard, only that "[o]nce 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." *Covington*, 138 S. Ct. at 2555. It did not reach or consider federal courts' power to apply state law to remedial districts. It held only that the Wake and Mecklenburg County alterations, which it viewed as unrelated to the remedial efforts, were outside the *Covington* court's remedial role.

B. Plaintiffs also claim the General Assembly is estopped from asserting that the crossover districts are necessary or even appropriate or that voting is racially polarized in North Carolina. This position too is meritless.

The relevant assertion Plaintiffs reference is one that the General Assembly stands by to this day and has no bearing on this case: that the evidentiary record before the General Assembly in 2017 contained no demonstration that legally polarized voting existed in North Carolina at a

sufficient level to justify districts above 50% BVAP. That is a statement concerning, and limited to, the evidentiary record that existed at the creation of those districts. JA101 ("No information regarding legally sufficient racially polarized voting *was provided to the redistricting committees* to justify the use of race in drawing districts.") (emphasis added).

That assertion is true and irrelevant. The State's vulnerability under VRA § 2 turns, not on what was before the General Assembly in drafting the plans, but on what evidence can be presented in court in future litigation. Similarly, the State's ability to defend a VRA § 2 claim depends, not on a showing of racial intent at the time of redistricting, but on objective evidence regarding voting patterns. Showing inconsistency requires showing no possibility of consistency. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (denying estoppel because "it could be argued" that allegedly inconsistent statements were "not necessarily co-extensive"); *Franco v. Selective Ins. Co.*, 184 F.3d 4, 8-9 (1st Cir. 1999); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1343-45 (1st Cir. 1991). The General Assembly's statements are consistent.[14]

[14] Plaintiffs also failed to establish any improper intent. The assertions regarding polarized voting had little impact on the *Covington* remedial proceedings because race was not used in drawing the remedial districts.

III. Sovereign Immunity Does Not Bar Removal

Plaintiffs also argued below that sovereign immunity bars federal adjudication of this case. That is a flat backwards assertion *by* private citizens *against* the General Assembly. The "sovereign power" of North Carolina "is exercised by [the people's] representatives in the general assembly." *State ex rel. Ewart v. Jones*, 21 S.E. 787, 787 (N.C. 1895); *see also In re Spivey*, 480 S.E.2d 693, 698 (N.C. 1997); *Smith v. Mecklenburg County*, 187 S.E.2d 67, 77 (N.C. 1972).

A successful removal by the General Assembly in this case would waive sovereign immunity. As the Supreme Court held in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 620 (2002), a state official with authority to represent a state waives sovereign immunity by removing the action to federal court. The General Assembly has authority to represent the State in litigation. N.C. Gen. Stat. §§ 1-72.2(a), 120-32.6(b). It therefore has power to waive immunity and has waived it.

CONCLUSION

The Court should vacate the district court's remand order and remand this case for proceedings in federal court.

REQUEST FOR ORAL ARGUMENT

Oral argument is requested pursuant to Local Rule 34(a) to the extent the Court deems oral argument consistent with its order for expedited briefing and review of this case.

February 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing corrected motion complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the motion contains 12,884 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14 point size.

DATE: February 19, 2019

/s/ E. Mark Braden
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CERTIFICATE OF SERVICE

I certify that on February 19, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ E. Mark Braden
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