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

In the United States Court of Appeals
for the Fourth Circuit

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

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

REPLY BRIEF OF PLAINTIFFS-APPELLEES-CROSS-APPELLANTS

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INTRODUCTION

Rarely does a removal fail for so many reasons, or such obvious reasons. Legislative Defendants' theories of removal contradict the explicit text of the *Covington* remedial order, rest on an absurd notion that federal law requires intentional discrimination against Democratic voters in redistricting, and break with 153 years of unbroken precedent allowing removal under the Refusal Clause only by officials who refuse to enforce discriminatory state laws, not by state legislators who enact such laws.

The removal here was further doomed by estoppel and state sovereign immunity. Contrary to Legislative Defendants' responses, litigants cannot talk out of both sides of their mouth to different courts, and Legislative Defendants do not control North Carolina's executive branch for purposes of waiving immunity. Because the district court refused to address either estoppel or immunity, it could not have properly concluded that this removal had an objectively reasonable basis. But even on the issues the district court did decide, it is exceedingly clear that this removal was baseless and designed only to cause delay in expedited litigation of enormous public import.

There is no presumption against fee awards, as Legislative Defendants erroneously contend. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137-38 (2005). If ever there was a case for fees and costs under § 1447(c), this is it.

ARGUMENT

I. Removal Was Objectively Unreasonable Because the Refusal Clause Does Not Apply for a Multitude of Straightforward Reasons

A. The Purported Conflicts Between Plaintiffs' State-Law Claims and Federal Equal-Rights Law Are Objectively Baseless

Attorneys' fees are warranted because the purported conflicts between state and federal law are frivolous. Regardless of the standard for a "colorable conflict" under the Refusal Clause, or the definition of a "refusal," Legislative Defendants had no "objectively reasonable basis" for asserting any conflict here. *Martin*, 546 U.S. at 136.

1. The Purported Conflict with the *Covington* Remedial Order Is Objectively Baseless

Legislative Defendants continue to insist that the *Covington* remedial order "requires the State to utilize the remedial plans … in future elections," thereby precluding state courts from adjudicating challenges to those plans. Resp.26-27.[1] But the *Covington* court said exactly the opposite—that its remedial order was "without prejudice" to "other litigants" bringing state-law challenges to the 2017 Plans in "separate proceedings" in state court. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 447 n.9 (M.D.N.C. 2018). That alone renders removal based on a purported conflict with the *Covington* order objectively unreasonable.

[1] This brief refers to Legislative Defendants' opening brief as "Leg.Br.##," Plaintiffs' principal and response brief as "Pls.Br.##," State Defendants' joinder as "StateDefs.Br.##," and Legislative Defendants' response and reply brief as "Resp.##."

Neither of Legislative Defendants' responses is persuasive. They first say that *Covington*'s statement permitting future state-law challenges in state court carries little import because it was "text buried" in a "48-page … opinion." Resp.27. But the page number on which a court explains the scope of its holding is obviously immaterial. The salient point is that the "without prejudice" statement appears in the same January 21, 2018 order that Legislative Defendants claim precludes state-law challenges. Reasonable litigants must read the entirety of a court order before premising a removal on it.

Legislative Defendants next argue that *Covington*'s "without prejudice" statement is inapplicable because Plaintiffs here "neither raise Whole County Provision arguments, nor are their claims limited to Greene and Cabarrus Counties." Resp.29. For the first time ever in these removal proceedings, Legislative Defendants now retreat from their stance that the *Covington* order precludes *any* state-court challenge to the 2017 Plans, instead asserting that "a state court-action involving the 2017 plans based on [the Whole County Provision] objections raised in *Covington* might be fairly read as allowed under the *Covington* order." Resp.30. That assertion flatly contradicts the legal theory Legislative Defendants pressed below and in their opening brief on appeal. *See* JA50 (asserting in Notice of Removal that the *Covington* order "mandat[es] that the General Assembly use all the enacted districts … in future elections"); JA489-90

(similar); Leg.Br.40-41 (similar). Such flip-flopping underscores that this removal lacked an objectively reasonable basis.

