Nos. 19–1091(L), 19–1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMON CAUSE, et al.,

Plaintiffs–Appellees–Cross-Appellants

v.

DAVID R. LEWIS, et al.;

Defendants–Appellants–Cross-Appellees,

and

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

Defendants.

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

Response and Reply Brief of Defendants–Appellants–Cross-Appellees

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Corporate Disclosure Statement

Defendants–Appellants are not publicly held corporations and have no publicly owned parent corporation owning 10% or more of its stock. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Defendants–Appellants are not trade associations.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiffs agree that this case presents questions of first impression. Pls. Br. 1. To resolve them, the Court should look to the text of the operative removal provision, the "refusal" clause of 28 U.S.C. § 1443(2). But the district court paid little heed to that text, and Plaintiffs virtually ignore it.

The text authorizes removal by any "defendant" sued "for refusing to do any act on the ground that it would be inconsistent" with "any law providing for equal rights." 28 U.S.C. § 1443(2). The text does not, as Plaintiffs contend, place any special disability on a legislative body to remove. The General Assembly is a *defendant*, and Plaintiffs are suing it *for refusing* to enact "new" redistricting plans they say state law requires. JA335. The prospective purpose for suing the General Assembly's officers is readily obvious, since no damages or injunction are available against the General Assembly, and Plaintiffs cannot obtain new maps from the Board of Elections and Ethics Enforcement—or, for that matter, the Governor, a non-party who lacks even veto power over redistricting legislation. Nor are Plaintiffs persuasive in asking the Court to ignore North Carolina's choice of agents to represent it in this case or, worse, assume that choice to be unconstitutional. The *refusal* element is doubly satisfied.

So is the *inconsistency* element. Plaintiffs (unlike the district court) concede that a colorable-conflict standard applies but fail to explain why it is not met. Plaintiffs' demand for yet another redistricting creates a colorable conflict with the *Covington* order, which does not allow the General Assembly to use "a near-infinite number of plans." Pls. Br. 31. That is clear from both its operative language and the *Covington* court's choice to deny the General Assembly further opportunities to amend the 2017 plans. And the colorable *inconsistency* with the Voting Rights Act and Fourteenth and Fifteenth Amendments arises from the "new, fair maps" Plaintiffs demand, JA335, not from their unproven allegations of past partisan motive. Tellingly, Plaintiffs do not address their complaint's 60+ references to "packed" districts or the possibility of their being "unpacked" without adversely impacting minority opportunity districts. Nor do Plaintiffs even cite *Bartlett v. Strickland*, 556 U.S. 1 (2009), the case the General Assembly advances as its basis for a colorable *inconsistency*. At best, Plaintiffs' arguments preview litigation that should occur in federal, not state, court; at worst, they are entirely beside the point.

The refusal clause being satisfied, no other bar to federal court exists. Most of the statements Plaintiffs cite for their affirmative defense of estoppel are legal positions estoppel does not reach, and the *Covington* court's rulings on the scope of remedial discretion did not adopt the General Assembly's legal

views on jurisdiction, the operative issue here. Plaintiffs' sovereign-immunity argument fares even worse. That defense "may not be invoked by a plaintiff to control the forum" and, besides, is inapplicable "because, by removing the case to federal court" the General Assembly "waived any Eleventh Amendment immunity defense." *Gustin v. W. Va. Univ.*, 63 F. App'x 695, 698 (4th Cir. 2003). The removal was timely because service on North Carolina was, by statute, only complete when effectuated on the General Assembly.

For these reasons, the only objectively unreasonable position advanced here is Plaintiffs' cross-appeal demand for fee shifting. Every issue in this case is one of first impression. Plaintiffs cite no precedential bar to even one argument the General Assembly has advanced. And there is neither a heightened expedited-case removal standard nor a meaningful delay from the General Assembly's valid choice to assert its "rights under [the] law," JA690, when Plaintiffs waited over a year from passage of the 2017 plans to file their complaint (and subsequently amended it). The district court properly exercised its discretion to deny Plaintiffs' fee-shifting demand, and there is no basis to reverse that choice.

ARGUMENT

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

A. The General Assembly Is Sued *for Refusing* To Enact Plaintiffs' Preferred Redistricting Plans

The General Assembly is being sued *for refusing* to enact redistricting plans Plaintiffs say state law affirmatively requires. G.A. Opening Br. 21-26. This is plain from the following points of agreement among the parties: (1) the ultimate goal of this litigation is "new" redistricting maps, JA335, (2) for that goal to be realized, someone must somehow cloak those maps with the force of law, Pls. Br. 40, and (3) the General Assembly is the constitutionally prescribed body to confer that legal status, N.C. Const. art. II, §§ 1, 3, 5. Accordingly, the General Assembly is being sued *for refusing* to do an affirmative *act* Plaintiffs claim state law requires.

Plaintiffs are wrong (at 16-17) that they did not sue the General Assembly *for* affirmative relief. Plaintiffs seek new maps from this lawsuit and sued the body authorized to provide that relief: the General Assembly. The General Assembly could decide today, against the interests of the State and its residents, to moot this case by enacting Plaintiffs' new maps. Its *refusal* to do so is why this case continues.

Plaintiffs brought this case "[t]oward the obtaining of," American Dictionary of the English Language 469 (1860) (defining *for*), a set of "new" redistricting plans. JA335. Plaintiffs' other demanded relief, an injunction, is one step toward that ultimate end and in no way obfuscates it. Plaintiffs will not be satisfied with an injunction; they do not want 170 legislators to be elected in at-large contests. Besides, an injunction against the General Assembly does nothing for Plaintiffs, and no compensatory relief is even available. The point of naming the General Assembly is new maps, to be obtained by its affirmative *act*.

In this respect, Plaintiffs' demanded relief is no different from that sought in redistricting and desegregation cases where the goal of a new regime supports removal, even though that relief implies an injunction against the old. *See, e.g.*, *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995); *Cavanagh v. Brock*, 577 F. Supp. 176, 180 (E.D.N.C. 1983); *Voketz v. City of Decatur, Ala.*, 5:14-cv-540, ALA13, DE 24 at 7–17 (N.D. Ala. Aug. 19, 2014); *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 437 F.2d 1143, 1144 (7th Cir. 1971); *Linker v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 344 F. Supp. 1187, 1195 (D. Kan. 1972); *Mills v. Birmingham Bd. of Ed.*, 449 F.2d 902, 905 (5th Cir. 1971); *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691, 694 (W.D.N.Y. 1979). Even if Plaintiffs were correct (at 19-22) that these cases

involve only executive actors—they are not, *see infra* § I.B—their interpretation of the word *for* excludes "[e]ven…the State Defendants," as they concede. Pls. Br. 17. Thus, under Plaintiffs' erroneous logic, these cases were all wrongly decided.

But Plaintiffs' authorities are not contrary to the General Assembly's. They involve remedies solely for past actions and no request for future state cooperation. In a defamation suit, *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995), a suit seeking an injunction against enforcement of a promotion-eligibility list, *Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979), or a prosecution for resisting arrest and criminal trespass, *New York v. Horelick*, 424 F.2d 697, 698-700 (2d Cir. 1970), the defendants are sued *for* acts already done, which cannot provoke a *refusal*. The result would be different if, as here, the backward-looking relief were a step towards future affirmative relief also sought.

That much is expressly stated in Judge Friendly's *Horelick* opinion, which distinguished the case before it from one "where a teacher was being prosecuted for having admitted black children to a school in which racial segregation was required by state law"; that, said Judge Friendly, would qualify under Section 1443(2). 424 F.2d at 703. Judge Friendly's hypothetical—like Plaintiffs' complaint—combines past and prospective relief:

(1) punishment *for* the past act of admitting the black student—in Judge Friendly's words "for having admitted black children"—and (2) an injunction forcing the future affirmative *act* of expelling the black student. The pursuit of both negative and affirmative goals neither negates the affirmative goal nor defeats the defendant's capability to *refuse* cooperation.

Nor does it matter, as Plaintiffs say (at 17-18), that the case will, if Plaintiffs succeed, proceed, first, with a liability phase and, second, with a remedial phase—any more than it would matter in Judge Friendly's hypothetical that the suit were to proceed by, first, adjudicating whether the teacher's admission of black students violated state law and, second, compelling the teacher to expel them. The purpose *for* which the suit was brought can surely be advanced in steps.

Likewise, it is not relevant that Plaintiffs can obtain legal imprimatur for their new maps from a state court if the General Assembly does not capitulate. Pls. Br. 18. The same can be said of Judge Friendly's hypothetical: the prosecution can expel the black students without the teacher's help by jailing or firing the teacher, assigning the teacher to some other role, placing guards around the school to prevent the teacher from admitting the students, or authorizing guards to enter the teacher's classroom and physically remove them. Those alternatives to accomplishing the *act* without the teacher's

cooperation do not change the fact that the teacher is charged *for refusing* to cooperate. Likewise, Plaintiffs' demand that the state courts seize the General Assembly's power—acting in its stead, by color of its authority, over its objection, and to its exclusion—only confirms that this case was brought to obtain its affirmative *act*. The statutory prerequisites are therefore satisfied.

