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

In the United States Court of Appeals
for the Fourth Circuit

COMMON CAUSE, *ET AL.*,
Plaintiffs–Appellees–Cross-Appellants,
v.
DAVID R. LEWIS, *ET AL.*,
Defendants–Appellants–Cross-Appellees,
and
NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, *ET AL.*,
Defendants–Appellees.

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

RESPONSE AND PRINCIPAL BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

This appeal concerns a time-sensitive lawsuit of immense public importance, filed in state court exclusively under state law. Plaintiffs allege that the redistricting plans enacted by the North Carolina General Assembly in 2017 for the state House and state Senate intentionally discriminate against North Carolina voters based on partisan affiliation, in violation of the North Carolina Constitution. Plaintiffs seek new redistricting plans for the upcoming 2020 elections.

In a naked attempt to delay and derail the state-court proceedings, the state legislative leaders named as defendants ("Legislative Defendants") removed the case to federal court. No reasonable person could have believed that the removal would stick. Legislative Defendants relied on a removal provision, the Refusal Clause of 28 U.S.C. § 1443(2), that no state legislator has ever successfully invoked in the provision's 153-year history. Their lead argument for removal is that a federal court order from last year forbids state-law challenges like this one, when in fact the order expressly invited such challenges to be brought in state court. The order even specifically invited a future partisan gerrymandering challenge. Legislative Defendants' other theory is that fair, nonpartisan maps somehow would conflict with the Fourteenth and Fifteenth Amendments and the Voting Rights Act. But that could be true only if federal law required state legislatures to intentionally discriminate against Democratic voters. It does not.

The district court correctly remanded this case to state court. That much of the decision below should be affirmed. The district court erred, however, in denying Plaintiffs' request for fees and costs. The objective unreasonableness of this removal, on a multitude of grounds, makes this the paradigmatic case for a fee award.

JURISDICTIONAL STATEMENT

The district court lacked subject-matter jurisdiction. Legislative Defendants removed this case under 28 U.S.C. §§ 1441(a) and 1443(2). The district court correctly held that removal was improper under both provisions and remanded to state court. The district court independently lacked jurisdiction based on state sovereign immunity. Under 28 U.S.C. § 1447(d), this Court has jurisdiction to review the propriety of removal under § 1443(2), but not under § 1441(a). This Court has jurisdiction to review the district court's denial of fees and costs under 28 U.S.C. § 1291.

The district court remanded and denied fees and costs on January 2, 2019, and issued an opinion memorializing its reasoning on January 7. JA671-90. Legislative Defendants timely appealed the remand on January 22. JA698. Plaintiffs timely cross-appealed the denial of fees and costs on January 23. JA702.

ISSUES PRESENTED

1. Whether the district court correctly concluded that the Refusal Clause of 28 U.S.C. § 1443(2) does not authorize removal of this case.

2. Alternatively, whether the removal was independently improper because (a) Legislative Defendants are judicially estopped from seeking a federal forum to adjudicate state-law challenges to the 2017 state House and Senate redistricting plans, and (b) state sovereign immunity bars federal jurisdiction.

3. Whether the district court abused its discretion in denying fees and costs under 28 U.S.C. § 1447(c).

STATEMENT OF THE CASE

A. Factual Background

1. The District Court in *Covington* Invalidates Numerous 2011 Districts as Unconstitutional Racial Gerrymanders

In 2011, the Republican-controlled North Carolina General Assembly enacted redistricting plans for the state House and Senate (the "2011 Plans"). Those plans produced Republican supermajorities in both chambers in the 2012, 2014, and 2016 elections. JA353-55.

In 2015, a group of plaintiffs filed a federal lawsuit challenging twenty-eight districts under the 2011 Plans as racially gerrymandered in violation of the U.S. Constitution. *Covington v. North Carolina*, No. 1:15-CV-00399 (M.D.N.C.). In August 2016, the district court invalidated every challenged district, *Covington v. North Carolina*, 316 F.R.D. 176, 176-78 (M.D.N.C. 2016), and in June 2017, the Supreme Court summarily affirmed, 137 S. Ct. 2211 (2017). The district court gave the General Assembly until September 1, 2017 to enact new redistricting

plans that would "cure the unconstitutional racial gerrymanders." *Covington v. North Carolina*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017).

2. The General Assembly Enacts the 2017 Plans

The General Assembly undertook a new round of redistricting for the state House and Senate in summer 2017. JA356. The House and Senate Redistricting Committees—led by Legislative Defendants—adopted a set of criteria explicitly directing the Republican mapmaker, Dr. Thomas Hofeller, to use "political considerations and elections results" in drawing the new plans. JA357, 360. As another criterion, the Committees directed that racial data *not* be used. JA359-60. Legislative Defendants stated that they were ignoring racial considerations entirely because they had concluded that the "third *Gingles* factor"—regarding "legally sufficient racially polarized voting"—was not "present," and therefore the Voting Rights Act ("VRA") did not apply. JA101, 106; *see Thornburg v. Gingles*, 478 U.S. 30 (1986).

The General Assembly passed legislation adopting new House and Senate plans (the "2017 Plans") on August 31, 2017. JA258. The 2017 Plans changed roughly 115 of the 170 total House and Senate districts from the 2011 Plans.

3. At Legislative Defendants' Urging, the *Covington* Courts Do Not Address State-Law Challenges to the 2017 Plans

The *Covington* plaintiffs raised several objections to the 2017 Plans before the district court, under state and federal law. Under federal law, the plaintiffs

argued that the plans did not cure the racial gerrymanders in four districts. The district court agreed and appointed a special master to redraw those districts, *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018)—a decision the Supreme Court later affirmed, 138 S. Ct. 2548, 2553-54 (2018). Plaintiffs in the instant suit do not challenge any of these districts redrawn by the special master.

The *Covington* plaintiffs also raised two state constitutional objections to the 2017 Plans. The plaintiffs argued that certain districts in Greene and Cabarrus Counties crossed county lines in violation of the "Whole County Provision." The plaintiffs also argued that certain districts in Wake and Mecklenburg Counties—which did not need to be changed to cure any racial gerrymander—violated the state constitutional prohibition on mid-decade redistricting. *Id.* at 419. Legislative Defendants responded that the *Covington* court was "foreclosed from ruling on [these] contested issues of state law," which instead must be "directed to North Carolina courts." JA158.

The district court agreed and declined to rule on the plaintiffs' objection under the Whole County Provision, which raised an "unsettled question of state law." 283 F. Supp. at 428, 446. But the court made clear that this ruling was "without prejudice to Plaintiffs or other litigants asserting such arguments in separate proceedings." *Covington*, 283 F. Supp. 3d at 447 n.9. The court even

cited to "ongoing proceedings in state court regarding North Carolina's legislative districting plans," which raised "state … issues" and could require "other relief." *Id.* And while the plaintiffs "d[id] not presently raise any partisan gerrymandering objection" to the 2017 Plans, the district court concluded that any "partisan gerrymandering objection[] would demand development of significant new evidence and therefore [would] be more appropriately addressed in a separate proceeding." *Id.* at 427, 429 n.2.

The district court did address and grant relief on the plaintiffs' state-law objection under North Carolina's mid-decade redistricting bar, which the court considered settled. *Id.* at 443. But Legislative Defendants appealed to the Supreme Court, arguing that "any state-law challenge" to the 2017 Plans "must be filed in state court, where state judges familiar with the state constitution can address the unsettled question[s]" of state law. JA205. The Supreme Court agreed, holding that the district court lacked authority to address any state-law challenge because the district court's remedial authority was limited to "ensur[ing] that the racial gerrymanders at issue in [the] case were remedied." *Covington*, 138 S. Ct. at 2555.

B. Procedural History

Plaintiffs filed the instant suit in Wake County Superior Court on November 13, 2018. Plaintiffs are Common Cause, the North Carolina Democratic Party, and

38 individual North Carolina voters. JA235-42. Plaintiffs assert that the 2017 Plans violate three provisions of the North Carolina Constitution by intentionally discriminating against Plaintiffs and other voters based on their political views, affiliations, and voting histories. JA289-300. Plaintiffs do not assert any federal claims.

Plaintiffs named as defendants Speaker of the House Timothy Moore, President Pro Tempore of the Senate Philip Berger, Senior Chairman of the House Select Committee on Redistricting David Lewis, and Chairman of the Senate Standing Committee on Redistricting Ralph Hise, Jr. (collectively, "Legislative Defendants"). Plaintiffs also named as defendants the State of North Carolina, the State Board of Elections, and the State Board's members (collectively, "State Defendants"). JA243-44.[1] Plaintiffs do not seek any injunction running against Legislative Defendants. Plaintiffs instead seek an injunction prohibiting the State Defendants from implementing the 2017 Plans for future elections, as well as the adoption of new plans—drawn by the General Assembly, or by a court if necessary—that comport with the North Carolina Constitution. Plaintiffs seek this relief in time for the 2020 elections. JA300.

On November 20, 2018, Plaintiffs moved to expedite the case because deadlines relating to the 2020 elections are quickly approaching. JA419-24; *see*

[1] To avoid disputes over who properly represents the State, Plaintiffs voluntarily dismissed the State as a defendant on February 13, 2019.

also JA414-16. On December 12, 2018, the Wake County trial court administrator emailed Legislative Defendants' counsel, noting that they had failed to respond to the motion to expedite and asking whether they would consent to a telephonic hearing. JA80-82. On December 14, rather than respond to the motion to expedite, Legislative Defendants removed the case to federal court, relying on 28 U.S.C. § 1443(2)'s Refusal Clause and § 1441(a). JA41-54.

Private counsel for Legislative Defendants purported to remove on behalf of the State of North Carolina, JA42 & n.1, even though the North Carolina Attorney General's Office had accepted service for the State more than 30 days before the removal, JA85-86, and even though the Attorney General did not consent to removal on behalf of the State. The Board of Elections and its members did not consent to removal either. JA54, 462-67.

On December 17, 2018, one business day after the removal, Plaintiffs filed an emergency motion seeking immediate remand to state court and an award of fees and costs under 28 U.S.C. § 1447(c). JA67.

