IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Common Cause, et al., Plaintiffs-Appellees-Cross-Appellants, v. David R. Lewis, et al., Defendants-Appellants-Cross-Appellees, and The North Carolina State Board of Elections and Ethics Enforcement, et al. Defendants-Appellees.	Nos. 19-1091 (L), 19-1094

JOINDER OF THE STATE OF NORTH CAROLINA, THE NORTH CAROLINA STATE BOARD OF ELECTIONS, AND ITS MEMBERS

Under Federal Rule of Appellate Procedure 28(i), the State of North Carolina, the North Carolina State Board of Elections, and its members (the State defendants)[1] join with plaintiffs in respectfully requesting that this Court "affirm

[1] Since this lawsuit was first filed, the North Carolina State of Board of Elections and Ethics Enforcement has been reconstituted as the North Carolina State Board of Elections. *See* Act of Dec. 27, 2018, ch. 146, secs. 3.2(a), 3.5(a), 2018-5 N.C. Adv. Legis. Serv. 125, 125, 130 (LexisNexis). Also, new members have been appointed to the Board. By rule, these new members have automatically been substituted as parties in this case. *See* Fed. R. App. P. 43(c).

the district court's decision remanding this case to state court." Pls. Br. 67.[2] This case presents exceptionally important issues of state law, not federal law. It should be heard in the courts of North Carolina, not the federal courts.

The legislative defendants maintain that removal of this lawsuit to federal court is appropriate under 28 U.S.C. § 1443(2), which is commonly referred to as the "refusal clause." Removal under the refusal clause is available to state officers who are sued because they refuse "to enforce discriminatory state laws in conflict with [equal-rights law]." *Baines v. City of Danville*, 357 F.2d 756, 772 (4th Cir. 1966); *accord City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). For removal to be appropriate under the refusal clause, a state official 1) must have refused to enforce a state law 2) that is in conflict with federal equal-rights law.

Since the district court remanded this lawsuit to state court, plaintiffs have also voluntarily dismissed their claims against the State. To the extent that the State remains a party to this appeal, it submits this joinder.

[2] The State defendants file this joinder in accordance with Rule 28(i). Fed. R. App. P. 28(i). The legislative defendants filed their opening brief, purportedly on behalf of the State as well as themselves. However, the State has already been dismissed as a defendant in this lawsuit. To the extent that it remains a party to this appeal, the State is properly represented by the Department of Justice, the executive agency charged with defending the State and its officers and agencies. *See* N.C. Gen. Stat. § 114-2(1). Counsel from the Department have filed their notices of appearance on behalf of the State and objected to the legislative defendants' docketing statement. The State defendants did not file this appeal and support remand. As a result, the State defendants join plaintiffs' brief to the extent described in this joinder and make this submission to clarify their position in this appeal.

Attempting to qualify under the refusal clause, the legislative defendants assert that two North Carolina statutes — sections 1-72.2 and 120-32.6 of the General Statutes — authorize them to wield executive power, including taking an "enforcement role" with respect to state election law. Leg. Defs. Br. 26-29, 35. Selectively quoting the statutes, the legislative defendants maintain that these provisions give them the power to act as the entire State of North Carolina, not just as the legislative branch, and that, as the State, they could "refuse to administer a new redistricting plan," ordered by the North Carolina courts, that might conflict with federal equal-rights law. *Id.* 27.

If sections 1-72.2 and 120-32.6 were interpreted as the legislative defendants suggest, they would plainly violate the North Carolina Constitution. The North Carolina Constitution includes an express separation of powers clause mandating that executive and legislative power must be kept "forever separate and distinct." *See* N.C. Const. art. I, § 6.[3] The North Carolina Constitution vests the power to

[3] The separation of powers clause is a vital part of the North Carolina Constitution, and has been relied upon in several recent cases to prevent legislative encroachment on executive power. *See, e.g.*, *Cooper v. Berger*, 370 N.C. 392, 415-16, 809 S.E.2d 98, 112 (2018) (holding that statute that limited Governor's control over execution of election law violated separation of powers); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 647-48, 781 S.E.2d 248, 256-57 (2016) (holding that statute that gave legislature too much control over execution of environmental law violated separation of powers); *Cooper v. Berger*, No. 17 CVS 6465 (N.C. Super. Ct. Wake Cty. Dec. 5, 2018) (holding that statute that limited Governor's control over execution of worker's compensation laws violated separation of

enforce state law in the executive branch of state government. N.C. Const. art. III; *Cooper*, 370 N.C. at 407, 809 S.E.2d at 107. As this Court has recognized, the "North Carolina Constitution clearly assigns the enforcement of laws to the executive branch," and the "General Assembly retains no ability to enforce any of the laws that it passes." *Wright v. North Carolina*, 787 F.3d 256, 262 (4th Cir. 2015).