B. The General Assembly Is a *Defendant*

Like the district court, Plaintiffs advance a "second reason" Section 1443(2) removal is unavailable: that the General Assembly's officers "serve only a 'legislative role, rather than a law enforcement role.'" Pls. Br. 19. But the statute neither imposes a special disability on a legislative body nor differentiates among different government roles. Because the General Assembly is a *defendant* capable of violating *equal-rights law*, it can remove.

Rather than distinguish between executive and legislative actors, the statute creates a nexus between the *act* demanded and the *defendant*'s ability to *refuse* it. A *defendant* responsible for the *act* the plaintiff demands can, as a matter of plain language, *refuse* it through "inaction" that is "the subject of the state-court suit." *City & County 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). Here, the *act* demanded is the creation of "new" redistricting plans, JA335, and the General Assembly, as the *defendant* capable of engaging in that *act*, can refuse.

It does not matter, then, that "[l]egislators generally do not have judicially enforceable duties to enact legislation." Pls. Br. 21. What is "generally" true is not always true. This argument provides no basis for limiting the statute's reach where, as here, such duties are asserted.

Perhaps the best evidence of which *defendant* is capable of a *refusal* is Plaintiffs' own choice to sue the General Assembly's officers. That choice is grounded in the North Carolina Constitution, which imposes an affirmative obligation that the General Assembly draw the State's house and senate districting maps. N.C. Const. art. II, §§ 3, 5. It is also grounded in the State's choice of what officers are "necessary parties," which confirms the General Assembly's officers as *defendants* capable of affording relief or refusing it. N.C. Gen. Stat. § 120-32.6(b).[1] Indeed, the General Assembly may be the only party capable of *refusal* in this case, since the North Carolina executive branch has no role in passing redistricting legislation. The Governor lacks even veto power, JA334-35, and thus cannot grant Plaintiffs the new maps they desire. The General Assembly is, then, the clearest candidate for *refusing* that relief.

[1] Plaintiffs' contention that any reliance on this statute was forfeited by failure to cite it below confuses claims and supporting authorities. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[P]arties are not limited to the precise arguments that they made below, and may present a new argument on appeal to support what has been a consistent claim." (cleaned up)).

Plaintiffs cite no applicable statutory disability to removal. Instead, as the General Assembly predicted in its opening brief (at 30-32), Plaintiffs rely on language in *Baines v. City of Danville, Va.*, 357 F.2d 756 (4th Cir. 1966), and *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), referencing Section 1443 as embracing refusals to "enforce" laws. Pls. Br. 14-15,19. And, as the General Assembly predicted, Plaintiffs can identify "no distinction between" legislative and executive functions that "was material to the result in" those cases. *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012). Nor do Plaintiffs have any response to the Supreme Court's and this Court's warnings that "words of our opinions are to be read in the light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); *Ameur v. Gates*, 759 F.3d 317, 324 (4th Cir. 2014) (same). This "dicta," JA682, does not negate the statutory text.

Plaintiffs' assertion (at 19) that legislators have never successfully removed under Section 1443(2) is no substitute for statutory interpretation. For one thing, Plaintiffs are wrong as a factual matter. The sole defendant in *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691 (W.D.N.Y. 1979), was the Board of Education for the City of Buffalo, and "[i]t is clear that the Board of Education of the City of Buffalo possesses substantial legislative or quasi-legislative powers," *Bd. of Ed. of City of Buffalo v. Buffalo Council of Sup'rs*

& Administrators, 383 N.Y.S.2d 732, 737 n.2 (N.Y. App. Div. 1976); *see also Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 721(D. Conn. 1976) (school-board officials); *Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind.*, 302 F. Supp. 309, 311–12 (S.D. Ind. 1969) (board of school commissioners). Likewise, the "Servaas" in *Sexson v. Servaas*, 33 F.3d 799 (7th Cir. 1994), a case Plaintiffs rely on, was the president of the Marion City Council. Under Indiana law, city council members perform only "legislative duties." *Schloer v. Moran*, 482 N.E.2d 460, 464 (Ind. 1985). Although remand was ordered after trial, initial removal was successful, and the Seventh Circuit did not cite Mr. Servaas's legislative capacity as a basis for remand.

Regardless, this point is irrelevant because statutory interpretation "begins and ends with the text," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014), not with a qualified-immunity-type burden where the General Assembly must point to factually analogous precedent at a high level of granularity, rather than (what Plaintiffs assert to be) a low level of granularity present in the above-cited redistricting and the desegregation cases (which, in fact, closely resemble this case). There is no precedent either way addressing this issue, and that is a historical happenstance resulting from irrelevant factors, including the availability of immunity and plaintiffs' normal

choice of defendants. The absence of case law calls for statutory interpretation, not summary rejection of removal.

Plaintiffs cite only one case that so much as contains the word *legislator*, and that case addressed "legislators sued solely because of their refusals to cast votes." *Wolpoff v. Cuomo*, 792 F. Supp. 964, 968 (S.D.N.Y. 1992). But this suit is not against "legislators" whose votes are not independently sufficient to accomplish the ultimate *act* demanded, as in *Wolpoff*. The parties Plaintiffs call the "Legislative Defendants" speak for the entire body. N.C. Gen. Stat. § 1-72.2(a). The General Assembly is the real-party *defendant*, it has an affirmative obligation to redistrict, and Plaintiffs are demanding that it *act* to do so or have its power seized in a coercive proceeding. *Wolpoff* had no occasion to consider these circumstances because most of the defendant legislators resisted removal and had the right to immunity, meaning the single legislator who desired removal could not on his own *act* through legislation. In all events, *Wolpoff* does not bind this Court, and an opinion that purports to interpret a statute without a single mention of its text should not mark the end of this dispute, if even the beginning. The Court should read the statute for itself to decide this question of first impression.

C. North Carolina, Spoken for Here by the General Assembly, *Refuses* To Administer Plaintiffs' Demanded Relief

The General Assembly's *refusal* to *act* through a new districting plan is sufficient for removal. But, that aside, North Carolina too can *refuse* to enact and implement a redistricting regime, including by declining enforcement action. Because state law authorizes the General Assembly to speak for North Carolina in this litigation, the General Assembly's assertion that the State itself *refuses* controls this question.

1. It is beside the point "[t]he legislative branch cannot perform or refuse to perform an executive function," Pls. Br. 23, because North Carolina itself is a *defendant* capable of removal. North Carolina encompasses all its component powers, so its duties align with all relief Plaintiffs demand, legislative, executive, and judicial. As the district court found, removal under Section 1443(2) would be proper, as it was in *Cavanagh v. Brock*, where an action seeks "declaratory and injunctive relief restraining the State of North Carolina from *implementing* the reapportionment plans." JA683 (quoting 557 F. Supp. at 176) (emphasis added by the district court). Plaintiffs named the State of North Carolina as a *defendant*, suing it *for refusing* to adopt and implement Plaintiffs' preferred scheme.

North Carolina can authorize "agents to represent it in federal court." *Hollingsworth v. Perry*, 570 U.S. 693, 710 (2013). By defining the General

Assembly, through its officers, as "agents of the State," N.C. Gen. Stat. § 1-72.2(b), North Carolina has identified which parties are empowered to tell the Court whether North Carolina *refuses* and its *grounds*. For purposes of this argument, however, the relevant *defendant* is North Carolina, so it is irrelevant whether the General Assembly has independent law-enforcement duties.

2. Contrary to Plaintiffs' and the Attorney General's arguments, state law expressly authorizes the General Assembly to represent the State: "[I]n any action in any North Carolina State court in which the validity or constitutionality of an act of the General Assembly or a provision of the North Carolina Constitution is challenged,…both the General Assembly and the Governor constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a). There could hardly be a clearer statement that the General Assembly speaks for the State than language that "the General Assembly…constitute[s] the State of North Carolina" for that very purpose. *Id.*

Plaintiffs are wrong (at 24) that, because the Governor also constitutes the State, the General Assembly somehow does not. The both/and formulation here—"*both* the General Assembly *and* the Governor constitute the State of North Carolina" (emphasis added)—means "the two, without exception of either." Webster's New International Dictionary 315 (2d ed. 1957). Nor does the phrase imply the dependency of one on the other, any

more than the clause "both the king and the queen spoke" implies such dependency, when each speaks independently. 2 Oxford English Dictionary 429 (2d ed. 1989). Words effectuating interdependency are present in the same statutory provision, which provides that the General Assembly "*jointly* through the Speaker of the House of Representatives and the President Pro Tempore of the Senate, constitutes the legislative branch of the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a) (emphasis added); *see also* N.C. Gen. Stat. § 120-32.6 ("the Speaker of the House of Representatives and President Pro Tempore of the Senate *jointly* shall possess final decision-making authority…." (emphasis added)). The General Assembly knew how to create interdependence and did not in providing that the General Assembly and Governor each constitute the State. The General Assembly speaks for the State here—independent of the non-party Governor.