After expedited briefing, the district court remanded on January 2, 2019, and issued an opinion explaining its reasoning on January 7. JA673, 676. The court held that § 1443(2)'s Refusal Clause did not authorize removal here for three separate reasons. First, "[P]laintiffs' state court action is not brought against the Legislative Defendants for 'refusing to do' anything." JA681. Second, "the

'refusal clause' … was intended to apply to 'state officers who refused to enforce' state laws," and Legislative Defendants "have only a legislative role, rather than a law enforcement role." *Id.* (quoting *Baines v. City of Danville, Va.*, 357 F.2d 756, 759 (4th Cir.), *aff'd*, 384 U.S. 890 (1966)).[2] Third, any suggestion that "[P]laintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law" was "speculative." JA682. The court also held § 1441(a) did not authorize removal because "Plaintiffs assert solely state law claims under the North Carolina Constitution." JA687. The court "d[id] not reach additional arguments [P]laintiffs raise[d] in support of remand, including procedural defect in removal under § 1441(a); sovereign immunity …; and judicial estoppel." JA689 n.9.

The court denied Plaintiffs' request for fees and costs. JA689-90. Although the court had no difficulty rejecting Legislative Defendants' removal arguments on the merits, the court held that Legislative Defendants nevertheless had "an objectively reasonable basis for seeking removal." JA690.

Meanwhile, on January 3, Legislative Defendants moved to "[c]onfirm[]" that Federal Rule of Civil Procedure 62(a) imposed a 30-day automatic stay of the remand order. JA36. On that ground, Legislative Defendants asked the district court not to transmit a certified copy of the remand order to the state court. On

[2] In quotations throughout this brief, underlined emphases are by the district court.

January 17, 2019, the district court denied the motion, in part because the court had already sent the certified remand order to the state court even before Legislative Defendants filed their stay motion. JA693-97. The state court took no action on the case, however, until after the district court denied the stay motion. In total, Legislative Defendants' removal delayed the state-court proceedings by nearly a month and a half.

The state court has since entered an order expediting the case and setting trial for July 15, 2019. Intensive pretrial proceedings are ongoing in state court.

SUMMARY OF ARGUMENT

This Court should affirm the decision below remanding this case to state court and reverse the denial of fees and costs.

I. The district court correctly held that § 1443(2)'s Refusal Clause does not authorize removal here, for three reasons. *First*, Plaintiffs are suing Legislative Defendants for affirmatively enacting unconstitutional laws, not "for refusing to do any act," as the Refusal Clause requires. Legislative Defendants claim that they are "refusing" to enact new maps, but that is not the conduct this suit challenges. Legislative Defendants' attempt to recharacterize Plaintiffs' claims, if accepted, would read the word "refusing" right out of the Refusal Clause.

Second, the Refusal Clause authorizes removal only by state officials who refuse to *enforce* state laws, not by legislators like Legislative Defendants who

serve only a *legislative* function. In the 153-year history of the Refusal Clause, no federal court has ever allowed removal by a state legislator.

Third, Legislative Defendants cannot colorably claim that Plaintiffs' state-law claims are "inconsistent" with federal equal-rights law, as the Refusal Clause requires. Legislative Defendants assert that Plaintiffs' state-law claims conflict with the *Covington* court's remedial order, but the *Covington* court expressly held that its remedial order was "without prejudice" to future state-law challenges to the 2017 Plans in state court. 283 F. Supp. 3d at 447 n.9. And for Plaintiffs' state-law claims to conflict with the Fourteenth or Fifteenth Amendment or the VRA, federal law would have to *require* mapmakers to *intentionally* discriminate against Democratic voters. Federal law requires no such thing. In any event, there is no risk that North Carolina courts, in adopting remedial plans in this case, will intentionally dilute the votes of minority populations in violation of the Fourteenth or Fifteenth Amendments. And Legislative Defendants unequivocally stated in creating the 2017 Plans that the VRA did not and should not have any bearing on the Plans at all.

II. The removal here was independently improper for two additional reasons that the district court declined to address. *First*, Legislative Defendants are judicially estopped from seeking a federal forum to adjudicate state-law challenges to the 2017 Plans. In *Covington*, Legislative Defendants repeatedly and

successfully told both the district court and the Supreme Court that any state-law challenge to the 2017 Plans may proceed *only* in state court. They should be held to that position here.

Second, state sovereign immunity bars federal jurisdiction where, as here, plaintiffs seek injunctive relief against state officials under state law. Legislative Defendants claim that their removal notice waived North Carolina's sovereign immunity, but such a waiver requires unequivocally clear statutory authority, which Legislative Defendants lack. The North Carolina Attorney General, moreover, has declined to waive sovereign immunity on behalf of the State Defendants.

III. This Court should reverse the district court's denial of fees and costs under § 1447(c). The district court abused its discretion as a matter of law by denying fees without even addressing judicial estoppel or sovereign immunity, each of which alone renders the removal objectively unreasonable. Even on the grounds the court did address, the removal lacked any objectively reasonable basis. Awarding fees here is essential to deter baseless removals that disrupt time-sensitive proceedings in state courts.

STANDARD OF REVIEW

This Court reviews de novo a decision remanding to state court for lack of subject-matter jurisdiction. *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 209 (4th

Cir. 2016). The Court reviews for abuse of discretion a denial of fees and costs under § 1447(c). *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996).

ARGUMENT

"Because removal jurisdiction raises significant federalism concerns," federal courts "must strictly construe removal jurisdiction." *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (citation omitted). "[A]ny doubt about the propriety of removal should be resolved in favor of remanding the case to state court." *Barbour v. Int'l Union*, 640 F.3d 599, 615 (4th Cir. 2011) (en banc). The federalism concerns with removal are at their apex here. "[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Chapman v. Meier*, 420 U.S. 1, 27 (1975). Federal courts therefore must defer to a state's "legislative *or* judicial branch" on redistricting matters. *Growe v. Emison*, 507 U.S. 25, 33 (1993).

I. The District Court Properly Remanded this Case to State Court Because the Refusal Clause Does Not Authorize Removal

The Refusal Clause of 28 U.S.C. § 1443(2) authorizes removal of a civil action "for refusing to do any act on the ground that it would be inconsistent with" federal equal-rights law. The district court correctly concluded that the Refusal Clause does not authorize removal here, for three reasons. First, Plaintiffs have sued Legislative Defendants for affirmatively enacting an unconstitutional law, not

"for refusing to do any act." Second, the Refusal Clause applies only to state officials' refusal to enforce a law, and Legislative Defendants—as legislators—do not enforce state election laws. Third, there is no "inconsisten[cy]" between Plaintiffs' state-law claims and federal equal-rights law. Legislative Defendants' asserted conflicts with the *Covington* remedial order, the Voting Rights Act, and the Fourteenth and Fifteenth Amendments are at best hopelessly speculative and in reality frivolous.

A. The Refusal Clause Does Not Apply Because Plaintiffs Have Not Sued Legislative Defendants "For Refusing To Do Any Act"

1. This Lawsuit Challenges Legislative Defendants' Enactment of a Law, Not their Refusal To Act

The district court correctly held that the Refusal Clause does not authorize removal here because Plaintiffs have sued Legislative Defendants for a completed, affirmative act, not "for refusing to do any act." 28 U.S.C. § 1443(2). Congress enacted the Refusal Clause as part of the Civil Rights Act of 1866 to provide a federal forum for "state officers who refused to enforce discriminatory state laws … and who were prosecuted in the state courts because of their refusal to enforce state law." *Baines v. City of Danville, Va.*, 357 F.2d 756, 772 (4th Cir.), *aff'd*, 384 U.S. 890 (1966). As the Supreme Court has explained—quoting a statement by "the chairman of the House Judiciary Committee and the floor manager of the bill"—the Refusal Clause was "intended to enable State officers, who shall refuse to enforce State laws discriminating … on account of race or color, to remove their

cases to the United States courts when prosecuted for refusing to enforce those laws." *City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). The provision thus "protect[s] state officers from being penalized for failing to enforce discriminatory state laws or policies." *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979).

Three courts of appeals have held that the Refusal Clause does not authorize removal where the underlying suit challenges the removing defendants' action rather than inaction. In *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995), the Eighth Circuit held that the Refusal Clause did not apply to a state-law defamation claim because the removing defendants "d[id] not point out any act that they refused to do." *Id.* at 523. Similarly, in *New York v. Horelick*, 424 F.2d 697 (2d Cir. 1970), the Second Circuit held that the Refusal Clause did not apply to the state-law prosecutions of two public school teachers. *Id.* at 698-99. Even though they raised a federal equal protection defense, the teachers were being prosecuted for the completed act of resisting arrest, "not … for refusing to enforce any law of the State or ordinance of the City of New York." *Id.* at 703. And in *Detroit Police Lieutenants*, the Sixth Circuit held that the Refusal Clause did not apply to a state-law suit by a police union "seeking injunctive relief to restrain the defendants from implementing a promotion eligibility list." 597 F.2d at 567. "[N]o one," the court

explained, had "attempted … to punish [the defendants] for refusing to do any act inconsistent with any law providing equal rights." *Id.* at 568.

District courts have rejected removals under the Refusal Clause on the same grounds. As one court explained, removal under the Refusal Clause is "unavailable where the removing party's action, rather than its inaction, is the subject of the state-court suit." *City & Cty. of San Francisco v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 2002 WL 1677711, at *4 (N.D. Cal. July 24, 2002). The court therefore remanded a claim that "did not challenge any refusal by the Civil Service Commission to enforce the law," but instead "challenged an affirmative order by the commission." *Id.* Another court likewise remanded a suit challenging the constitutionality of a state statute and two executive orders by the Mayor of Boston. "[T]he 'refusal' clause is unavailable," the court explained, "where the defendants' actions, rather than their inaction, are being challenged." *Mass. Council of Constr. Emp'rs., Inc. v. White*, 495 F. Supp. 220, 222 (D. Mass. 1980); *see also Wolpoff v. Cuomo*, 792 F. Supp. 964 (S.D.N.Y. 1992).

The district court below correctly held that the Refusal Clause does not apply here because "[P]laintiffs' state court action is not brought against the Legislative Defendants for 'refusing to do' anything." JA681. Instead, with respect to Legislative Defendants, "[P]laintiffs challenge an action already

completed"—the enactment of the 2017 Plans. *Id.* "Plaintiffs' prayer for injunctive relief further reinforces this point," as Plaintiffs "seek to enjoin defendants from 'administering, preparing for, or moving forward with the 2020 primary and general elections … using the 2017 plans,' which is not a legislative activity." *Id.* (quoting JA300). This injunction would run only against the State Defendants. Plaintiffs thus "do not seek an injunction compelling the Legislative Defendants to act." JA682.