The North Carolina Supreme Court has recently underscored that the administration of the State's election laws is executive in nature. *Cooper*, 370 N.C. at 415, 809 S.E.2d at 112. Thus, the legislative defendants cannot constitutionally "administer a new redistricting plan," Leg. Defs. Br. 27, because that would involve exercising a "power that the constitution vests exclusively" in the executive branch. *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250. As a result, the legislative defendants cannot rely on sections 1-72.2 and 120-32.6 to remove this lawsuit to federal court, because there is no circumstance in which they could ever "refuse to administer a new redistricting plan." Leg. Defs. Br. 27.

In any event, as the plaintiffs argue, this Court need not rule on the interpretation or validity of sections 1-72.2 and 120-32.6, which are issues of state

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powers); *Cooper v. Berger*, No. 16 CVS 15636 (N.C. Super. Ct. Wake Cty. Mar. 17, 2017) (holding that statute that limited Governor's power to make appointments within executive branch violated separation of powers).

law, to affirm the district court's decision to remand this case to state court.[4] As noted above, removal under the refusal clause is appropriate only when a state official 1) has refused to enforce a state law 2) that conflicts with federal equal-rights law. *Baines*, 357 F.2d at 772. Even if the legislative defendants *could* enforce state law on the State's behalf, they still would not satisfy either of these conditions.

First, in this lawsuit, plaintiffs do not challenge the refusal of any defendant to take any action. Rather, plaintiffs seek to enjoin defendants from carrying out future elections using the district maps that plaintiffs allege are unconstitutional. J.A. 300. Because plaintiffs challenge defendants' actions, not their refusal to act, removal under the refusal clause is inappropriate. *See, e.g.*, *Thornton v. Holloway*, 70 F.3d 522, 523 (8th Cir. 1995).

Second, there is no colorable conflict between plaintiffs' interpretation of the North Carolina Constitution and federal equal-rights law. For example, there is no conflict with the judgment in *Covington v. North Carolina* that struck down certain districts as racial gerrymanders under federal law, because the *Covington* court expressly stated that its decision was "made without prejudice" to litigants asserting other state-law challenges "in separate proceedings." 283 F. Supp. 3d

[4] The Attorney General reserves the right to challenge more comprehensively, in an appropriate setting, the interpretation of sections 1-72.2 and 120-32.6 that the legislative defendants have advanced in this lawsuit.

410, 447 n.9 (M.D.N.C. 2018). Likewise, there is no conflict with other federal law, such as the Voting Rights Act. Plaintiffs do not seek districts that violate federal law; instead, they seek "an alternative apportionment plan." *Sexson v. Servaas*, 33 F.3d 799, 804 (7th Cir. 1994); *see also* J.A. 300. There are "infinite" districting plans that could comply with both federal and state law. *Sexson*, 33 F.3d at 804. Thus, any conflict between the relief that plaintiffs seek and federal equal-rights law is illusory.

As a final matter, removal is also inappropriate because it would deny the North Carolina courts the opportunity to rule on an especially important issue of state constitutional law concerning voting rights. As one court has observed, if removal were permissible in circumstances like these, then "any state constitutional attack on [a] state's redistricting plans would necessarily raise a federal issue," denying state courts the power to rule on these matters. *Stephenson v. Barlett*, 180 F. Supp. 2d. 779, 785 (E.D.N.C. 2001). This Court should decline the invitation of the legislative defendants to transfer to the federal courts the most important responsibility of the courts of North Carolina: interpreting the scope of the rights granted to the people of North Carolina by their Constitution.

CONCLUSION

For the foregoing reasons, the State defendants respectfully request that this Court affirm the district court's decision remanding this case to state court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have filed the foregoing Joinder with the Clerk of Court using the CM/ECF System, which will automatically send e-mail notification of such filing to all counsel of record.

March 11, 2019

/s/ Stephanie A. Brennan
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