And it speaks for the State as an undivided whole, a point that follows from the provision's text and structure. If Plaintiffs were correct that the statute merely allows the General Assembly's officers to speak for North Carolina's legislative branch, the statute would have stopped at providing that "the General Assembly…constitutes the legislative branch…." N.C. Gen. Stat. § 1-72.2(a). Instead, the statute proceeds to identify the General Assembly as speaking for "the State of North Carolina," full stop. *Id.* The clause references

the State as a whole without differentiating its component parts, powers, or rights. It therefore defines the Governor and General Assembly each as standing for North Carolina itself, undivided. And that only makes sense, since North Carolina cannot take multiple sides in the same case.

The statute reaffirms this point by defining the General Assembly's officers as "agents of the State," referencing it again as an undivided whole. N.C. Gen. Stat. § 1-72.2(b). Plaintiffs' retort that this language applies "only for purposes of establishing 'standing to intervene,'" Pls. Br. 24 (quoting N.C. Gen. Stat. § 1-72.2(b)), does violence to the statute. The relevant language provides that the General Assembly's officers, "*as* agents of the state,…shall jointly have standing to intervene." N.C. Gen. Stat. § 1-72.2(b) (emphasis added). The word *as* signifies the "character" or "role" of the General Assembly's officers, from which their intervention standing is derived. 1 Oxford English Dictionary 674 (2d ed. 1989). The usage is no different from, say, the clause: "[L]awyers, who serve as officers of the court, have the first line task of assuring the integrity of the process." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). Lawyers do not serve "as officers of the court" solely for purposes of assuring the integrity of the process; their duty to assure integrity follows from their role as officers. Likewise, the standing to

intervene follows from, and is not limited to, the General Assembly's preexisting status as agents of the State, defined in Section 1-72.2(a).

3. Whatever problems this arrangement may pose in cases where the General Assembly and the Governor disagree, the Court need not be detained on that abstraction: the Governor is not a party here. The Attorney General's brief is filed on behalf of the North Carolina State Board of Elections and its Members. State A.G. Br. 1. No statute provides that the North Carolina State Board of Elections and its Members constitute the State of North Carolina. With the Governor absent, the sole party authorized to speak for the State in this case is the General Assembly.[2]

The Attorney General's role as attorney "to appear for the State" in litigation does not privilege his voice over the General Assembly's. N.C. Gen. Stat. § 114-2(1); State A.G. Br. 2 n.2. As the Fifth Circuit explained in *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993), when the Attorney General represents the State, he is the attorney and is bound by the client's directives. The notion that "he can ignore [the client] and impose his own views" is "remarkable" and "wholly inexplicable."

[2] In all events, North Carolina law provides the General Assembly "shall possess final decision-making authority with respect to the defense of the challenged act of the General Assembly," N.C. Gen. Stat. § 120-32.6(b), thereby definitively answering who speaks for the State in the event of conflict between the Governor and the General Assembly.

999 F.2d at 840. Contrary to Plaintiffs' stunning proposed reversal of the attorney and client roles (at 25), the power to represent the State does not render the Attorney General "the sole arbiter of State policy when the State's interest is in litigation." 999 F.2d at 840. Rather, North Carolina statute provides that the General Assembly is "a client of the Attorney General for purposes of that action." N.C. Gen. Stat. § 120-32.6(b). The Attorney General's role is to obey the General Assembly's directives, not override or oppose them.

4. Unable to explain how the General Assembly does not speak for the very State it constitutes and for which it serves as agent, Plaintiffs urge the Court to differentiate "decisionmaking authority over litigation" and "any underlying executive enforcement action." Pls. Br. 25. But that is impossible because the elements of removal are inextricably intertwined with the lawsuit. North Carolina is a *defendant* because of (i.e., *for*) its inaction, and the suit would end tomorrow if North Carolina reached a settlement with Plaintiffs to *act* as they demand. But (without an *act* of the General Assembly) that would require a consent decree enforced by the court, so North Carolina must speak in that proceeding to effectuate a choice of *refusal* or cooperation. State law authorizes the General Assembly to make that choice.

Similarly, if the proceeding is to continue with no settlement, a *ground* of defense must be asserted, which can include an alleged *inconsistency* with *equal-rights law*. Someone must assert the *ground* of defense and decide whether it will include an *equal-rights-law* defense. By state law, the General Assembly is the voice through which that *ground* must be asserted, and the General Assembly decides which *grounds* it will choose.

Consequently, the litigation is the very stage in which the removal grounds play out, and the authority to take action in the litigation is synonymous with North Carolina's choices to render the statutory prerequisites operative. Just as in Judge Friendly's hypothetical (discussed *supra* § I.A) a teacher charged with failing to dismiss black students from a classroom would announce that *refusal* and the *ground* by speaking in a court proceeding—and in that very proceeding incur or avoid a contempt sanction depending on the stated choice—North Carolina satisfies or does not satisfy Section 1443(2) based on what it says in court. Through pleadings, briefs, and evidentiary showings, North Carolina must either *refuse* Plaintiffs' overtures, assert *grounds* of defense, choose whether an asserted *inconsistency* with *equal-rights-law* will be among them, and continue to keep Plaintiffs' basis for litigation (the *for* of the suit) alive, or—alternatively—take contrary actions negating one or more of the Section 1443(2) prerequisites. The ministerial task

of matching voting precincts to new lines and printing ballots is merely the afterword of that drama and only follows from already made choices.

For those choices to be made, then, someone must speak for North Carolina in this litigation. This very dynamic is unfolding in this briefing sequence because the Attorney General asserts that North Carolina is, in fact, no longer a party to the case. State A.G. Br. 2 n.2. The Attorney General informed the Court of this purported fact in its briefing, not through some other executive enforcement decision, and he asserts that, for this reason, North Carolina no longer *refuses* anything. But contrary to this assertion, the General Assembly now informs the Court that this is not true. The General Assembly's officers were never contacted about this change, and the General Assembly's officers did not consent. North Carolina therefore remains a party. Regardless, this purported "subsequent event cannot divest the court of…subject matter jurisdiction" because the district court "possessed subject matter jurisdiction" at the action's commencement, the point at which removal jurisdiction is assessed. *In re Celotex Corp.*, 124 F.3d 619, 626 (4th Cir. 1997).

The question of who speaks for the State is unavoidable, and it has been answered. The General Assembly speaks for the State, and the State *refuses*.

5. Themselves "[g]rasping at straws," Pls. Br. 23, Plaintiffs and the Attorney General ask the Court to assume, but not decide, that Sections 120-

32.6 and 1-72.2 violate the North Carolina Constitution. Pls. Br. 26. This is a classic smoke-and-mirrors argument.

Plaintiffs agree that "[t]his Court need not resolve these fundamental state-law questions here." Pls. Br. 26; *see also* State A.G. Br. 4-5 (joining Plaintiffs' position). The General Assembly concurs, and that should end the matter. "Every statute is presumed to be constitutional." *Munn v. Illinois*, 94 U.S. 113, 123 (1876); *United States v. Bollinger*, 798 F.3d 201, 207 (4th Cir. 2015) (same); *see also Cooper v. Berger*, 822 S.E.2d 286, 291 (N.C. 2018) ("When reviewing an act of the General Assembly, we presume that the act is constitutional, and we will declare it invalid only if it violates the constitution beyond a reasonable doubt."). Having waived any right (which there is no reason to think exists) to establish here why these statutes are unconstitutional here, Plaintiffs and the Attorney General cannot be heard to complain that the General Assembly continues to rely on them, which is its right. Further, the North Carolina Governor had no problem suing for a declaration of unconstitutionality in the cases Plaintiffs and the Attorney General cite, *see Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018), *State v. Berger*, 781 S.E.2d 248 (N.C. 2016), and the operative provisions of Sections 120-32.6 and 1-72.2 were enacted in 2017. There was ample time to challenge these statutes in the right forum, and this is neither the time nor the forum.

Plaintiffs do not disagree and argue instead (at 26) that their proposed presumption of unconstitutionality follows from the presumption in favor of remand. That is a *non-sequitur*. The presumption of remand is not a magic wand whereby any party opposing removal can obtain automatic remand. Any statute might be unconstitutional, including Section 1443 itself or the statute creating this very Court. Plaintiffs and the Attorney General provide no basis to guess, much less assume, that Sections 120-32.6 and 1-72.2 are in truth unconstitutional. Plaintiffs assert: "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." Pls. Br. 25-26. But those were different statutes, and there is no reason to think they and the statutes relevant here rise or fall together. The North Carolina courts have also recently upheld statutes against separation-of-powers arguments. *See, e.g.*, *Cooper*, 822 S.E.2d at 293-95; *State v. Mangino*, 683 S.E.2d 779, 780-81 (N.C. Ct. App. 2009). None of this means anything to the statutes at issue here.