Indeed, Plaintiffs do not seek an injunction compelling *any* defendant to act, and have not sued *any* defendant "for refusing to do any act." Even as to the State Defendants, Plaintiffs seek an injunction preventing them from implementing the 2017 Plans—*i.e.*, preventing them from acting. JA300.

Legislative Defendants do not contest the district court's holding that the Refusal Clause is inapplicable to suits challenging action rather than inaction. Instead, Legislative Defendants contend that this suit challenges their inaction because they "*refuse*[] to implement Plaintiffs' asserted theories of state law into new redistricting legislation." Br.19. But Plaintiffs have not sued Legislative Defendants for refusing to enact new redistricting legislation. That purported "refusal" could relate only to the remedial phase of this case—after the merits have been adjudicated—and even then Legislative Defendants will not be forced to do anything. If Plaintiffs prevail on their state-law claims, Legislative Defendants

may be afforded an *opportunity* to enact new plans, but they will not be *compelled* to take any action. If Legislative Defendants are unable or unwilling to draw constitutional redistricting plans, the state courts will do so and order the State Defendants to implement them.

Legislative Defendants acknowledge that "Plaintiffs do not necessarily demand a legislatively enacted map on pain of contempt," but contend that "[a] refusal can occur … without a threat of contempt." Br.25. The question, however, is not whether Legislative Defendants are refusing to do *something*, but whether that refusal is what Plaintiffs are suing them *for*. The Refusal Clause applies only if the plaintiff is suing the removing defendant "for refusing to do any act." 28 U.S.C. § 1443(2). That Plaintiffs are not asking the state court to order Legislative Defendants to do anything at all—on pain of contempt or otherwise—underscores that Plaintiffs are not suing Legislative Defendants "for" a refusal.

Legislative Defendants' interpretation ultimately would read the word "refusing" out of § 1443(2)'s Refusal Clause. It would mean that any lawsuit challenging an affirmative act could be reframed as a lawsuit challenging the defendant's "refusal" to perform an alternative act. On that interpretation, anything and everything is a "refus[al]."

2. Legislative Defendants Cannot Invoke the Refusal Clause Because They Do Not Enforce State Election Laws

The district court correctly held that Legislative Defendants cannot invoke the Refusal Clause for a second reason: they serve only a "legislative role, rather than a law enforcement role." JA682. Legislative Defendants do not point to a single case in the 153-year history of the Refusal Clause where any federal court has ever permitted state legislators to remove under the Refusal Clause. This Court should not be the first.

No court has ever allowed removal by a state legislator because, as the district court recognized, quoting this Court's decision in *Baines*, "the 'refusal' clause of § 1443 was intended to apply to 'state officers who refused to enforce' state laws." JA682 (quoting *Baines*, 357 F.2d at 759). The Supreme Court too has explained that the Refusal Clause is designed for state officers who "refuse to enforce State laws discriminating … on account of race or color." *Peacock*, 384 U.S. at 824 n.22 (quotation marks omitted). "The privilege of removal" under the Refusal Clause thus "is conferred … only upon state officers who refuse to enforce state laws discriminating on account of race or color." *Id.* (quoting *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 311 (S.D. Ind. 1969)). State legislators like Legislative Defendants do not "enforce" state laws as contemplated by the Refusal Clause.

This Court has held that Legislative Defendants do not enforce state redistricting laws. In *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015), this Court held that, because "[t]he North Carolina Constitution clearly assigns the enforcement of laws to the executive branch," "[t]he General Assembly retains no ability to enforce any of the laws it passes." *Id.* at 262. Only State election officials in the State executive branch "ha[ve] the specific duty to enforce [a] redistricting plan." *Id.* And because Legislative Defendants do not enforce redistricting laws, they cannot remove on the ground that they are "refusing" to enforce such laws.

None of the cases Legislative Defendants cite, Br.21-23, are to the contrary. As the court below recognized, "[n]one of these [cases] … were removed by legislators or state actors who did not enforce or implement legislation." JA684. *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), "does not discuss removal by state legislators," JA683, because the defendants there were election officials responsible for "implementing the reapportionment plans," 577 F. Supp. at 179. Other cases involved removals by defendants who were sued for "conduct[ing] elections" as specifically required by a federal court order, *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995), for refusing to "implement a council-manager form of government" mandated by state law, *Voketz v. City of Decatur, Ala.*, No. 5:15-cv-540, Dkt. 24 at 1 (N.D. Ala. Aug. 19, 2014), and for

"administ[ering] promotional examination[s] and procedures," *White v. Wellington*, 627 F.2d 582, 584 (2d Cir. 1980). The cases involving school boards similarly describe the removing school officials as having enforcement or implementation authority. *See Buffalo Teachers Fed'n v. Board of Education*, 477 F. Supp. 691, 692-93 (W.D.N.Y. 1979); *Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 717-18 (D. Conn. 1976); *Burns*, 302 F. Supp. at 310-11.

Unlike the defendants in all of these cases, Legislative Defendants have no authority to use, implement, administer, or enforce redistricting plans. Only the State Defendants have such authority. Legislative Defendants' cases thus "would only be analogous to the instant case if the State Defendants in addition to the Legislative Defendants had sought removal …, but here the State Defendants oppose removal." JA684.

Legislative Defendants contend that the Refusal Clause must authorize removal by legislators because "[n]one of the operative words—*defendant*, *refusing*, *any act*, *ground*, *inconsistency*, or *equal-rights law*—contain an executive-enforcement limitation." Br.29. But that list omits one critical operative word—"for." By its plain text, the Refusal Clause authorizes removal only where the defendant is sued "for refusing to do" something—that is, where the actionable wrongful conduct for which the plaintiff seeks redress is a refusal. Legislators generally do not have judicially enforceable duties to enact legislation. Only

executive officials charged with enforcing or implementing the law may be sued for their wrongful refusal to do something the law requires.

The case most squarely on point—*Wolpoff v. Cuomo*, 792 F. Supp. 964—holds as much. The court there explained that "a legislator's refusal to cast his or her vote a certain way cannot be considered 'refusing to do any act' within the meaning of the refusal clause contained in 28 U.S.C. § 1443(2)." *Id.* at 968. "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." *Id.* Legislative Defendants argue that *Wolpoff* rested on sovereign immunity grounds, Br.33, but the court expressly held that "[e]ven assuming, *arguendo*, that the eleventh amendment d[id] not bar th[e] court's jurisdiction," removal was still improper because the Refusal Clause "is not available to legislators." 792 F. Supp. at 968.

Legislative Defendants also contend that the suit in *Wolpoff* did not challenge "state action," just the removing legislator's individual vote. Br.34. But the court clearly stated that the "Plaintiffs asserted that the legislative defendants violated the New York State Constitution when the legislative defendants passed a New York State Senate districting plan." 792 F. Supp. at 965. That is the same wrongful act Plaintiffs challenge here. In North Carolina, as in every other state,

state legislators do not enforce elections laws. Legislative Defendants therefore cannot remove under the Refusal Clause.

3. Legislative Defendants Cannot Remove Based on a Refusal By Other Officials in the State Executive Branch

Grasping at straws, Legislative Defendants contend that even if Plaintiffs' claims do not challenge any refusal by Legislative Defendants themselves, Legislative Defendants "represent North Carolina as an undivided whole," and "North Carolina can refuse to administer a new redistricting plan." Br.27. Legislative Defendants claim that they, as state *legislators*, "can refuse to undertake an *executive* act." *Id.* (emphasis added). This argument fails on every level.

The notion that state legislators "can refuse to undertake an executive act" is facially absurd. Br.27. North Carolina has separate legislative and executive branches. Indeed, the North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art I, § 6. The legislative branch cannot perform or refuse to perform an executive function. Only the executive branch can do that. Here, the State Board of Elections and its members alone have "the specific duty to enforce [a] redistricting plan." *Wright*, 787 F.3d at 262. Those election officials are separately named defendants, represented by the Attorney General, who alone is charged with "represent[ing] all State departments,

agencies, institutions, commissions, bureaus or other organized activities of the State." N.C.G.S.A. § 114-2(2).

The state statutes Legislative Defendants cite—§ 1-72.2 and § 120-32.6(b)—do not provide otherwise. Section 1-72.2(a) states that, in cases challenging a North Carolina statute, (1) "the General Assembly … constitutes the legislative branch of the State of North Carolina and the Governor constitutes the executive branch"; (2) "both the General Assembly and the Governor constitute the State"; and (3) "a federal court presiding over any such action … is requested to allow both the legislative branch and the executive branch … to participate in any such action as a party." N.C.G.S.A. § 1-72.2(a). Nothing in that language purports to allow Legislative Defendants to speak for the executive branch or for "North Carolina as an undivided whole." Br.27. To the contrary, the provision carefully distinguishes between the State's "legislative" and "executive" branches and provides that "the State" consists of "both" political branches together.

Legislative Defendants also note that under § 1-72.2(b), in cases where the State is named as a defendant, the Speaker of the House of Representatives and the President Pro Tempore of the Senate are "agents of the state." Br.27-28. But the provision names them as agents only for purposes of establishing "standing to intervene," N.C.G.S.A. § 1-72.2(b), not for purposes of enforcing state law.

Regardless, an "agent of the state" is not the entire State, including a separate branch of government.

Legislative Defendants' reliance on § 120-32.6(b) fares no better. That provision states that in cases challenging a state statute, "the General Assembly shall be deemed to be the State of North Carolina," but only "to the extent provided in G.S. 1-72.2(a)," just discussed above. Section 120-32.6(b) also provides that the General Assembly is "a client of the Attorney General" and "shall possess final decision-making authority with respect to the defense of the challenged [statute]." That language concerns decisionmaking authority over litigation—not over any underlying executive enforcement conduct. And even in litigation, the provision at most suggests that the General Assembly may make decisions with respect to the litigating position the Attorney General takes on behalf of the General Assembly. It does not suggest that the General Assembly may control the position the Attorney General takes on behalf of the State or other clients in the executive branch. Section 120-32.6(b) certainly does not suggest that a federal court must ignore the Attorney General's actual, stated position on behalf of the State Defendants and pretend that Legislative Defendants' private counsel controls the position of the Attorney General's other clients.