In any event, *Covington*'s "without prejudice" statement is not limited as Legislative Defendants suggest. The court's description of its order as "without prejudice" to other litigants raising "such arguments" in separate proceedings referred to any argument raising "an unsettled question of state law." *Covington*, 283 F. Supp. 3d at 446-47 & n.9. The court made this statement in the context of adopting Legislative Defendants' position that the court should refrain from ruling on *any* "contested issues of state law," because "an unsettled issue of state law is more appropriately directed to North Carolina courts, the final arbiters of state law." JA158 (ellipses and quotation marks omitted). And Legislative Defendants' theory is not only refuted by the court's language; it makes no sense—on what basis could a federal court immunize the 2017 Plans from all future state-law challenges except under one specific state-law provision? Legislative Defendants' reading, moreover, contradicts their (incorrect) argument elsewhere that the "operative language" of the remedial order is an "express injunction" that "requires the State to utilize the remedial plans … in future elections." Resp.26-27.

If the *Covington* district court's statements were not enough, the Supreme Court's holding on appeal removes any conceivable doubt. The Supreme Court held that "[t]he District Court's remedial authority was … limited to ensuring that

the plaintiffs were relieved of the burden of voting in racially gerrymandered legislative districts." *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018). "Once the District Court had ensured that the racial gerrymanders at issue in this case were remedied, its proper role in North Carolina's legislative districting process was at an end." *Id.* at 2555. Legislative Defendants' response brief completely ignores this language. They offer no rationale for how the *Covington* district court could have mandated use of the 2017 Plans in all future elections—even if those plans violate state law—when the court's "remedial authority" was limited to remedying the unlawful racial gerrymanders, as the Supreme Court held. *Id.* It was objectively unreasonable for Legislative Defendants to remove based on a theory that flies in the face of a Supreme Court holding—one that Legislative Defendants themselves procured barely a year ago.[2]

2. The Purported Conflict with Federal Equal-Rights Laws Is Objectively Baseless

Legislative Defendants' alternative theory—that Plaintiffs' state-law claims somehow conflict with the Fourteenth and Fifteenth Amendments and the VRA—is also objectively unreasonable. The notion that the Fourteenth or Fifteenth Amendments or the VRA requires state legislatures to *intentionally* discriminate

[2] Legislative Defendants badly mischaracterize another portion of the Supreme Court's decision. Resp.28. When the Supreme Court affirmed the district court's holding that the General Assembly should not have "another chance at a remedial map," that was solely in reference to the four districts that the district court appointed the Special Master to redraw. *Covington*, 138 S. Ct. at 2553-54. Those districts are not challenged here.

against Democratic voters in redistricting remains as absurd now as it was at the time of removal.

a. Legislative Defendants Have Conceded That They Are Not Asserting an Actual Conflict

Legislative Defendants themselves have declined to assert that implementing "the proffered state-law theory … actually would violate federal law." JA484 n.6. Legislative Defendants do not deny that they made this concession below. *See* Resp.26. That concession should be dispositive here: it is unreasonable to remove based on a purported conflict between state and federal law, while refusing even to assert that such a conflict actually exists.

Citing *Greenberg v. Veteran*, 889 F.2d. 418 (2d Cir. 1989), Legislative Defendants argue that the Refusal Clause does not require them "to commit … to the position that Plaintiffs' demanded relief will, for certain, actually violate federal law." Resp.26 (internal quotation marks omitted). But *Greenberg* held nothing of the sort. *Greenberg* held that defendants removing under the Refusal Clause need not "admit that they have violated *state law*." 889 F.2d at 421 (emphasis added). Thus, a defendant can invoke the Refusal Clause while arguing that there has been no state-law violation, so long as the defendant "alternatively" argues that if the plaintiff's view of state law is correct, it would compel the defendant to violate federal law. *Id.* But the Refusal Clause certainly requires the defendant to assert that the plaintiff's view of state law actually conflicts with

federal law. The clause's plain text is unambiguous: the defendant must be "refusing" to take some action because it "*would be* inconsistent with [federal] law," 28 U.S.C. § 1443(2) (emphasis added), not because it "might be" inconsistent.

Legislative Defendants had no reasonable basis to remove under the Refusal Clause when even they will not "commit" to the position that Plaintiffs' view of state law conflicts with federal law. Resp.26. "It has been consistently held in the Supreme Court that the right of removal must appear in advance of trial," *Baines v. City of Danville, Va.*, 357 F.2d 756, 765 (4th Cir.), *aff'd*, 384 U.S. 890 (1966); indeed, it must appear at the "time" of "fil[ing] in state court," *Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 390 (1998). Legislative Defendants cannot remove on the basis of a possibility that a conflict will arise at the remedial stage. Resp. 32.

b. It Is Objectively Unreasonable To Believe That Federal Law Requires Intentional Discrimination Against Democratic Voters

In any event, there is no conceivable conflict between state law and federal equal-rights provisions because Plaintiffs' state-law claims rest on allegations of intentional discrimination against Democratic voters. For the challenged state law to conflict with federal law, federal law would have to require intentional discrimination against Democrats. Federal law requires no such thing.