Plaintiffs vaguely allege that the statutes "improperly intrude[] on executive authority." Pls. Br. 26. But they do not so much as hint at why they "unreasonably disrupt a core power of the executive." *Cooper*, 822 S.E.2d at 293 (cleaned up). They identify neither a core power nor a disruption, and

there is none. Sections 1-72 and 120-32.6 authorize the General Assembly to speak for the State in litigation, and the North Carolina Constitution does not vest that power anywhere else. Only a statute empowers the Attorney General to represent the State, and the Constitution empowers the General Assembly to grant and define the Attorney General's powers. N.C. Const. art. III, § 7(2). The General Assembly is constitutionally authorized to qualify them by defining the General Assembly as the Attorney General's client empowered to make the litigation decisions on behalf of the State.

Plaintiffs' cited authorities, in fact, cut against them because they show that litigation decision-making is not a quintessentially executive function. Both cases involved suits by the Governor against the General Assembly's officers, who defended the constitutionality of the state laws. *Cooper*, 809 S.E.2d at 102-03; *Berger*, 781 S.E.2d at 248-50. The Governor chose to place the General Assembly in the position of defending state law, and nothing in these decisions even hints at a separation-of-powers problem with the General Assembly's controlling the defense and making the decisions. Sections 1-72 and 120-32.6 simply clarify that role and articulate the General Assembly's role as speaking for the State in this type of litigation. There is no reason to guess that this is unconstitutional.

6. Plaintiffs' final position (at 27) that the General Assembly's removal on behalf of the State is untimely adds nothing to their other arguments. They claim that, because the Attorney General accepted service more than 30 days prior to removal, the General Assembly cannot represent the State. But this is circular and reverts the question back to which party represents the State. As explained, the General Assembly represents the State here and is acting through private counsel, as is its statutory right. Accordingly, service on the State was not complete until the General Assembly too was served, which occurred on November 20, 2018. JA42. The General Assembly timely removed the case on December 14, 2018. JA54.

II. There Is a Colorable Inconsistency Between Plaintiffs' Asserted State-Law Rights and Federal *Equal-Rights Law*

The General Assembly has alleged multiple colorable *inconsistencies* between Plaintiffs' asserted state-law rights and federal *equal-rights law*, each of which alone supports removal. The existence of responses, even colorable ones, does not defeat removal. Plaintiffs fail to address the underlying point, that these very disputes belong in federal court. The merits are for another day.

A. The parties' *inconsistency* disagreement turns, at least in part, on the legal standard. The district court disagreed with the colorable-conflict standard applied in every circuit to have addressed this issue. JA685-86. In the one passage where Plaintiffs hint support for this holding, they (like the district

court) take the word *act* out of context by insinuating that actual conflict must be shown as to that *act*. Pls. Br. 47. But the word *act* (and the pronoun *it* that relates back to *act*) are qualified by the prepositional phrase *on the ground* and following relative clause. 28 U.S.C. § 1443(2). As the General Assembly's opening brief explains (at 37-38), *ground* refers to an assertion, not a proof immune from counter-assertion. And that meaning is confirmed by the subjunctive use of *would*—i.e., "*would* be inconsistent"—indicating a hypothetical supposition. *See, e.g.*, Bryan A. Garner, Garner's Modern American Usage 756 (2d ed. 2003).

Plaintiffs ultimately concede this standard, but their arguments pay it only lip service—a point evidenced by Plaintiffs' choice to address the legal standard only after tendering their substantive arguments. *See* Pls. Br. 45-46. The standard directs even "subtle cases" to federal court, since "it is most appropriate for the difficult issue of the availability of the asserted federal defense to be decided by a federal court." *Bridgeport Ed. Ass'n*, 415 F. Supp. at 723. The Supreme Court has emphasized this in interpreting the materially identical "colorable defense" standard of federal-officer removal under 28 U.S.C. § 1442(a), holding that the statute allows "such defenses litigated in the federal courts" and therefore the "officer need not win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

The question here is whether even one of the General Assembly's multiple *grounds* of *inconsistency* is colorable, not whether the *grounds* will prevail. The mere existence of counter-arguments does not imply, as Plaintiffs would have it, that the General Assembly should not "have the opportunity to *present [its] version of the facts* to a federal, not a state, court." *Id.* at 409 (emphasis added); *Osborn v. Haley*, 549 U.S. 225, 249 (2007).

For all these reasons, the colorable-conflict standard allows inconsistent pleading, as the General Assembly has done here. Plaintiffs are wrong that the General Assembly has conceded removal away by declining to commit itself to the position that Plaintiffs' demanded relief will, for certain, "actually…violate federal law." Pls. Br. 33 (quoting JA484). Officers seeking removal under Section 1443(2) are not "require[d]…to admit that they have violated" the law or will in the future. *Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989). That requirement "would exact too high a price for exercising the right of removal" and contradict the ordinary pleading rules that allow "inconsistent allegations." *Id.* (quoting *White v. Wellington*, 627 F.2d 587, 589 (2d Cir. 1980)). The General Assembly need not promise to concede contempt in future proceedings to advance colorable defenses here.

B. The *Covington* final order creates a colorable inconsistency with Plaintiffs' demanded "new" maps. Its operative language requires the State to

utilize the remedial plans (consisting of some legislative-drawn and some special-master-drawn districts) in future elections. It states: "the Court will approve and adopt the remaining remedial districts in the 2017 Plans for use in future elections in the State." *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018). It further stated: "We direct Defendants to implement the Special Master's Recommended Plans," i.e., the remedial plans. *Id.* That is a federal-court order implementing the Equal Protection Clause, and the State and the General Assembly must comply.

Plaintiffs do not disagree that a court order can create a cognizable *inconsistency* under Section 1443(2), and they do not address the *Covington* order's operative words of command. They therefore do not address the General Assembly's *grounds* for removal. Their counter-arguments based on other portions of the 48-page *Covington* opinion are, at most, a preview of the litigation to come over the defense.

Even assuming portions of text buried in a court opinion can override its express injunction, Plaintiffs' positions about that text are meritless. They cut and paste (at 28) disparate language from disparate parts of the opinion, taken out of context, to assert the remarkable proposition that the *Covington* order binds the General Assembly to practically nothing. That defeats the purpose of an order.

To begin, Plaintiffs cite nothing for their view that the *Covington* order allowed the General Assembly to use "a near-infinite number of plans," any of which "could have cured the racial gerrymanders at issue." Pls. Br. 31. The opinion says the opposite. The General Assembly asked the *Covington* court for additional chances to amend districts, but it spurned that request, expressly denying "the General Assembly…a second bite at the apple." 283 F. Supp. at 447 n.10. The Supreme Court affirmed, holding that the General Assembly should not have "another chance at a remedial map." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018). The General Assembly is not free to use a "near-infinite number" of maps when both the *Covington* court and the Supreme Court expressly forbade this. That notion is also at odds with the Supreme Court's holding that the *Covington* court maintained supervisory authority over the General Assembly to vet its new legislation, rejecting the General Assembly's argument that new legislation cut off the *Covington* court's jurisdiction. *Covington*, 138 S. Ct. at 2552-53. The *Covington* order remains alive and its mandate binding.

Next, Plaintiffs point to ongoing state-court litigation "in Wake and Mecklenburg County districts" as proof that further redistricting will not conflict with the *Covington* order. Pls. Br. 31. But "Wake and Mecklenburg County districts" are the areas of North Carolina all parties agree are outside

the *Covington* order because the Supreme Court held that those counties "had nothing to do" with the underlying violations. *Covington*, 138 S. Ct. at 2554. Plaintiffs' partisan-gerrymandering claims are not limited to Wake and Mecklenburg Counties; they span the State, including areas not carved out of the *Covington* order.

The same problem defeats Plaintiffs' reliance on the *Covington* opinion's discussion of Greene and Cabarrus Counties. Pls. Br. 29. The *Covington* court exercised discretion not to address the *Covington* plaintiffs' interpretation of North Carolina's Whole County Provisions in objecting to districts in these areas. 283 F. Supp. 3d at 447; *id*. at 447 n.9. The *Covington* court said this choice was "without prejudice to Plaintiffs or other litigants asserting such arguments in separate proceedings." *Id.* at 447 n.9. But Plaintiffs here do not assert "such arguments." They neither raise Whole County Provision arguments, nor are their claims limited to Greene and Cabarrus Counties (or even a few discrete counties). They challenge virtually the entirety of the maps the *Covington* order required the General Assembly to use.