Regardless, if these state statutes mean what Legislative Defendants say, they are unconstitutional. The North Carolina Supreme Court recently has struck

down two statutes under the State constitution's separation of powers clause because the General Assembly improperly intruded on executive authority. *See Cooper v. Berger*, 809 S.E.2d 98, 116 (N.C. 2018); *State v. Berger*, 781 S.E.2d 248, 256 (N.C. 2016). The provisions here are unconstitutional for the same reason. Legislative Defendants affirmatively argue that they are exercising "an enforcement role," "not … 'only a legislative role.'" Br.29, 35 (quoting JA682). That alone shows that the legislative branch is purporting to "exercise[] power that the constitution vests exclusively in another branch." *Cooper*, 809 S.E.2d at 111 (quotation marks omitted).

This Court need not resolve these fundamental state-law questions here. The Attorney General has "reserve[d] the right to challenge" these provisions "in an appropriate setting." JA463 n.2. Because "any doubt about the propriety of removal should be resolved in favor of remanding the case to state court," *Barbour*, 640 F.3d at 615, it is enough that Legislative Defendants' state-law arguments are, at a minimum, dubious.

Even if Legislative Defendants' state-law arguments were unquestionably correct, moreover, Legislative Defendants *still* could not remove based on a purported refusal by the State as a whole, for two independent reasons. First, as noted, Plaintiffs have not sued *anyone*—including the State—for "refus[ing] to

administer a new redistricting plan." Br.27; *supra* p.17. This lawsuit challenges the enactment and enforcement of unconstitutional districting plans.

Second, any removal on behalf of the State was untimely. Under 28 U.S.C. § 1446(b)(2)(B), "[e]ach defendant shall have 30 days after receipt by or service upon that defendant of the initial pleading or summons … to file [a] notice of removal." The Attorney General accepted service on behalf of the State on November 13, JA85-86—31 days before Legislative Defendants filed their notice of removal on December 14, JA31. Plaintiffs noted this procedural deficiency below. Legislative Defendants did not respond. They still have no response.

B. The Refusal Clause Does Not Apply Because Plaintiffs' Claims Are Not "Inconsistent with" Federal Equal-Rights Law

Even if Legislative Defendants were being sued for refusing to enforce state law, the Refusal Clause still would not authorize removal. That is because there is no conceivable "inconsisten[cy]" between Plaintiffs' state-law claims and federal equal-rights laws, and Legislative Defendants certainly have not refused to do anything "on the ground" of any such inconsistency. 28 U.S.C. § 1443(2). Indeed, the purported conflicts between state law and federal law are preposterous.

1. There is No Conflict with the *Covington* Remedial Order

Legislative Defendants argue that the *Covington* court "mandate[d] the use of" the 2017 Plans in future elections, effectively immunizing those plans from any future challenge. Br.42. The *Covington* court did no such thing. As the court

below recognized, the *Covington* court did not "mandate the specific existing apportionment to the exclusion of … others." JA684. Quite the contrary, in the same opinion Legislative Defendants quote, Br.40-41, the *Covington* court explained that its decision not to address some of the plaintiffs' state-law arguments was "without prejudice to Plaintiffs or other litigants asserting such arguments in separate proceedings," including "state court" proceedings that might lead to "other relief." 283 F. Supp. 3d at 447 n.9. The court also stated that any "partisan gerrymandering objection" to the 2017 Plans "would demand development of significant new evidence and therefore [would] be more appropriately addressed in a separate proceeding." *Id.* at 427. In light of this unambiguous language, Legislative Defendants never should have removed based on the *Covington* remedial order.

Not only did the *Covington* court hold that other litigants could bring state-law challenges to the 2017 Plans in state court, it did so at Legislative Defendants' urging. Legislative Defendants successfully convinced the federal courts in *Covington* not to address state-law objections to the 2017 Plans, specifically because such challenges could be brought separately in state court later. In opposing the plaintiffs' objections that various new districts violated the North Carolina Constitution's Whole County Provision or its prohibition on mid-decade redistricting, Legislative Defendants argued that the district court was "foreclosed

from ruling on [such] contested issues of state law," since "an unsettled question of state law is more appropriately directed to North Carolina courts, the final arbiters of state law." JA158 (ellipses and quotation marks omitted). Legislative Defendants thus told the district court that it "must defer to the North Carolina courts." *Id.*

The district court agreed with Legislative Defendants with respect to the plaintiffs' objection under the Whole County Provision, involving Greene and Cabarrus Counties. "In light of the absence of … guidance from North Carolina courts," the court "declined" to consider that objection because it raised "unsettled question[s] of state law." 283 F. Supp. 3d at 447; *see also id.* at 428 (similar). With respect to the plaintiffs' objection under the mid-decade redistricting bar, involving districts in Wake and Mecklenburg Counties, the court sustained the state-law objection and redrew the districts, but only because the court viewed the state-law legal issue as settled. *Id* at 442-44. Legislative Defendants pretend that the dispute over the Wake and Mecklenburg districts was the only state-law objection at issue in the *Covington* remedial phase. Br.41, 55-56. But Legislative Defendants successfully convinced the district court not to address a separate state-law challenge to districts in Greene and Cabarrus Counties because an "unsettled question of state law" was better addressed by "North Carolina courts."

In the Supreme Court, Legislative Defendants then successfully argued that the *Covington* district court lacked authority to address *any* state-law challenge to the 2017 Plans. Legislative Defendants argued that "any state-law challenge" to the 2017 Plans "must be filed in state court, where state judges familiar with the state constitution can address the unsettled question[s]" of state law. JA205. Legislative Defendants even pointed to a new suit that had been filed in state court challenging the Wake and Mecklenburg districts under state law. *Id.* "That state-court lawsuit," Legislative Defendants argued, "underscores" that "the federal court should not have adjudicated state-law claims." *Id.*

Legislative Defendants again prevailed. The Supreme Court held that the *Covington* district court lacked authority to adjudicate any state-law challenge to the 2017 Plans. "The District Court's remedial authority was … limited to ensuring that the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts." 138 S. Ct. at 2554. "Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end." *Id.* at 2555. Legislative Defendants call this portion of the Supreme Court's opinion "an out-of-context squib," Br.41, but it was the Court's entire holding on this issue. The Supreme Court clearly held that the *Covington* district court had no authority to order anything other than a cure for the federal racial gerrymandering violations.

There are a near-infinite number of plans that could have cured the racial gerrymanders at issue, and the *Covington* remedial order merely held that the 2017 Plans were among those near-infinite variations.

Legislative Defendants contend that because the Supreme Court "affirmed in part and reversed in part," 138 S. Ct. at 2555, "the districts within the *Covington* court's purview could be, and were, ordered for future use," Br.41-42. That is a gross mischaracterization of the Supreme Court's opinion. The Court held that the district court's remedial order "should be affirmed insofar as it provided a court-drawn remedy for" four districts in which the General Assembly's proposed maps did not cure the racial gerrymanders. 138 S. Ct. at 2554. The Supreme Court never remotely suggested that any districts were "ordered for future use," even if they violated state law. And Plaintiffs do not challenge those four court-drawn districts in this case anyway.

Legislative Defendants well know that the *Covington* remedial order did not enshrine the districts under the 2017 Plans, as their conduct in other litigation makes clear. In the separate state-court case alleging that the Wake and Mecklenburg County districts violate the state-law ban on mid-decade redistricting, the state court has since ruled for the plaintiffs and ordered four districts under the 2017 Plans to be changed for the 2020 elections. *N.C. State. Conf. of NAACP Branches v. Lewis*, 18-CVS-002322 (N.C. Super. 2018).

Legislative Defendants never argued there that the *Covington* court's injunction prohibited any and all changes to the 2017 Plans. Just weeks ago, Legislative Defendants announced that they will not appeal the state court's decision and will revise the relevant districts by June 30, 2019.[3] Legislative Defendants cannot credibly claim that they are "refusing" to comply with state law in the instant case because *any* changes to the 2017 Plans would violate the *Covington* court's order, when they are already actively planning to change the 2017 Plans.

Legislative Defendants also never grapple with the obviously untenable consequences of their reading of the *Covington* remedial order. On their reading, the General Assembly could have violated state law in the most flagrant ways imaginable when drawing the 2017 Plans, and no one could do anything about it. In Legislative Defendants' view, the *Covington* court would have lacked authority to address such state-law violations, and a state court would lack authority as well because the *Covington* court purportedly "mandate[d] a specific districting map." Br.41. That is not and cannot be correct.

2. There Is No Conflict with Federal Equal-Rights Laws

Legislative Defendants' alternative theory is that Plaintiffs' state-law claims conflict with the Fourteenth and Fifteenth Amendments and the VRA. The district court correctly rejected any such conflict. It is clearly possible to comply with

[3] *See Republicans Won't Appeal Ruling Striking Down 4 Districts*, Associated Press, Feb. 15, 2019, https://bit.ly/2XMA3ah.

both federal law prohibiting racial discrimination and state law prohibiting intentional partisan gerrymandering.

a. Any Conflict with the Fourteenth or Fifteenth Amendment or the Voting Rights Act Is Speculative and Inconsistent with a Critical Admission Below

Remarkably, Legislative Defendants admitted below that they are *not* asserting that "the proffered state-law theory would conflict with federal law." JA484 n.6. Legislative Defendants said they "do not concede at this time that" complying with Plaintiffs' view of state law "actually would violate federal law." *Id.* That admission alone forecloses removal under the Refusal Clause. Legislative Defendants cannot claim that they are "refusing" to comply with state law "on the ground that it would be inconsistent with [federal] law," 28 U.S.C. § 1443(2), when they do not assert "at this time" that a conflict "actually" exists and concede it may not. Legislative Defendants apparently are unable or unwilling to make the central assertion required for removal under the Refusal Clause.

Legislative Defendants' admission at a minimum highlights that the district court correctly held that "it is uncertain and speculative whether the ultimate relief sought … in the form of new plans 'comporting with the North Carolina Constitution' would conflict with federal law." JA686 (quoting JA408). There are literally trillions of possible configurations of North Carolina's state legislative

districts. The notion that not a single one complies with both state and federal law is fanciful.