Legislative Defendants have no plausible response. They suggest that the intent element is relevant only to evaluating Legislative Defendants' "prior action" in passing the 2017 Plans, not their "future affirmative action" of enacting "new maps" if this case reaches a remedial phase. Resp.32. But that is not so. Any new maps enacted in a remedial phase would violate state law only if Legislative Defendants intentionally discriminate against Democratic voters based on their political viewpoints, voting histories, or political affiliations. So long as the new maps do not effectuate such intentional discrimination, they would comply with state law. Thus, there would be no conflict with federal law unless federal law requires intentional partisan discrimination.

The intent element of Plaintiffs' claim is a complete response to Legislative Defendants' professed concern about a remedial district's African-American voting age population ("BVAP"). If Legislative Defendants establish that federal law requires a minimum BVAP for certain districts (notwithstanding their assertions in creating the 2017 Plans that the *Gingles* factors were not met), then drawing a remedial map that contains VRA-compliant districts would pose no conflict with state law. If the partisan makeup of a remedial district were a consequence solely of a legally required effort to comply with the VRA, there would be no intentional partisan discrimination and no violation of state law.

Contrary to Legislative Defendants' repeated assertions, their removal is not one of "first impression." Resp.1, 3, 12, 48, 50. As detailed in Plaintiffs' opening brief, numerous federal courts have rejected removals under the Refusal Clause in redistricting cases because any conflict between state and federal law in such cases is "speculative." Pls.Br.36-38 (collecting cases). Here, the alleged conflicts are not just speculative—they are non-existent.

c. It Is Objectively Unreasonable To Assume That a State Court Will Discriminate Against Minorities in Violation of the Fourteenth and Fifteen Amendments

The specific federal equal-rights violations raised by Legislative Defendants lay bare the objective unreasonableness of their removal. Legislative Defendants' theory under the Fourteenth and Fifteenth Amendments is that the state courts presiding over the adoption of remedial plans in this case will intentionally "dismantle crossover districts" to "privilege the electoral prospects of the Democratic Party" at the expense of "racial minorities." Resp.35-36. That is ridiculous. This Court cannot assume that state courts will act with "discriminatory intent" and "intentionally [draw] district lines in order to destroy otherwise effective crossover districts." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). *Bartlett*, Legislative Defendants' primary authority on this issue (Resp.2, 36), made clear that only "discriminatory intent" of that kind can trigger an equal-protection violation, 556 U.S. at 24. There will be no specific, "invidious" intent

to lower the BVAP in any district during the remedial phase here. *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

The purported conflict with the Fourteenth and Fifteenth Amendments is even more far-fetched given that there is an intent element not only for a federal equal-protection violation, but also for Plaintiffs' state-law gerrymandering claims. Plaintiffs' state-law claims could conflict with the Fourteenth and Fifteenth Amendments only if mapmakers had an unavoidable choice of intentionally discriminating against either Democratic voters or racial minorities. Mapmakers face no such dilemma. The notion that mapmakers simply *must* intentionally discriminate against Democrats or racial minorities is objectively unreasonable.

d. It Was Objectively Unreasonable for Legislative Defendants To Remove Based on the VRA When They Believe the VRA Does Not Apply

Legislative Defendants' removal based on the VRA is equally if not more unreasonable. Legislative Defendants do not deny that they ignored racial considerations in creating the 2017 Plans because they concluded that the third *Gingles* factor, requiring legally sufficient racial bloc voting, was not met. Pls.Br.42-43. They do not dispute that, because they concluded the *Gingles* factors were not met, they necessarily concluded that Section 2 of the VRA "does not apply" at all to the state's legislative districts, including the districts they now call "crossover districts." *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

Yet Legislative Defendants argue that their removal based on the VRA was proper because, in some hypothetical future case, a "third party" could bring a VRA claim. Resp.37. Speculation about possible third-party litigation is no basis to remove under the Refusal Clause. Legislative Defendants, as the state officials removing, must assert that *they* are refusing to comply with state law because *they* believe it "would be inconsistent with [federal] law." 28 U.S.C. § 1443(2). Legislative Defendants still do not cite any precedent where a state official has been permitted to remove under the Refusal Clause based on a fear that some third party might assert that implementing state law conflicts with federal law, even if the official does not share that belief. No such authority exists, as it would contradict the text and purpose of the Refusal Clause.[3]