Then, Plaintiffs cherry-pick language from the *Covington* opinion about future proceedings and contend that it hints that the General Assembly may depart from the plain-as-day command to use the 2017 plans. This places enormous interpretive weight on precious little and ignores everything else. As

noted, the *Covington* court and the Supreme Court barred the General Assembly from passing and using new maps. The *Covington* opinion's vague references to "separate proceeding[s]," *see, e.g.*, 283 F. Supp. 3d at 427, say—as was proper—very little about what those proceedings might be or what defenses may be available in them. The *Covington* court in no way suggested that federal defenses would not be available or otherwise restricted the General Assembly's arguments or otherwise lawful choice of forum.

For example, the *Covington* court's reference to possible partisan-gerrymandering litigation concerned the complaint of a violation of "the Equal Protection Clause." *Id.* at 429 n.2. An Equal Protection Clause claim would raise a claim under federal *equal-rights law*, not an *inconsistency* with *equal-rights law*, and would proceed in a federal forum (either by the plaintiffs' choice or under Section 1441(a) removal). A federal court would then be empowered to amend the prior federal-court order as appropriate in granting any relief. But state-court power does not exceed federal-court power.[3] And, although a state-court action involving modification to the 2017 plans based on objections raised in *Covington* might be fairly read as allowed under the *Covington* order,

[3] To the extent Plaintiffs read the *Covington* order to allow a state court to do what the General Assembly could not, it calls the order into serious constitutional doubt, since there is no basis to allow one branch of state government to do what another cannot.

Plaintiffs' complaint does not raise these arguments. It can only be read to demand a complete demolition of the 2017 plans.

Plaintiffs fundamentally misunderstand the posture of this dispute. The General Assembly is not asking that the 2017 plans be "effectively immuniz[ed]" from "future challenge." Pls. Br. 27. This is a removal proceeding, not a motion to dismiss. The *Covington* order directly bears on Plaintiffs' demanded relief by restricting what the General Assembly can give in terms of a new plan. That is the basis of a colorable conflict. The order—and the numerous issues and arguments it addressed—must be interpreted, applied to this case, and possibly amended if Plaintiffs succeed. Section 1443(2) directs this colorable conflict to federal court.

C. An independent basis of removal follows from Plaintiffs' demand for new districting plans of markedly different demographics. They challenge numerous house and senate districts as "packed" with Democratic voters, and there is no way to undo that "packing" except by either dropping black voting-age population (BVAP) or purposefully weeding out only white Democratic constituents. G.A. Opening Br. 43-45.

1. Plaintiffs have no response. Even though their amended complaint uses a derivation of *pack* or *packing* over 60 times, JA332-409, Plaintiffs' opening brief uses the word only once and in a non-substantive context, Pls.

Br. 39. Plaintiffs instead focus (at 34) on their allegation of prior action—"that Legislative Defendants *intentionally* discriminated against Democratic voters"—but Section 1443(2) removal looks to the future affirmative action demanded, the "new" maps, JA335. Even if intentional partisan discrimination occurred—which the General Assembly denies—it could not be remedied in the abstract. A remedy requires "new" maps that are "fair" by Plaintiffs' definition of partisan fairness. JA335. The complaint defines fairness as a map devoid of "cracking" and "packing"—or, in other words, one that affords "an equal opportunity to translate their votes into representation" on a partisan basis. JA403. The alleged *inconsistency* must be measured against that standard.

Plaintiffs do everything but address the General Assembly's position: whatever the cause of the "packing"—i.e., whether it occurred by partisan motive or as a result of non-partisan criteria—the General Assembly is unable to afford "an equal opportunity" for the political parties "to translate their votes into representation," as the complaint demands, JA403, without either radically altering the racial demographics of minority crossover districts or else using stark racial precision in changing the districts' partisan demographics without affecting their racial demographics. That is the basis of *inconsistency* forming the *ground* of *refusal*.

Although Plaintiffs disclaim any subjective desire to drop BVAP in the crossover districts, they do not address either objective premise of the General Assembly's defense. The first premise is that remedying the violation would require undoing the "packing" by removing Democratic constituents from the "packed" districts. Plaintiffs do not disclaim the desire for this relief, and, if they did, that almost certainly would disavow standing to press their claims. The second premise is that Democratic constituents cannot be removed from the "packed" districts without BVAP reductions or stark racial sorting, given the "inextricable link between race and politics in North Carolina." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Plaintiffs say nothing about this correlation.

Accordingly, there is no basis to believe "trillions" of maps (or even one) would reach the same racial demographics in crossover districts having markedly different political demographics. Pls. Br. 33-34. Redistricting maps do not naturally afford political parties "an equal opportunity to translate their votes into representation." JA403. Partisan constituents are not spread evenly throughout any jurisdiction, which is why the geographically based electoral college did not award the presidency in 2016 to the candidate who won the popular vote. It would take precise drafting to meet Plaintiffs' definition of political-party fairness. To be precise, it would require intentionally dropping

Democratic vote share in the allegedly "packed" districts, and—without concomitant racial sorting—that would unavoidably impact racial demographics. There is, then, no "reason to believe that remedial plans drawn could have similar demographics," Pls. Br. 35, since the 2017 plans' "demographics" are alleged to be their very constitutional defect.

Other than histrionics, Plaintiffs have no meaningful response. The case law they cite (none of it binding) does not involve the type of correlation involved in this case. G.A. Opening Br. 50-53. And their reliance on *Stephenson v. Bartlett*, 180 F. Supp. 2d 779 (E.D.N.C. 2001), is particularly misplaced since the *Stephenson* plaintiffs, unlike Plaintiffs here, engaged with the alleged inconsistency with the Voting Rights Act by presenting an alternative redistricting plan copying and pasting "the proposed minority districts enacted by the General Assembly" to demonstrate that the asserted state-law theory did not conflict with the Voting Rights Act. JA645. Plaintiffs have declined to engage the General Assembly's removal theory or present even one of the "trillions" of maps they say satisfies both state and federal law. If their claim (at 35) that *inconsistency* is "speculative" is to be given any weight, they should at minimum be required to present just one of those "trillions" of maps satisfying their novel state-law theory while preserving existing racial demographics.

There is, to be sure, no need to doubt Plaintiffs' assertions (at 38) that they "are not seeking to affect minority populations" and (at 40) that they "promot[e] racial equality." And, although the General Assembly disagrees "that it is Plaintiffs" who suffer "intentional discrimination," Pls. Br. 41, it respects their right to present their position in court. But neither their subjective hopes nor the mere existence of their bald assertions deprives the General Assembly of its "opportunity to present [its] version of the facts to a federal, not a state, court." *Willingham*, 395 U.S. at 409.

Similarly, Plaintiffs' assertion (at 35) that the North Carolina courts will not "interpret state law in a way that conflicts with federal law" is equally irrelevant. Section 1443(2) directs colorable conflicts between state law and *equal-rights* law to federal court. The "touchstone" of removal is a "good faith" belief that "plaintiff's interpretation of state law" conflicts with federal law. *White*, 627 F.2d at 586-87 (quotations omitted). There is no requirement to wait until the state courts have adopted Plaintiffs' position before the right of removal is triggered.

2. Having done nothing to counter the General Assembly's position that a remedial map must dismantle crossover districts, Plaintiffs can hardly offer a meaningful response under the considerations germane to the Fourteenth and Fifteenth Amendments and the Voting Rights Act.

Plaintiffs do not dispute that most of the "packed" districts qualify as minority crossover districts. Nor do they dispute that, "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Although Plaintiffs claim that dismantling effective crossover districts in this context would not be discriminatory, there is no requirement of "race-based hatred." *N.C. State Conf. of NAACP*, 831 F.3d at 222. North Carolina knows that these districts exist as functioning minority crossover districts, and dismantling them to privilege the electoral prospects of the Democratic Party over the electoral prospects of racial minorities would meet the standard of mere "intent." *See id.* at 222-23; *see also League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (dismantling performing opportunity district for even legitimate political reasons likely qualified as intentional discrimination and violated the Voting Rights Act). Plaintiffs' suggestion that a court order can excuse this violation ignores that state-court action is covered under the Fourteenth and Fifteenth Amendments, so a state-court order would in no way extenuate the violation. The conflict is, at minimum, colorable.

So is the conflict under the Voting Rights Act. The Act protects equal electoral opportunity on the basis of race regardless of intent, so Plaintiffs'

focus (at 42-45) on the General Assembly's intent at the time of redistricting proceeds from the wrong premise. Although the General Assembly did not attempt to prove a Voting Rights Act claim against itself in 2017, it does not follow that a Voting Rights Act claim is not available or even colorable to a third party who makes the requisite showing of polarized voting. Plaintiffs concede that they do not know whether polarized voting can be proven, Pls. Br. 44 n.4, and they ignore this Court's 2016 finding that "[v]oting in many areas of North Carolina is racially polarized." *N.C. State Conf. of NAACP*, 831 F.3d at 214. The threat of Section 2 litigation remains tangible.