Plaintiffs' state-law claims allege that Legislative Defendants *intentionally* discriminated against Democratic voters by sorting them into districts based on their political views, to dilute their votes and advantage Republicans. Legislative Defendants suggest that Plaintiffs' amended complaint does not rest on allegations of intentional discrimination, Br.43-44, but every count clearly alleges intentional discrimination, JA401-05. Plaintiffs' state-law theories thus would conflict with federal law only if federal law *required* state legislatures to *intentionally* discriminate against voters of one political party and in favor of another political party. Federal law of course requires nothing of the sort. There is no federal requirement to engage in intentional partisan gerrymandering, and it is plainly possible for a state legislature to engage in neither partisan nor racial discrimination in redistricting. Other state legislatures do it all the time.

Plaintiffs do not "demand" that any remedial plans "dismantle," "drop," or "dilute" the African-American voting age population ("BVAP") in any district, as Legislative Defendants repeatedly suggest. Br.42, 45-46, 49. Plaintiffs do not claim that state law requires any particular percentage of Democratic or African-American voters in any district. Plaintiffs argue only that mapmakers cannot intentionally sort voters into districts based on their political views for partisan

advantage. Regardless, Legislative Defendants' own prior statements suggest that remedial plans in this case could produce districts with comparable BVAPs to the current plans. In creating the 2017 Plans, Legislative Defendants asserted that any districts with a BVAP of roughly "40 percent or 42 percent"—the districts they now call "crossover" districts —were "naturally occurring" because African-American voters "group themselves into … urban areas that are compact." JA665. If the racial demographics of these districts truly occurred "naturally," there is every reason to believe that remedial plans drawn could have similar demographics. At a minimum, it is speculative that they will not.

Legislative Defendants' theory also rests on the untenable assumption that North Carolina state courts will interpret state law in a way that conflicts with federal law. Federal courts must presume the opposite—that state courts will interpret state law to comport with federal law. *Manning v. Hunt*, 119 F.3d 254, 270-71 (4th Cir. 1997). As the district court recognized, this maxim is particularly true for North Carolina, since 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.'" JA686 (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 392 (N.C. 2002)). As state courts have yet to interpret state law in this case, the notion that state law will conflict with federal law is, again, utterly speculative.

For precisely these reasons, federal courts repeatedly have rejected removals of state-law redistricting cases under the Refusal Clause. In *Stephenson*, the plaintiffs challenged North Carolina's state legislative districts under the North Carolina Constitution, including on grounds of "partisan gerrymandering." *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 781 (E.D.N.C. 2001). As here, the defendants removed under § 1443(2), arguing that the suit sought to compel them to violate the VRA and federal equal-protection guarantees. *Id.* at 785. After observing that "it is not entirely clear what the defendants refuse to do" to trigger § 1443(2) at all, *id.*, the district court concluded that the defendants could not show a conflict between state and federal law. It was "unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law," and therefore "any implication of the refusal clause [was] speculative." *Id.* The plaintiffs were "merely seeking an alternative apportionment plan which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law." *Id.* (quotation marks and alterations omitted).

Legislative Defendants are flat wrong that *Stephenson* is distinguishable because the state-law theories there did not have a potential "racial impact." Br.50-51. The Attorney General of the United States had previously declared that one of the state constitutional provisions at issue there, the Whole County

Provision, *did* violate the VRA. *See* 180 F. Supp. 2d at 784-86. The prospect of a conflict thus was far less speculative than here. But the *Stephenson* court still remanded based on the "plaintiffs' exclusive reliance on state law," the uncertainty regarding an actual conflict, and "the court's obligation to strictly construe removal statutes against removal." *Id.* at 785.

The Seventh Circuit similarly rejected a removal of a redistricting lawsuit under the Refusal Clause in *Sexson v. Servaas*, 33 F.3d 799 (7th Cir. 1994). There, the defendants initially removed based on one VRA defense, but then at trial switched to a different VRA defense—namely, that "federal law was implicated because their redistricting plan was in accordance with the [VRA]." *Id.* at 804. But "it does not follow that just because an apportionment plan conforms with federal law, an attack on that plan necessarily seeks to transgress federal law." *Id.* The VRA "established broad boundaries which no state apportionment law could contravene," the court explained, but "[w]ithin those boundaries, in any given case, infinite variations of apportionment plans could be formulated, none of which would violate federal law." *Id.* The court also strongly suggested that the initial removal based on the defendants' first VRA theory was not proper either. *See id.* at 803-04 & n.2.

In *Senators v. Gardner*, 2002 WL 1072305 (D.N.H. May 29, 2002), the district court likewise rejected a § 1443(2) removal of a legislative redistricting

case. The court explained that "defendants have failed to make even a colorable claim that, if the New Hampshire Supreme Court is forced to intervene and formulate a redistricting plan, defendants' compliance with that plan would compel them to violate the [VRA]." *Id.* at *1. The district court reached a similar conclusion in *Brown v. Florida*, 208 F. Supp. 2d 1344 (S.D. Fla. 2002). Because, as here, the state court had not even begun to address whether the relevant redistricting plan violated state law and, if so, what remedy would apply, "at the present there [was] not a colorable conflict between federal and state law," and the defendant's "reliance on the 'refusal' clause [was] therefore 'speculative.'" *Id.* at 1351.

The district court below correctly found the reasoning of these decisions applicable here. JA682-83. Plaintiffs are not seeking to affect minority populations in a way that would violate federal law. There are "infinite variations of apportionment plans" that comply with federal law, *Sexson*, 33 F.3d at 804, and Plaintiffs "are merely seeking an alternative apportionment plan" among those infinite variations "which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law," JA682-83 (quoting *Stephenson*, 180 F. Supp. 2d at 785).

If Legislative Defendants' theory of § 1443(2) were accepted, moreover, it would mean that "any state constitutional attack on [a] state's redistricting plans

would necessarily raise a federal issue" and be subject to removal, because state officials will always be able to speculate that altering the current plans could raise VRA or equal protection concerns. *Stephenson*, 180 F. Supp. 2d at 784. "To allow removal" on such a theory "would give defendants the power to select the forum in which [every redistricting] claim is litigated." *Id.* at 786. That would be particularly true for partisan gerrymandering claims, which frequently allege packing and cracking in states where minority voters favor one party. That would upset the basic principle that plaintiffs, not defendants, select the forum for litigation. It is also irreconcilable with the "primacy" of state courts in redistricting matters. *Growe*, 507 U.S. at 35.

b. There Is No Conflict with the Fourteenth or Fifteenth Amendments

Legislative Defendants' assertion that a state prohibition on intentional partisan gerrymandering would conflict with the Fourteenth and Fifteenth Amendments, Br.45-47, is not just speculative—it is clearly wrong. To establish a Fourteenth or Fifteenth Amendment violation, there must be "racially discriminatory intent." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016). In the redistricting context, mapmakers violate these constitutional provisions by engaging in "intentional vote dilution," "invidiously minimizing or canceling out the voting potential of racial or ethnic minorities." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (quotation marks and alterations omitted).

The suggestion that Plaintiffs—including a diverse array of North Carolina voters and Common Cause, whose mission includes promoting racial equality—want to intentionally discriminate against minority voters for the benefit of the Democratic Party is wrong and deeply offensive. Plaintiffs do not "demand" that anyone "dismantle crossover districts" to "intentionally dilute" minority voting strength. Br.42; *see also id.* at 45-47. Plaintiffs want an end to *all* discrimination against voters, on the basis of race or partisan affiliation.

Regardless, Plaintiffs alone will have no power to draw remedial maps in this case. In any remedial phase, only two entities will be able to adopt remedial plans: North Carolina's General Assembly or state courts. As the Supreme Court recently observed in rejecting an equal protection challenge to a plan initially drawn by a court, "no one" would seriously suggest that courts would "act[] with invidious intent" in drawing remedial plans. *Abbott*, 138 S. Ct. at 2328. Nor would anyone suggest that the North Carolina courts would interpret the State Constitution to compel the General Assembly to draw districts so as to deliberately dilute minority voting strength.

And it plainly will be possible for the General Assembly or state courts to draw remedial maps that simultaneously (1) do not intentionally disadvantage Democratic voters in violation of state law and (2) do not intentionally dilute the voting strength of minorities in violation of federal law. Drawing maps to

eliminate partisan discrimination, without any specific intent to lower the BVAP of any particular district, would not satisfy the "intent element of [a federal] constitution violation." Br.46. Legislative Defendants' contention that *any* alternative map that eliminates partisan discrimination *necessarily* would conflict with federal equal-protection requirements is ridiculous.

Legislative Defendants' invocation of the Fourteenth and Fifteenth Amendments is particularly inapt given that it is Plaintiffs, not Legislative Defendants, who seek relief from intentional discrimination in this case. As in *Detroit Police Lieutenants*, it is Plaintiffs whose "rights … are being violated by the actions of the defendants," not the other way around. 597 F.2d at 568. And courts have repeatedly found in recent years that the North Carolina General Assembly, led by Legislative Defendants, discriminated against racial minorities in enacting election laws. *Compare* Br.45 (Legislative Defendants contending that they are seeking to "empower North Carolina's African-American communities") *with N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (concluding that the General Assembly "target[ed] African Americans with almost surgical precision"); *see also Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

c. There Is No Conflict with the Voting Rights Act

Legislative Defendants' final basis for removal—that they refuse to comply with state law on account of the VRA—is equally meritless. In drawing the 2017 Plans, Legislative Defendants expressly told the *Covington* district court that they did *not* draw the 2017 Plans to comply with the VRA, because they had assessed that the VRA did not apply.

Legislative Defendants asserted over and over during the 2017 redistricting that they were ignoring racial considerations in drawing the 2017 Plans. They adopted as a formal criterion: "Data identifying the race of individuals or voters shall not be used in the drawing of legislative districts in the 2017 House and Senate plans." *Covington*, 283 F. Supp. 3d at 418. When subsequently submitting the plans to the district court for approval, they confirmed that "[d]ata regarding race was not used in the drawing of districts for the 2017 House and Senate redistricting plans." JA101. Senator Hise, who led the redistricting for the Senate, asserted that Legislative Defendants did not even have racial data in their "database," and that any districts with a BVAP of around 40% were "naturally occurring." JA664, 666. Representative Lewis, who led the redistricting for the House, asserted that he did not even "see" the statistics produced by legislative staff on the racial demographics of the new districts until "after the House plan passed" in the House. *Covington*, No. 15-cv-399, ECF No. 184-25 at 12. Thus,

while Representative Lewis now claims that he "did consider race" and "concluded that the VRA was satisfied because of the many districts with BVAP in the range [of 40%]," Br.50, he said at the time that he had no idea of the BVAP of any district in the House plan until after he voted on it.