Well-established estoppel principles also render it objectively unreasonable for Legislative Defendants to invoke the VRA as a ground for removal. Legislative Defendants assert that their "prior statements" in *Covington* during "the 2017 redistricting" have no bearing on what they "may prove in this case." Resp.43. But estoppel exists precisely to prevent parties from saying different things to different courts at different times. Legislative Defendants told the

[3] Legislative Defendants falsely assert that "Plaintiffs do not dispute that most of the 'packed' districts qualify as minority crossover districts." Resp.36. Plaintiffs have taken no position on that question at this stage. In contrast, Legislative Defendants asserted during the 2017 redistricting that these purported "crossover districts" were not subject to the VRA.

Covington court that, as a factual matter, there was insufficient evidence of racial bloc voting to meet the third *Gingles* factor. They cannot tell this Court that there is sufficient evidence of racial bloc voting to require racial thresholds for certain districts. *See* Resp.42-43. And contrary to Legislative Defendants' assertion, the "relevant representations were adopted" in *Covington*, Resp.43, as the court approved the 2017 Plans on the premise that the VRA did not require that the districts account for race or meet racial thresholds.

In all events, if Legislative Defendants or any other party did establish in the state court that the VRA imposes particular requirements in any district, the state courts assuredly will adhere to those requirements in presiding over any remedial phase, and there would be no conflict with Plaintiffs' state-law claims. It was objectively unreasonable for Legislative Defendants to assume that the state courts will implement state law in a way that violates the VRA. As the district court recognized, there is every reason to assume that the state courts will faithfully comply with federal law. JA686; *see also Stephenson v. Bartlett*, 562 S.E.2d 377, 396 (N.C. 2002) (interpreting North Carolina's Whole County Provision in a manner ensuring VRA compliance).

B. It Was Objectively Unreasonable for Legislative Defendants To Invoke the Refusal Clause When They Have Not Been Sued for Refusing to Act

This removal was independently objectively unreasonable because Legislative Defendants have been sued for enacting an unconstitutional law, not "for refusing to do any act." 28 U.S.C. § 1443(2).

1. This Court held in *Baines* that the individuals who said they were being sued for refusing to "desist" from certain activities could not invoke the refusal clause, *because* they were not "state officers who refused to enforce discriminatory state laws." *Baines*, 357 F.2d at 772; *see also City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966) (similar). This was not "dicta," Resp.10; it was necessary to, and indeed the only basis for, *Baines*' holding that the Refusal Clause did not apply. So when Legislative Defendants say their removal cannot be objectively unreasonable because Plaintiffs "have no case from the Supreme Court [or] this Circuit" (Resp.50), they are flat wrong. Because Legislative Defendants do not argue that they are being sued for "refus[ing] to enforce" state law, *Baines* alone establishes that the removal was objectively unreasonable.

Beyond *Baines*, which is binding, there is a wealth of "precedent … addressing [the refusal] issue" (Resp.11) and confirming that the Refusal Clause applies only to lawsuits challenging an actual refusal to enforce law. Three courts of appeals have so held. Pls.Br.15-16. Legislative Defendants are wrong that the plaintiffs' "goals" in those cases did not involve "future affirmative relief"

(Resp.5-7). *See Detroit Police Lieutenants & Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979) (seeking replacement of one promotion system with another); *Thornton v. Holloway*, 70 F.3d 522 (8th Cir. 1995) (suing for defamation in part to undermine ongoing discrimination investigation); *New York v. Horelick*, 424 F.2d 697 (2d Cir. 1970) (seeking the ultimate in future affirmative relief—sending the defendants to prison). Legislative Defendants rely on a hypothetical from Judge Friendly in *Horelick*, in which a hypothetical teacher is prosecuted for refusing to enforce state-mandated segregation and instead admits black students into an otherwise white school. Resp.7; 424 F.3d at 704. But the salient difference between that hypothetical and the facts of *Horelick* itself was that the hypothetical involved an actual *refusal* to enforce state law, not that it would have led to an "injunction" requiring an expulsion of a student, Resp.7—which it would not have. Multiple district court opinions confirm that the Refusal Clause applies only to actual refusals to enforce state law. *See* Pls.Br.16 (citing cases).