"States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts." *Bartlett*, 556 U.S. at 24. The crossover districts therefore protect the State from the "competing hazards of liability" under the Voting Rights Act and Equal Protection Clause, *Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (quotations omitted), since (1) they serve as opportunity districts and (2) race-consciousness was unnecessary to their creation. Plaintiffs have no response and fail even to cite *Bartlett*.

III. Estoppel Does Not Apply

Plaintiffs assert one judicial-estoppel argument in one section of their brief (§ II.A) and scatter others elsewhere. This approach mixes estoppel

positions with other discrete questions and masks the differing standards, most notably that it is Plaintiffs' burden to establish estoppel even in this procedural posture.[4] *Bartels By & Through Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 680-81 (4th Cir. 2018).

A. Estoppel is an equitable doctrine to be applied "in the discretion of the district court and with the recognition that each application must be decided upon its own specific facts and circumstances." *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998). As the General Assembly's opening brief notes (at 54), this Court may reject the estoppel defense as plainly inadequate, or it may remand. But it may not reverse on the discretionary issue the district court did not reach.

If the Court disagrees and exercises district-court discretion itself, it should take into account the labyrinthian litigation over North Carolina's election laws and the role of Plaintiffs' attorneys in it. In those cases, the lawyers contradicted their arguments in this case, but they avoid those statements by recruiting new plaintiffs. The plaintiffs in *NAACP*, for example, were represented by Plaintiffs' lawyers at Perkins Coie, and they convinced this Court that "racially polarized voting between African Americans and

[4] Plaintiffs' contention (at 53) that doubt on estoppel should be resolved in favor of remand ignores *Bartels*, which holds the opposite.

whites remains prevalent in North Carolina." 831 F.3d at 225. But, with different clients, the lawyers urge the Court to find that the General Assembly should have no fear of a finding of polarized voting. Similarly, the same law firm in *Covington* persuaded the *Covington* court that "there is no evidence in this record that political considerations played a primary role in the drawing of the" 2011 plans. *Covington v. North Carolina*, 316 F.R.D. 117, 139 (M.D.N.C. 2016). For different clients, they argue that politics did play a primary role even in 2011. JA350-54. The equities of the "specific facts and circumstances" in this situation weigh against estoppel. *Herbert J. Thomas Mem'l Hosp.*, 159 F.3d at 196.

B. Plaintiffs' estoppel arguments also fail as a matter of law.

> [T]his Court has identified four elements that must be met before a court may apply judicial estoppel: (1) "the party sought to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation;" (2) "the position sought to be estopped must be one of fact rather than law or legal theory;" (3) "the prior inconsistent position must have been accepted by the court;" and (4) "the party sought to be estopped must have intentionally misled the court to gain unfair advantage."

Minnieland Private Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., Inc., 867 F.3d 449, 458 (4th Cir. 2017)[5] (quoting *Lowery v. Stovall*, 92 F.3d

[5] *cert. denied sub nom. Applied Underwriters Captive Risk Assur. Co. v. Minnieland Private Day Sch., Inc.*, 138 S. Ct. 926 (2018).

219, 223–24 (4th Cir. 1996)). Failing even to mention these elements, Plaintiffs fail to prove them.

1. Plaintiffs establish none of the elements as to the General Assembly's statements regarding federal-court authority in the *Covington* remedial phase.

First, these statements concern the "jurisdiction" of the federal courts, JA111, and therefore are statements of law, not fact. Plaintiffs respond (at 52) by disagreeing with this Circuit's standard, but there is no basis for this panel to reverse the dozens of panels that have adhered to it. *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 271 n.2 (4th Cir. 2002) (stating well-known rule that one panel cannot reverse another). Plaintiffs' counter-authority consists of: (1) a legal treatise, (2) a pre-2007 unpublished decision that cannot override a "published opinion" on this issue, Circuit Rule 32.1, and (3) a 2004 Supreme Court decision that subsequent decisions of this Court have interpreted to contain a requirement that the statement be "one of fact rather than law or legal theory." *See 1000 Friends of Md. v. Browner*, 265 F.3d 216, 226 (4th Cir. 2001) (citing, quoting, and discussing at length *New Hampshire v. Maine*, 532 U.S. 742 (2001)). Their estoppel argument fails on this element alone.

Second, the General Assembly "successfully convinced" the *Covington* court of practically nothing and the Supreme Court of only slightly more. Pls.

Br. 28. Plaintiffs cite the General Assembly's argument that the remedial court "does not have jurisdiction to consider" attacks based "purely on state law." JA111. The *Covington* court disagreed, finding that it did have jurisdiction. *Covington*, 283 F. Supp. 3d at 425-27. Plaintiffs contend that the Supreme Court reversed on this point, but the Supreme Court held only that the *Covington* court committed "clear error" in addressing districts in "Wake and Mecklenburg Counties"—not that it lacked jurisdiction. *Covington*, 138 S. Ct. at 2554. Similarly, the *Covington* court's choice to "decline[]" to address the *Covington* plaintiffs' challenge to districts in Greene and Cabarrus Counties was not a ruling about its jurisdiction, but rather an "exercise" of "our discretion." 283 F. Supp. 3d at 447. The distinction between jurisdiction—the very power to act—and erroneous action is well developed. *See, e.g.*, *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 69 (1935). Whereas the arguments Plaintiffs cite deal exclusively with the former, the rulings in the General Assembly's favor concern only the latter.

Third, although the General Assembly did make arguments about the proper scope of the *Covington* court's remedial discretion, these arguments are not inconsistent with removal because they concern the scope of a federal court's remedial review of a legislatively adopted redistricting plan. *See* JA128-32. The scope of a federal court's power in a remedial phase after finding a

violation of federal law, the topic of such cases as *Perry v. Perez*, 565 U.S. 388 (2012), and *Upham v. Seamon*, 456 U.S. 37 (1982), has no relevance to removal under Section 1443(2). Plaintiffs do not suggest otherwise.

Fourth, having failed to identify anything inconsistent, and little even of relevance, here, Plaintiffs' failure to show "intent to mislead" is a non-starter. *Minnieland Private Day School, Inc.*, 867 F.3d at 458. There was no reason for the General Assembly to "disclose their prior inconsistent statements," Pls. Br. 53, when it is Plaintiffs' burden to plead and prove estoppel and there was no way to guess that Plaintiffs would view these issues in *Covington* as relevant here.

2. Plaintiffs fail to meet their estoppel burden as to the General Assembly's statements regarding polarized voting in the *Covington* remedial phase.

First, there is no inconsistency. The General Assembly stated in *Covington* that it had "[n]o information regarding legally sufficient racially polarized voting" at the time it drew the 2017 plans. JA101. The General Assembly quotes this very language as its position here. G.A. Opening Br. 9 (quoting same). Plaintiffs cannot find inconsistency in perfect consistency. Although Plaintiffs insist (at 45) that "Legislative Defendants would need to establish that there is sufficient evidence of racial bloc voting" to "raise a VRA

defense," the General Assembly's prior statements concern what was on the record as of the 2017 redistricting, not what it may prove in this case. This Court found in 2016 that "[v]oting in many areas of North Carolina is racially polarized." *N.C. State Conf. of NAACP*, 831 F.3d at 214. Indeed, Plaintiffs themselves do not disagree that bloc voting may exist. Pls. Br. 44 n.4. The General Assembly's future ability to prove bloc voting is supported in precedent and does not turn on statements about the state of the legislative record in 2017.

Second, Plaintiffs identify no reliance on the General Assembly's representations by the *Covington* court. The page they cite of the *Covington* decision does not assert that voting is not polarized in North Carolina. Pls. Br. 45 (citing *Covington*, 283 F. Supp. 3d at 458). The page simply states that the "districts are entitled to the presumption of constitutionality" and "[n]o party has raised a substantive challenge." 283 F. Supp. 3d at 458. Plaintiffs thus have failed in their burden to show that the relevant representations were adopted.

Third, Plaintiffs again identify no intent to mislead, which plainly cannot be shown where the General Assembly restates its 2017 position here—that no evidence of polarized voting was before the body in 2017. Plaintiffs' estoppel argument fails as a matter of law.

IV. The General Assembly Can Waive Sovereign Immunity

Plaintiffs' sovereign-immunity argument is baffling. The General Assembly represents the State; Plaintiffs do not. Eleventh Amendment immunity "may not be invoked by a plaintiff to control the forum." *Gustin v. W. Va. Univ.*, 63 F. App'x 695, 698 (4th Cir. 2003); *Rettew v. S.C. Dep't of Parks, Recreation & Tourism*, 2010 WL 2851094, at *3 (D.S.C. July 16, 2010).