The reason that Legislative Defendants ignored racial considerations in creating the 2017 Plans was that they did "not believe [they could] develop a strong enough basis in evidence that the third *Gingles* factor is present." JA106. They explained to the *Covington* court that "[n]o information regarding legally sufficient racially polarized voting was provided to the redistricting committees to justify the use of race in drawing districts." JA101. It is blackletter law that "*each* of the three *Gingles*" factors is a "perquisite[]" to VRA liability. *Cooper*, 137 S. Ct. at 1472. If any *Gingles* factor is not met, "§ 2 simply does not apply." *Id.* That is true with respect to "crossover" districts, majority-minority districts, or any other districts—if any *Gingles* factor is not met, § 2 does not come into play and no VRA claim ever "could succeed." *Id.*; *see also Hall v. Virginia*, 385 F.3d 421, 426-31 (4th Cir. 2004). Because Legislative Defendants concluded during the 2017 redistricting that the third *Gingles* factor regarding racial bloc voting was not

met, they necessarily concluded that Section 2 of the VRA does not apply to the state's legislative districts.[4]

Legislative Defendants accordingly cannot remove under § 1443(2) based on the VRA. Legislative Defendants try to deflect from their own prior statements and conclusions, arguing that some hypothetical "Section 2 plaintiffs" in some hypothetical future case could argue down the road that the VRA imposes certain requirements. Br.48. But Legislative Defendants cite no case authorizing removal under the Refusal Clause where the removing defendants believed that enforcing state law would be consistent with federal law, but feared some other unidentified party might disagree. Legislative Defendants must assert that *they* are "refusing" to comply with state law because *they* believe "it would be inconsistent" with federal law. 28 U.S.C. § 1443(2). Legislative Defendants cannot assert that the VRA is a ground for their refusal to comply with state law given their statements that the VRA does not apply.

Indeed, Legislative Defendants' prior statements judicially estop them from raising any VRA defense in this case. Judicial estoppel applies where: (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "the

[4] Plaintiffs take no position as to whether Legislative Defendants' assessment of the third *Gingles* factor was correct. The salient point is that Legislative Defendants cannot rely on the VRA to defend their redistricting decisions or as a basis for their purported "refusal" to comply with state law.

party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (quotation marks omitted). First, to raise a VRA defense, Legislative Defendants would need to establish that there is sufficient evidence of racial bloc voting to satisfy the third *Gingles* factor, but that would be "clearly inconsistent" with the position they took during the *Covington* remedial phase that there was insufficient evidence of racial bloc voting. *Id.* Legislative Defendants argue that judicial estoppel applies only to inconsistent statements of fact, Br.54-55, but the existence of racial bloc voting under the VRA, or lack thereof, is a question of fact. *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 936 (8th Cir. 2018). Second, in allowing implementation of the 2017 Plans, the *Covington* court relied on Legislative Defendants' statements that they had ignored racial considerations entirely in creating the Plans. *See Covington*, 283 F. Supp. 3d at 458. And third, it would be unfair and an abuse of the "judicial machinery" for Legislative Defendants to obtain removal based on a purported conflict with the VRA when they repeatedly told another federal court—just a year ago—that they did not believe the VRA applied. *New Hampshire*, 532 U.S. at 750-51.

3. The District Court Applied the Correct Standard for Inconsistency

Legislative Defendants contend that the district court "misconstrued the governing test in rejecting a 'colorable conflict' standard" because the Refusal

Clause "predicat[es] removal on a *ground*, not proof, of inconsistency." Br.36-37. But Legislative Defendants' conflict arguments fail by any standard. And in any event, the district court applied the correct standard. To remove under the Refusal Clause, the defendant must be "refusing to do" the "act" that the plaintiff alleges state law requires, "on the ground" that doing so "would be inconsistent with" federal equal-rights law. In other words, the removing defendants must assert an actual "conflict between state and federal law," such that "to follow plaintiff's interpretation of state law" would "violate federal law." *White*, 627 F.2d at 586-87 (quotation marks omitted). The removing defendant need not prove the existence of this conflict at the outset—but the defendant must claim an actual state-federal conflict, and that claim must be "colorable." *Id.*

The district court correctly applied that standard here. The court held that the *Covington* remedial order does not preclude Plaintiffs' state-law challenge because the order "does not mandate the specific existing apportionment to the exclusion of … others." JA684. And the court held that any purported conflict between nondiscriminatory maps and the Fourteenth or Fifteenth Amendment or the VRA was "speculative," JA682, 686—*i.e.*, not colorable. *See Hegab v. Long*, 716 F.3d 790, 796-97 (4th Cir. 2013) (contrasting a "speculative claim" with a "colorable … claim").

In the portion of the decision below that Legislative Defendants attack, the district court did not require "proof" of a state-federal conflict. The court simply made clear that Legislative Defendants cannot assert just *any* "colorable conflict" between state and federal law—they must assert a colorable conflict between federal law and "the act" that *they* are "'refusing to do.'" JA685 (quoting 28 U.S.C. § 1443(2)). This requirement follows straightforwardly from "the language of the removal statute." *Id.* And the court held that, "[i]n any event," there was no "colorable conflict" even on Legislative Defendants' understanding of the term. JA686.

The cases cited by Legislative Defendants, Br.37-38, do not suggest otherwise. In *White*, the Second Circuit held that the Refusal Clause requires "a colorable claim" that "follow[ing] plaintiff's interpretation of state law … would violate federal law." 627 F.2d at 586-87. In two other cases, the Second and Fifth Circuits found "colorable conflicts" where the defendants colorably claimed that federal law "required" or "mandate[d]" violating state law. *Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989); *Alonzo*, 68 F.3d at 946. And in *Bridgeport Education Association*, the district court held that the removing defendant must "allege[] at least a colorable claim … that following [state law] would be inconsistent with federal law." 415 F. Supp. at 722-23. Legislative Defendants do not and cannot make that kind of colorable claim here.

II. Independent of the Refusal Clause, the District Court Was Required to Remand Based on Judicial Estoppel and State Sovereign Immunity

Beyond all the reasons above, the removal here was independently improper for two additional reasons. Legislative Defendants are judicially estopped from asserting that federal court is an appropriate forum for any state-law challenge to the 2017 Plans. And Eleventh Amendment state sovereign immunity barred the district court from awarding injunctive relief against state officials on the basis of state law. The court below declined to reach these independent grounds for remand. JA689 n.9. But this Court may "affirm the district court on any ground that would support the judgment in favor of the party prevailing below." *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2013) (quotation marks omitted).

A. Legislative Defendants Are Estopped from Seeking a Federal Forum for State-Law Challenges to the 2017 Plans

As explained, judicial estoppel applies where a party takes a position "clearly inconsistent with its earlier position," "succeeded in persuading a court to accept that party's earlier position," and "would derive an unfair advantage … if not estopped." *New Hampshire*, 532 U.S. at 750-51. By removing this case to federal court, Legislative Defendants take the position that federal court is an appropriate forum for a state-law challenge to the 2017 Plans. But just a year ago, Legislative Defendants in *Covington* repeatedly and successfully told both the

district court and the Supreme Court that any such challenge may proceed *only* in state court.

Here is how Legislative Defendants summarized their own position: "In short, any state-law challenge must be filed in state court, where state judges familiar with the state constitution can address the unsettled question[s]" under state law. JA205. They said it over and over again:

- A federal district court "does not have jurisdiction to consider [state-law] claims" challenging the 2017 Plans. JA111.
- A federal district court adjudicating a challenge to the 2017 Plans "is foreclosed from ruling on contested issues of state law." JA158.
- "[A]n unsettled issue of state law … is more appropriately directed to North Carolina courts, the final arbiters of state law." *Id.* (quotation marks omitted).
- The district court "must defer to the North Carolina courts on" "contested issues of state law." *Id.*
- "[F]ederal courts do not even have the power to entertain *state-law* challenges to state districting laws." Emergency App. for Stay at 21, *Covington*, No. 17A790 (U.S.) (filed Jan. 24, 2018), *available at* goo.gl/EJ4pLK.
- "[T]he district court lacked jurisdiction to consider plaintiffs' state law challenges." JA182.
- "[F]ederal courts have no power to enjoin state districts on state-law claims, especially novel ones." JA190.
- "The district court … lacked jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds." JA204.
- "[T]he federal court should not have adjudicated state law claims …." JA205.

- "[I]t would be a revolution in federalism to conclude" that federal courts have "authority" to adjudicate "any state-law claims" regarding redistricting plans. JA227 (quotation marks omitted).

Legislative Defendants prevailed on these assertions—twice. First, the district court "declined" to address the plaintiffs' objection to remedial districts in Greene and Cabarrus Counties under the Whole County Provision, because that objection raised "an unsettled question of state law" that was more appropriately addressed by "North Carolina courts." 283 F. Supp. 3d at 446-47.

Second, while the district court sustained the plaintiffs' objection to districts in Wake and Mecklenburg Counties under the mid-decade redistricting bar, the Supreme Court reversed in relevant part. The Supreme Court held that the district court erred in adjudicating these claims because a federal court is "not free … to disregard the political program of a state legislature on other bases" beyond "the clear commands of federal law." 138 S. Ct. at 2555 (quotation marks omitted). The district court thus could not "redr[a]w [certain] districts because it found that the legislature's revision of them violated *the North Carolina Constitution*'s ban on mid-decade redistricting, *not federal law*." *Id.* (emphases added).

Legislative Defendants' irreconcilable positions are an abuse of the judicial machinery and would give them an unfair advantage. The only constant in Legislative Defendants' shifting positions is that state-law challenges to the 2017 Plans should proceed in whatever court is least able to grant effective relief. In

arguing that the federal courts in *Covington* could not address any state-law challenges, Legislative Defendants successfully delayed relief on the mid-decade redistricting challenge until after the 2018 elections. But after Plaintiffs filed this state-law challenge in state court, Legislative Defendants now assert that state-law claims should be heard by a federal court. Federal courts, however, are more limited than state courts in their ability to interpret state law and to impose redistricting remedies. *See White v. Weiser*, 412 U.S. 783, 795 (1973). And federal courts "do[] not have a mechanism for certifying questions of state law to [the North Carolina] Supreme Court." *United States v. Vinson*, 805 F.3d 120, 122 n.1 (4th Cir. 2015).

Legislative Defendants contend that there is "no inconsistency" between their positions here and in *Covington*. Br.55. According to Legislative Defendants, in *Covington* they argued only "that the Wake and Mecklenburg County alterations were outside the *Covington* court's purview." *Id.* Not so. In the district court, they opposed the plaintiffs' state-law objections not only as to the Wake and Mecklenburg districts, but also as to the Greene and Cabarrus districts, which undisputedly were within the *Covington* court's remedial "purview." Even at the Supreme Court, Legislative Defendants' absolutist statements—including that "any state-law challenge must be filed in state court," JA205—speak for themselves. Legislative Defendants' assertions are the epitome of what judicial

estoppel exists to prevent—"blowing hot and cold as the occasion demands," and "wanting to have [one's] cake and eat it too." *Lowery v. Stovall*, 92 F.3d 219, 225 (4th Cir. 1996) (quotation marks omitted).

Legislative Defendants also contend that estoppel does not apply because their statements were "of law or legal theory," rather than "of fact." Br.55 (quotation marks omitted). But "[l]ittle would be left of judicial estoppel if any trace of law were to defeat preclusion." 18B Wright & Miller, Fed. Prac. & Proc. Juris. § 4477 (2d ed.). The Supreme Court has applied estoppel to the interpretation of a term in a royal decree fixing a state boundary line. *New Hampshire*, 532 U.S. at 746, 749. And this Court has applied estoppel to an assertion that a scheme for electing superior court judges through statewide elections was constitutional. *Ragan v. Vosburgh*, 110 F.3d 60, 1997 WL 168292, at *5-6 (4th Cir. Apr. 10, 1997) (unpub.). If those positions were sufficiently "factual," then Legislative Defendants' positions here are too.

Legislative Defendants also contend that estoppel does not apply because they could not have intended "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." Br.56. But defending other districts *was* contemplated and foreseeable. Legislative Defendants had already successfully defended districts in Greene and

Cabarrus Counties in the district court. And there were other "ongoing proceedings in state court regarding North Carolina's legislative districting plans." 283 F. Supp. 3d at 447 n.9. Regardless, the question is not whether Legislative Defendants intended to mislead the courts in *Covington*, but whether they intended to mislead "the district court and this [C]ourt to gain unfair advantage in this action." *Lowery*, 92 F.3d at 225. They did—Legislative Defendants did not disclose their prior inconsistent statements in their removal notice.

There is no need to "remand to allow the district court to resolve [estoppel] in the first instance." Br.54. All the elements of estoppel are apparent from the record in *Covington* and on this appeal. To the extent any element is uncertain, "any doubt about the propriety of removal should be resolved in favor of remanding the case to state court." *Barbour*, 640 F.3d at 615. Legislative Defendants successfully argued in *Covington* that federal court is not an appropriate forum for state-law challenges to the 2017 Plans. They should be held to that position here.

B. State Sovereign Immunity Precludes Federal Jurisdiction over Plaintiffs' State-Law Claims

State sovereign immunity also forecloses federal jurisdiction over this case. Under 28 U.S.C. § 1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Eleventh Amendment sovereign immunity is a "jurisdictional limitation on the

power of the federal courts." *Westinghouse Elec. Corp. v. W. Va. Dep't of Highways*, 845 F.2d 468, 469 (4th Cir. 1988). So if "[t]he Eleventh Amendment prevented the district court from exercising subject-matter jurisdiction over [Plaintiffs'] claims," then "§ 1447(c) required the court to remand the action to state court." *Roach v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996).

Here, Plaintiffs seek injunctive relief barring the State Board of Elections and its members from conducting elections under the 2017 Plans because those plans violate state law. In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Supreme Court held that state sovereign immunity prohibits federal courts from granting injunctive relief against "state officials on the basis of state law." *Id.* at 117.

This Court need not take Plaintiffs' word for it. As just noted, Legislative Defendants themselves told the Supreme Court in *Covington* that federal courts "lack[] jurisdiction to enjoin the State from using the 2017 Plan on state-law grounds." JA204. Under *Pennhurst*, Legislative Defendants explained, "[t]he Eleventh Amendment forbids federal courts from enjoining state laws on state-law grounds." JA203. And "neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment." JA204 (quoting *Pennhurst*, 465 U.S. at 121).

To be sure, a State may waive its sovereign immunity, including by having an authorized official file a valid notice of removal on the State's behalf. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002). After cleaving to state sovereign immunity to preclude a federal forum in *Covington*, Legislative Defendants now eagerly attempt to cast that immunity aside through such a waiver. To effectuate a waiver, Legislative Defendants' private counsel purported to remove this case on behalf of the State. JA42 n.1. But private counsel does not represent the State, cannot remove on behalf of the State, and cannot waive the State's sovereign immunity. State law authorizes the Attorney General to represent the State and its agencies in court. *See* N.C.G.S.A. § 114-2(1), (2); *supra* pp.23-24. The Attorney General did not join Legislative Defendants' notice of removal or consent to removal. On behalf of the State, the Attorney General "object[ed] to the removal and join[ed] in Plaintiffs' Motion to Remand." JA463 n.2. That should end the matter.

Legislative Defendants assert that it is "backwards" for "private citizens" to assert sovereign immunity "*against* the General Assembly." Br.58. But the Attorney General has made clear that his office has not waived the State's sovereign immunity. And as the parties invoking federal jurisdiction, Legislative Defendants bear the burden to establish federal jurisdiction—here, through a valid waiver of sovereign immunity. *See Strawn v. AT & T Mobility LLC*, 530 F.3d 293,

297 (4th Cir. 2008). Plaintiffs, moreover, have every reason to ensure that the court hearing this case has jurisdiction to grant the relief sought.

Legislative Defendants contend that they have authority to waive North Carolina's sovereign immunity because, under § 1-72.2 and § 120-32.6(b), "[t]he General Assembly has authority to represent the State in litigation." Br.58. But just as those statutes do not allow Legislative Defendants to remove based on a refusal by State executive branch officials, *supra* pp.23-27, they also do not allow Legislative Defendants to waive the State's sovereign immunity over the executive branch's objection.

As explained, § 1-72.2(b) concerns intervention and therefore does not apply here. Section 1-72.2(a) simply "request[s]" that federal courts allow both the State legislative and executive branches to "participate" in cases challenging the validity of North Carolina statutes. Neither provision authorizes Legislative Defendants' private counsel to waive North Carolina's sovereign immunity without the Governor's consent and over the Attorney General's express objection. If anything, § 1-72.2(a) *undermines* any notion that Legislative Defendants may act on behalf of the State unilaterally—the statute provides that the legislative and executive branches "both" constitute the State together, not separately.

Legislative Defendants' reliance on § 120-32.6(b) is similarly unavailing. Legislative Defendants never mentioned this provision below and thus have

waived any argument about it. *Pornomo v. United States*, 814 F.3d 681, 686 (4th Cir. 2016). Regardless, the provision states that the General Assembly is "a" client of the Attorney General; it does not suggest that the General Assembly, which constitutes only the legislative branch, may unilaterally waive sovereign immunity on behalf of the entire State, over the Attorney General and executive branch's stated objection. Anyway, Legislative Defendants' interpretation of these provisions is unconstitutional. *Supra* pp.25-26.

Even if Legislative Defendants *could* have waived North Carolina's sovereign immunity, they have not successfully done so. Legislative Defendants acknowledge that only a "successful removal" on behalf of the State "would waive sovereign immunity." Br.58. But Legislative Defendants' removal notice did not properly invoke federal jurisdiction on the State's behalf. As explained, to the extent it purports to be filed on behalf of the State, Legislative Defendants' removal notice is procedurally defective because it was filed more than 30 days after the State accepted service. *Supra* p.27.

Ultimately, this Court need not resolve whether Legislative Defendants have authority to waive North Carolina's sovereign immunity, or whether their removal notice successfully did so. Any doubt about Legislative Defendants' purported waiver of sovereign immunity must be construed against them twice over. "A State's consent to suit must be 'unequivocally expressed' in the text of the relevant

statute." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (quotation marks omitted). "[O]nly by requiring this clear declaration by the State can [a federal court] be certain that the State in fact consents to suit." *Id.* (quotation marks omitted). This clear statement rule is compounded by the principle that "[i]f federal jurisdiction is doubtful, a remand is necessary." *Mulcahey*, 29 F.3d at 151. If this Court harbors any doubt whatsoever about Legislative Defendants' purported waiver—even doubt about whether there is doubt—then remand to state court was required.

III. The District Court Abused its Discretion in Denying Fees and Costs Because Legislative Defendants' Removal Was Objectively Baseless

Under 28 U.S.C. § 1447(c), "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The decision whether to award fees under this provision "turn[s] on the reasonableness of the removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). A plaintiff seeking fees need not establish that the notice of removal was "frivolous … or without foundation." *Id.* at 138 (quotation marks omitted). The plaintiff need only show that "the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141.

The district court's denial of fees here was an abuse of discretion, for three reasons. First, because the court declined to address Plaintiffs' estoppel and immunity arguments—two independent bases for remand—it could not possibly have known whether the removal was objectively reasonable. Second, even on the

grounds the district court did address, the removal was objectively unreasonable. Third, granting fees in cases like this is essential to deter baseless removals aimed at delaying time-sensitive state-court proceedings.

A. The District Court Could Not Properly Conclude That the Removal Was Objectively Reasonable Without Addressing All Independent Grounds Supporting Remand

The district court erred as a matter of law by denying Plaintiffs' request for fees and costs without addressing all of Plaintiffs' grounds for remand. The court agreed with Plaintiffs that the Refusal Clause did not authorize removal, but "d[id] not reach [the] additional arguments plaintiffs raise[d] in support of remand, including … sovereign immunity under *Pennhurst* … and judicial estoppel." JA689 n.9.

While the district court did not need to reach those additional grounds in order to remand the case, it did need to reach them in order to deny fees. Judicial estoppel and sovereign immunity are *independent* grounds for remand, either of which *alone* would suffice to render the removal objectively unreasonable. And collectively, the multitude of independent grounds on which this removal failed eliminates any doubt.

It is *per se* an abuse of discretion to deny relief without addressing all legally sufficient grounds for that relief. A district court abuses its discretion where it "has failed to consider judicially recognized factors constraining its exercise of

discretion, or when it has relied on erroneous … legal premises." *United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (quotation marks omitted). The district court's denial of fees here rests on a plainly erroneous premise—namely, that judicial estoppel and sovereign immunity are irrelevant to whether this removal was objectively baseless. By denying fees without addressing those additional grounds for remand, the court failed to consider all relevant factors.