Moreover, "[e]ven if" Plaintiffs "*could* assert Eleventh Amendment immunity on behalf of Defendants," they "would be barred from doing so here because, by removing the case to federal court, Defendants waived any Eleventh Amendment immunity defense to which they may have been entitled." *Gustin*, 63 F. App'x at 698. State law unequivocally authorizes the General Assembly, which exercises the State's sovereign power, to represent the State in federal court. "[I]t is not surprising that more than a century ago" the Supreme Court "indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity." *Lapides v. Bd. of Regents of Univ. System of Ga.*, 535 U.S. 613, 619 (2002). Waiver is effectuated where an agent of a state "*voluntarily* invoke[s] the jurisdiction of the federal court." *Id.* at 622.

That occurred here. North Carolina law "provides a…mechanism through which the Speaker of the House and President Pro Tempore of the

Senate may defend laws passed by the North Carolina General Assembly." *Fisher-Borne v. Smith*, 14 F. Supp. 3d 699, 703 (M.D.N.C. 2014); N.C. Gen. Stat. § 1-72.2; *id.* § 12-32.6. These statutes surely grant the General Assembly power to represent the State in litigation. They, in fact, exceed the power authorized under the statute addressed in *Lapides*, which authorized the Georgia attorney general merely to "represent the state." 535 U.S. at 621 (quoting Ga. Code § 45-15-3(6) (1990)). Here, North Carolina law goes a step further and provides that the General Assembly and the Governor "constitute the State of North Carolina." N.C. Gen. Stat. § 1-72.2(a). And the statute refutes Plaintiffs' contention that the General Assembly cannot use private counsel (at 55) by expressly allowing this and designating the private counsel "lead counsel." *Id.* § 120-32.6(c). An "attorney authorized to represent the state in the pertinent litigation" waives immunity by removing. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 247 (5th Cir. 2005); *Abreu v. N.M. Children, Youth & Families Dep't*, 646 F. Supp. 2d 1259, 1270 (D.N.M. 2009) ("Because the private attorneys have the authority to represent the Defendants in this case, they have the authority to waive the State's Eleventh Amendment immunity.").

It is irrelevant that North Carolina law authorizes the Attorney General also to represent the State because North Carolina can authorize "agents to

represent it in federal court," *Hollingsworth*, 570 U.S. at 710, and is not restricted to a single agent. North Carolina law unequivocally resolves inter-governmental disputes by affording the General Assembly "final decision-making authority with respect to the defense of the challenged act," N.C. Gen. Stat. § 120-32.6(b), an authority that negates any need for "the Governor's consent," which neither Plaintiffs nor the Attorney General contend the Attorney General needs for removal, Pls. Br. 56. Indeed, there is no reason the Governor should have any role whatsoever, when he is not a party and lacks even a veto power over redistricting legislation. As to the Attorney General, North Carolina law renders him answerable to the General Assembly, his "client," N.C. Gen. Stat. § 120-32.6(b), and this Court should look to the client's, not its rogue attorney's, representation of its own wishes. *See Clements*, 999 F.2d at 840.

All of this satisfies any requirement that waiver of immunity be "unequivocally expressed." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). The General Assembly's officers are "agents of the State," and, unlike the limited-scope waiver in *Sossaman*, the statutory authorization covers a case in which "the validity or constitutionality of an act of the General Assembly" is challenged. N.C. Gen. Stat. § 120-32.6(b). Besides, the Supreme Court has not applied the unequivocal-waiver standard to an authorization of the states'

agents, as distinct from a standing immunity waiver "in the text of the relevant statute." *Sossamon*, 563 U.S. at 284. In *Lapides*, the Supreme Court did not require that the authorization of the Georgia attorney general be unequivocal as to sovereign immunity; a broad authorization to represent the state in court sufficed. 535 U.S. at 621-22. This case is no different.

Plaintiffs' and the Attorney General's contentions would render Sections 1-72.2 and 120-32.6 a nullity, which presumably is their purpose. It is precisely in a case like this, where the Attorney General has sided with the parties challenging state law, that these statutes are most needed. As occurred in *Hollingsworth* and *Clements*—and has occurred in numerous other cases—state executive officials sometimes turn against laws they are duty-bound to defend. The question, then, becomes whether other parties, like the legislative branch, "had authority under state law to represent the State's interests." *Karcher v. May*, 484 U.S. 72, 82 (1987). Sections 1-72.2 and 120-32.6 plainly answer that question in the affirmative. But reading them against their plain text to require assent of the North Carolina Governor and Attorney General negates their intended impact.

Nor is there any colorable argument that waiver did not occur under the circumstances. As discussed (*supra* § I.C), service was not completed on the State of North Carolina until the General Assembly was served, and removal

was timely. And the General Assembly's "removal notice" most certainly "invoke[d] federal jurisdiction on the State's behalf," Pls. Br. 57, by expressly stating that "the State of North Carolina" was a removing party, JA42. And there is no basis for Plaintiffs' predictable resort to presumptions (at 57-58) when the General Assembly's statutory authorization to represent the State, and thereby waive its immunity, is crystal clear.

V. Plaintiffs' Cross-Appeal Is Meritless

Plaintiffs' cross-appeal for attorneys' fees seeks to vindicate blood-lust, not legal principle. Every issue discussed in Plaintiffs' 67-page brief is one of first impression on which any reasonable lawyer would be confident taking sides in "zealously" advocating the client's interests. 27 N.C.A.C. 02 Rule 0.1. To punish the General Assembly for raising issues Plaintiffs concede (at 1) have never been raised in Section 1443(2)'s "153-year history" would do lasting damaging to the adversarial system, which normally encourages parties and their lawyers to exercise their "rights under [the] law." JA690.

To win attorneys' fees, Plaintiffs must overcome two presumptions. The first is the presumption against fee shifting under 28 U.S.C. § 1447(c), which does not require defendants to seek removal "only in cases where the right to remove was obvious." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). The statute shifts fees "only where the removing party lacked an

objectively reasonable basis for seeking removal." *Id.* at 141. The second is the presumption in favor of the district court's denial of fees, which is reviewed for abuse of discretion. *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996). Plaintiffs are nowhere close to overcoming either of these high hurdles and, at times, erroneously argue against them.

A. As the district court correctly found, the General Assembly had an objectively reasonable basis to seek removal under Section 1443(2). Likely because this "statute…has been described as a text of exquisite obscurity," *Baines*, 357 F.2d at 759 (en banc) (internal quotations omitted), Plaintiffs identify no case where attempted removal under Section 1443(2) was found to be objectively baseless, *see also Horelick*, 424 F.2d at 698 n.1 (describing § 1443(2) as a "Delphically worded statute). Plaintiffs' own authorities deny attorneys' fees under this statute. *See, e.g.*, *City & County of San Francisco*, 2002 WL 1677711, at *7; *Brown v. Florida*, 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002). There is precedent for Section 1443(2) removal in North Carolina redistricting litigation in *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983). And, although removal failed in *Stephenson*—a fact well known to Edwin Speas, a lawyer for Plaintiffs who attempted and failed at removal in that case—the court called the case (which does not bind this Court) "a close call." 180 F. Supp. 2d at 785. That Plaintiffs believe these cases are distinguishable in

no way meets their cross-appeal burden. On a daily basis, this Court adjudicates colorable disputes over what cases are and are not distinguishable.

Plaintiffs cite no case rejecting any of the General Assembly's arguments yet contend (at 64) the General Assembly's "cit[ing] no case where state legislators have *ever* been permitted to remove under the Refusal Clause" cuts in their favor. This flips the burden 180 degrees. Because attempted removal is not limited to "cases where the right to remove was obvious," *Martin*, 546 U.S. at 140, cases of first impression—where no side has authority clearly refuting the other—are the paradigmatic cases where fee shifting is improper. *See, e.g.*, *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1066 (9th Cir. 2008); *Breakman v. AOL LLC*, 545 F. Supp. 2d 96, 108 (D.D.C. 2008); *CMS N. Am., Inc. v. De Lorenzo Marble & Tile, Inc.*, 521 F. Supp. 2d 619, 630-31 (W.D. Mich. 2007); *Angel v. Am. HomeHealth, Inc.*, 2008 WL 11335072, at *5 (M.D. Fla. Oct. 24, 2008), *adopted*, 2009 WL 10670294 (M.D. Fla. Jan. 26, 2009). This case is therefore nothing like *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692, 701 (5th Cir. 2017), where removal under Section 1441 was in direct conflict with a Supreme Court decision. Plaintiffs have no case from the Supreme Court, this Circuit, or anywhere else addressing these issues of first impression.

The district court was well within its discretion to find that the "detailed arguments on the merits advanced by both" sides, JA686, renders a fee award

inappropriate. There is an objective basis in the statute's plain language, *defendant*, for the General Assembly to contest Plaintiffs' view that legislators are not covered, and Plaintiffs muster only a non-binding, factually distinct district-court case, *Wolpoff v. Cuomo*, in response. There is an independent objective basis in Sections 120-32.6(b) and 1-72.2(a) for the General Assembly to claim to represent North Carolina, also a *defendant*, and Plaintiffs have no case-law response; they instead resort to an unprecedented presumption of unconstitutionality. The General Assembly is not required to accede to that novel position.

The objective bases for the General Assembly's claim of colorable conflict is Plaintiffs' own allegations of "packed" districts, the expert reports in the *Covington* litigation, and this Court's finding of a strong correlation between race and politics in North Carolina. *N.C. State Conf. of NAACP*, 831 F.3d at 214. Plaintiffs' superficial disagreement does nothing to remove the objective basis of these positions. Plaintiffs fail even to cite *Bartlett v. Strickland*, much less show how the General Assembly is unjustified in relying on its holding that "States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts" or its warning that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise

serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24; *compare Shapiro v. McManus*, 136 S. Ct. 450, 456 (2015) (reliance on even one Justice's opinion is not "wholly insubstantial"). If Plaintiffs have a different reading of *Bartlett*, they are free to advocate it, but they have yet to do so.

B. Clearly recognizing that the General Assembly's basis of removal under Section 1443(2) is grounded in multiple, independent objective bases, Plaintiffs focus their arguments on peripheries. Their contention (at 65) that the district court erred in offering "only a single-sentence rationale" cites no obligation for the court to exhaust its reasoning in print, especially after reciting at length the parties' competing positions and finding them both plausible. JA686. Courts routinely reject fee-shifting arguments under Section 1447(c) in cursory sentences. *See, e.g.*, *W. Va. Univ. Bd. of Governors ex rel. W. Va. Univ. v. Rodriguez*, 543 F. Supp. 2d 526, 536 (N.D.W. Va. 2008); *Brooks v. GAF Materials Corp.*, 532 F. Supp. 2d 779, 783 (D.S.C. 2008); *Swanstrom v. Teledyne Cont'l Motors, Inc.*, 531 F. Supp. 2d 1325, 1334 (S.D. Ala. 2008); *Medtronic, Inc. v. Endologix, Inc.*, 530 F. Supp. 2d 1054, 1059 (D. Minn. 2008); *Ahmed v. GCA Prod. Servs., Inc.*, 249 F.R.D. 322, 325 (D. Minn. 2008); *Lee v. Am. Home Mortg. Servicing, Inc.*, 2012 WL 2993853, at *3 (N.D. Cal. July 20, 2012); *Jones v. Martin & Bayley, Inc.*, 2006 WL 146221, at *2 (E.D. Mo. Jan. 19,

2006); *Lemke v. Langford*, 2012 WL 12953743, at *6 (D.N.M. Oct. 15, 2012); *Paskal v. Indalex, Inc.*, 2008 WL 62279, at *3 (N.D. Cal. Jan. 4, 2008). This Court, too, has resolved attorney-fee matters in cursory opinions. *Beusterien v. Icon Clinical Research, Inc.*, 517 F. App'x 198, 199 (4th Cir. 2013). The district court found the General Assembly's position only "doubtful," not clearly wrong, JA686, and was justified in declining to shift fees.

Plaintiffs' estoppel and immunity arguments are also unavailing. Plaintiffs bore the burden of showing estoppel, and the district court did not abuse its discretion in declining to consider arguments the General Assembly had no duty to anticipate, *Bartels*, 880 F.3d at 680-81, especially when Plaintiffs demanded expedited resolution of their motion. JA649-50.

Besides, the General Assembly has more than an objective basis to oppose Plaintiffs' estoppel positions. There is good reason to believe statements in *Covington* regarding jurisdiction do not apply here when this Court's law applies estoppel only to assertions of fact. *Minnieland Private Day Sch., Inc.*, 867 F.3d at 458. Independently, the General Assembly is justified in concluding that the *Covington* court's and the Supreme Court's favorable rulings on the scope of discretion did not adopt the General Assembly's argument on the scope of jurisdiction, a distinct question. The General Assembly also has a strong basis to dispute Plaintiffs' estoppel arguments

regarding polarized voting when the prior positions Plaintiffs cite are worded identically with the General Assembly's positions in this case.

As for sovereign immunity, Plaintiffs concede the General Assembly had "colorable arguments that they can and have waived North Carolina's sovereign immunity," Pls. Br. 63, which the General Assembly itself wields. That objective basis lies in two state statutes authorizing the General Assembly to represent the State and a Supreme Court case, *Lapides v. Bd. of Regents of University System of Georgia*, 535 U.S. 613 (2002), finding this authorization enough for waiver by removal. Plaintiffs cite zero cases rejecting waiver where that authorization exists, and their argument about timeliness is circular, as shown above. The district court did not err in declining to reach this issue when it was facially apparent that an objective statutory basis for the General Assembly's assertion existed and where Plaintiffs do not even have standing to assert Eleventh Amendment immunity to select their preferred forum. *Gustin*, 63 F. App'x at 698.

Plaintiffs' contention (at 63) that the burden is flipped and the General Assembly must show "no reasonable basis even to question the validity of their purported waiver" is a stunning disregard for the Supreme Court's holding that the basis of removal need not be "obvious" to be objectively reasonable. *Martin*, 546 U.S. at 140. Even if the argument were correct, the district court

did not abuse its discretion in ignoring it because Plaintiffs did not argue below that the underlying immunity-waiver standard affected the burden in the fee-shifting inquiry. *See* District Court ECF No. 8; District Court ECF No. 43.

Besides, it is manifestly wrong. For one thing, as noted, the Supreme Court has looked for "unequivocal" clarity from provisions containing a waiver "in the text of the relevant statute," *Sossamon*, 563 U.S. at 284, not from statutes authorizing agents to waive, *see Lapides*, 535 U.S. at 621-22. Moreover, the relevant statutes expressly designate the General Assembly's officers as "agents of the State" authorized to represent the State, make litigation decisions on the State's behalf, exercise "final" authority over the litigation, and thus remove. Plaintiffs, moreover, cannot be right that the underlying "standard" flips the burden, since there is always a presumption against removal. Plaintiffs' position would mean fees are presumptively available, in conflict with *Martin*.[6]

C. Contrary to Plaintiffs' argument (at 66), there is no special removal burden in expedited cases. "Time is of the essence in this lawsuit," Pls. Br. 66,

[6] Plaintiffs' reference to an unreported, out-of-circuit case that concluded "the precedent governing removal in fraudulent joinder actions is well settled" against the removing party's position in that case, *Kent State Univ. Bd. of Trustees v. Lexington Ins. Co.*, 512 F. App'x 485, 491 (6th Cir. 2013), says nothing about sovereign immunity.

only because Plaintiffs waited nearly 15 months to file it, Pls. Br. 4, 6. The single month this case took to be resolved was less than seven percent of Plaintiffs' own delay.

Congress created "rights" to "assert grounds for removal," JA690, and the General Assembly's choice to exercise those rights is not suspect. Plaintiffs' view would incentivize defendants to "choose to exercise" those rights "only in cases where the right to remove was obvious," but "there is no reason to suppose Congress meant to confer a right to remove, while at the same time discouraging its exercise in all but obvious cases." *Martin*, 546 U.S. at 140. Even to read the competing briefs in this case—Plaintiffs' invective notwithstanding—is to see that this case involves colorable competing arguments. As the abuse-of-discretion standard implies, the district court was best positioned to identify any abusive purpose for delay—were subjective purpose even relevant (and it is not)—and it found only lawful assertion of colorable positions. JA690.

Plaintiffs dislike adversarial proceedings. They reveal that distaste by basing their fee-shifting position on the post-remand stay briefing, citing no authority that this motions practice is relevant. And, yet again, their conclusory dismissal of any competing argument ignores that the General Assembly's positions were grounded in precedent. *See* District Court ECF No.

46 at 2-6 (discussing *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3346349, at *7 (E.D. Va. June 16, 2016)); District Court ECF No. 50 at 2-3 (discussing *Eisenman v. Cont'l Airlines, Inc.*, 974 F. Supp. 425, 428 (D.N.J. 1997)). The adversarial process does not operate through one party's labeling another's "frivolous," offering no explanation, and expecting sanctions. Pls. Br. 67. That is why *Martin* directs the inquiry to the proffered bases of removal, not the opposing party's coarse élan. The General Assembly's positions are grounded in law—and meritorious.

CONCLUSION

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

March 25, 2019 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing corrected motion complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the motion contains 12,917 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14 point size.

DATE: March 25, 2019

/s/ E. Mark Braden
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CERTIFICATE OF SERVICE

I certify that on March 25, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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