Courts of appeals routinely find abuses of discretion in similar circumstances—including in the context of attorneys' fees. *See, e.g.*, *Raylon, LLC v. Complus Data Innovations, Inc.*, 700 F.3d 1361, 1369 (Fed. Cir. 2012) (the "failure to consider [certain] arguments was an abuse of discretion"); *Pearson v. Target Corp.*, 893 F.3d 980, 984-85 (7th Cir. 2018) (similar); *Dewitt v. Corizon, Inc.*, 760 F.3d 654, 659 (7th Cir. 2014) (similar). So too here, the district court's failure to consider all legally sufficient grounds for fees was a clear abuse of discretion.

This Court can and should resolve now whether judicial estoppel or sovereign immunity renders Legislative Defendants' removal objectively unreasonable, rather than remanding for the district court to address that question in the first instance. "A request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and this Court has "a strong, appropriate concern in avoiding burdensome satellite litigation over

fee awards," *E. Associated Coal Corp. v. Dir., Office of Workers' Comp. Programs*, 724 F.3d 561, 577 (4th Cir. 2013) (quotation marks omitted). This Court often decides issues in fees appeals that it ordinarily would "remand … for further work by the district court" in order to "avoid further litigation expenses that would follow a remand." *McAfee v. Boczar*, 738 F.3d 81, 94-95 (4th Cir. 2013) (quotation marks omitted). The parties will fully brief these issues on this appeal, and a remand would not "yield any … new information." *Cody v. Caterisano*, 631 F.3d 136, 145 (4th Cir. 2011).

It is apparent from the existing record that judicial estoppel and sovereign immunity render Legislative Defendants' removal notice objectively baseless. Legislative Defendants in *Covington* successfully told two federal courts that *any* state-law challenge to the 2017 Plans must proceed in state court; now they seek to proceed in federal court.. Those prior assertions implicate the very "integrity of the judicial process." *Lowery*, 92 F.3d at 223 (quotation marks omitted). When they filed their removal notice, moreover, Legislative Defendants plainly *knew* about the diametrically opposed position they had taken just a year earlier. In these circumstances, no reasonable litigant could have concluded that removal to federal court was justified.

As to sovereign immunity, Legislative Defendants do not dispute that immunity forecloses removal absent a waiver, which Legislative Defendants face a

doubly heightened standard to establish. As explained, a waiver of sovereign immunity is ineffective unless "unequivocally expressed," *Sossamon*, 563 U.S. at 284 (quotation marks omitted), and if the clarity of the waiver is even "doubtful, a remand is necessary," *Mulcahey*, 29 F.3d at 151; *supra* pp.57-58. Here, there are, at a minimum, reasonable arguments that Legislative Defendants lack authority to waive the State's sovereign immunity over the State executive branch's objection. That is the considered position not just of Plaintiffs, but of the North Carolina Attorney General. And even on appeal, Legislative Defendants offer *no response* to the fact that they filed their removal notice too late to invoke federal jurisdiction on behalf of the State.

Courts often grant attorneys' fees under § 1447(c) based on this kind of doubly heightened standard. For example, in *Kent State University Board of Trustees v. Lexington Insurance Co.*, 512 F. App'x 485, 489 (6th Cir. 2013), the removing defendant asserted that the federal court had diversity jurisdiction because the only non-diverse defendant had been fraudulently joined. *Id.* at 487. The standard for fraudulent joinder, however, like the standard for a waiver of sovereign immunity, is stringent—joinder is proper so long as there is "a colorable basis for predicting that a plaintiff may recover against non-diverse defendants." *Id.* at 489 (quotation marks omitted). "The *combination* of the 'colorable' standard with the requirement that all ambiguities of state law are to be resolved in favor of

the non-removing party presents a significant hurdle." *Id.* (emphasis added). The court therefore concluded that, when "[v]iewed through the lens of the … fraudulent joinder standard," a removal based on "clearly unsettled" law "was not … objectively reasonable." *Id.* at 493 (quotation marks omitted). The Second, Ninth, and Eleventh Circuit all have found removals alleging jurisdiction based on fraudulent joinder to be objectively unreasonable on similar grounds.[5]

The same logic applies here. Legislative Defendants may have colorable arguments that they can and have waived North Carolina's sovereign immunity. But Legislative Defendants cannot seriously maintain—as they must to avoid a fee award—that the law is settled and there is no reasonable basis even to question the validity of their purported waiver. When "viewed through the lens" of the waiver standard, combined with the principle that all doubts are resolved in favor or remand, the removal here was "not … objectively reasonable." *Id.* A fee award is therefore appropriate.

B. Even on the Grounds the District Court Did Address, Removal Was Objectively Unreasonable

Even setting aside estoppel and immunity, this removal still lacked an objectively reasonable basis. As shown above, Legislative Defendants' arguments under the Refusal Clause are baseless, and objectively so. Legislative Defendants

[5] *CMGRP, Inc. v. Agency for the Performing Arts, Inc.*, 689 F. App'x 40, 41-42 (2d Cir. 2017); *Grancare, LLC v. Thrower by & through Mills*, 889 F.3d 543, 552 (9th Cir. 2018); *Taylor Newman Cabinetry, Inc. v. Classic Soft Trim, Inc.*, 436 F. App'x 888, 892 (11th Cir. 2011).

have no reasonable basis to claim that Plaintiffs are suing them "for refusing to do" any act mandated by state law. Legislative Defendants cite no case where state legislators have *ever* been permitted to remove under the Refusal Clause. JA683. The Fifth Circuit has reversed a denial of fees under § 1447(c) where the removing defendant's "particular argument ha[d] not been directly addressed by [the] Court" and was supported by at least one "undoubtedly helpful" district court decision. *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692, 700 (5th Cir. 2017). Here, allowing removal would have been literally unprecedented.

Legislative Defendants' arguments for why it would violate federal law to draw maps that refrain from partisan discrimination are patently frivolous. It is astonishing for Legislative Defendants—who were parties in *Covington*—to assert that the *Covington* remedial order precludes future state-law challenges in state court, when that very same order made clear that it was "without prejudice to … other litigants asserting [state-law] arguments in separate proceedings," including "in state court." 283 F. Supp. 3d at 447 n.9. That same order even invited a future "partisan gerrymandering objection" to the 2017 Plans, explaining that such a challenge would be "more appropriately addressed in a separate proceeding." *Id.* at 427. If Legislative Defendants' arguments based on the *Covington* remedial order are not objectively unreasonable, nothing is.

Legislative Defendants also lack any reasonable basis for their claim that the VRA and the Fourteenth and Fifteenth Amendments require them to intentionally discriminate against Democratic voters. To state that argument is to refute it. Indeed, Legislative Defendants below expressly *disavowed* any assertion that complying with Plaintiffs' view of state law "actually would violate federal law." JA484 n.6. That concession alone warrants fees. And Legislative Defendants' removal based on the VRA plainly is not reasonable given their numerous statements in drawing the 2017 Plans that they did not believe the VRA applied to these districts. It is also objectively baseless—and offensive—to suggest that a North Carolina court ordering remedial maps in this case would *intentionally* dilute minority voting power in violation of the Fourteenth and Fifteenth Amendments. Legislative Defendants' arguments, if adopted, "would stretch the Voting Rights Act" and the Fourteenth and Fifteenth Amendment "beyond rational limits." *News-Texan, Inc. v. City of Garland, Tex.*, 814 F.2d 216, 219 (5th Cir. 1987) (reversing denial of fees under § 1447(c)).

The district court offered only a single-sentence rationale for its contrary ruling below. The court explained that that Legislative Defendants' "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." JA690. But whether Plaintiffs are entitled

to fees does not turn on the detail of Legislative Defendants' removal notice, the length of their briefing, or the variety of their citations—it turns on the strength of their arguments. As explained, those arguments are objectively unreasonable.

C. Awarding Fees and Costs Here Is Essential To Prevent Removals from Disrupting Expedited State-Court Proceedings

The Supreme Court has held that an award of fees under § 1447(c) must be "faithful to the purposes" of the fee-shifting provision—"deter[ring] removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Martin*, 546 U.S. at 140-41. Awarding fees here not only is "faithful" to the purposes of § 1447(c); it is essential to keep baseless removals from serving as an ever-ready tool to disrupt time-sensitive proceedings in state court.

Over and over this decade, the citizens of North Carolina have been forced to vote in unconstitutional state legislative or congressional districts because there was insufficient time to implement remedial maps before the next election. *See* JA420. Time is of the essence in this lawsuit to ensure that that does not happen again if Plaintiffs prevail. And the timeline for resolving this suit is particularly compressed because Legislative Defendants moved up the primaries for the 2020 elections. After this case was filed, Legislative Defendants even passed a new law that purports to significantly extend the time they must be given to enact any new

remedial plans. 2018 N.C. Sess. S.L. 2018-146 § 4.7; JA414-15. The removal here was just one more tactic to try to run out the clock.

Even after the district court remanded this case, Legislative Defendants sought—and obtained—further delay by filing a motion for a 30-day stay of the remand order. That motion was frivolous, since the act Legislative Defendants sought to stay—transmitting a certified copy of the remand order to the state court—had already happened. JA694. But because the state court took no action on the case until after the federal court denied the stay motion several weeks later, Legislative Defendants still succeeded in their goal of delay. In all, Legislative Defendants' removal gambit delayed this suit by nearly a month-and-half.

Legislative Defendants removed this case for precisely the ends § 1447(c) is designed to combat—"prolonging litigation and imposing costs on the opposing party." *Martin*, 546 U.S. at 140. If ever there were a case where awarding fees would be "faithful to the purposes of … § 1447(c)," *id.* at 141 (quotation marks omitted), this is it.

CONCLUSION

This Court should affirm the district court's decision remanding this case to state court and reverse the denial of fees and costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Response and Principal Brief of Plaintiffs–Appellees–Cross-Appellants complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B). The brief contains 15,299 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ *R. Stanton Jones*
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CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on March 11, 2019, I caused the foregoing Response and Principal Brief of Plaintiffs–Appellees–Cross-Appellants to be filed via ECF, and service was accomplished on all counsel of record by that means.

/s/ *R. Stanton Jones*
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