Lawsuits for past actions, such as enforcing a state law, often have future consequences or will lead to future affirmative relief if the challenged action is found unlawful. That cannot transform every lawsuit challenging affirmative conduct into a lawsuit challenging a "refusal." Legislative Defendants had no objectively reasonable basis to remove this suit, which does not challenge a "refusal" by anyone.

2. Legislative Defendants' removal was also unreasonable because, as state legislators, they do not "enforce" state laws and therefore cannot "refuse … to enforce discriminatory state laws." *Baines*, 357 F.2d at 772. Legislative Defendants do not cite any case—ever—where state legislators successfully removed under the Refusal Clause. And *Wolpoff v. Cuomo*, 792 F. Supp. 964, 968 (S.D.N.Y. 1992), squarely rejected the proposition that state legislators may remove under the Refusal Clause. Legislative Defendants attempt to distinguish *Wolpoff* on the ground that relief here would require the General Assembly or the court to redistrict, Resp.12, but that was equally true in *Wolpoff*, 792 F. Supp. at 965.

Legislative Defendants also fail to address this Court's opinion in *Wright v. North Carolina*, 787 F.3d 256 (4th Cir. 2015), which held that "[t]he General Assembly retains no ability to enforce any of the laws it passes," and that only North Carolina state election officials "enforce [a] redistricting plan." *Id.* at 262. Legislative Defendants cite *Cavanagh v. Brock*, Resp.13, but that case involved a removal by state election officials, not legislators. *See* 577 F. Supp. 176 (E.D.N.C. 1983). Legislative Defendants' failure to reconcile their refusal theory with *Wright* demonstrates the unreasonableness of their removal.

As for the segregation and other cases Legislative Defendants cite, Resp.5, those cases involved actual refusals by executive branch officials to enforce state

law based on assertions that state law violated federal law. These cases did not permit removal because the plaintiffs' "goal … support[ed] removal," Resp.5, even though no actual refusal was challenged. Rather, those cases permitted removal because providing a federal forum to state officials who are enforcing federal desegregation requirements rather than discriminatory state hiring laws is precisely the point of the Refusal Clause. *See, e.g.*, *Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo*, 477 F. Supp. 691, 692-93 (W.D.N.Y. 1979). Legislative Defendants argue that school boards legislate (Resp.10-11), but the cases permitting removal concern the board's executive functions, like hiring and firing, not legislating. It is objectively unreasonable to think that those cases support removal here.

Legislative Defendants offer no response to the absurd consequences that result from their interpretation of the Refusal Clause. Pls.Br.18. If every challenge to a law is also a suit against the legislature for refusing to repeal that law or enact a different law, the word "refusal" in the Refusal Clause is superfluous. Legislative Defendants say that their refusal to "moot this case by enacting Plaintiffs' new maps" satisfies the refusal requirement, Resp.4, but on that theory, literally every case involves a refusal. No authority suggests that a "refusal" under § 1443(2) can include a defendant's refusal to *settle* the case. And the plain text of § 1443(2) refers to the refusal that the lawsuit is brought "for," so qualifying

refusals cannot include litigation positions the defendant takes only *after* litigation commences.

3. Nor can Legislative Defendants evade § 1443(2)'s refusal requirement by arguing that they removed on behalf of the State of North Carolina. First, although the State's executive branch can enforce laws, that does not mean Plaintiffs sued the executive branch "for" refusing to act, or that Legislative Defendants can remove based on their "assertion that the State … *refuses*." Resp.13. As discussed, this lawsuit does not challenge anyone's refusal, but rather solely affirmative acts.

Second, Legislative Defendants are not North Carolina's executive branch and do not represent it. Legislative Defendants argue that they can remove on behalf of the State, including on behalf of its executive branch, because they are "agents of the State." But the statute they cite says the opposite: "as agents of the State," in specified actions, Legislative Defendants can "intervene *on behalf of the General Assembly*." N.C. Gen. Stat. § 1-72.2(b) (emphasis added). The statute thus does not "identify the General Assembly as speaking for 'the State of North Carolina,' full stop." Resp.15. Rather, it emphasizes the critical *distinction* between the executive and legislative functions of the State, confirming that the General Assembly speaks for the State only for purposes of "legislative" functions. N.C. Gen. Stat. § 1-72.2(a). The statute requests that federal courts allow "both the

legislative branch and the executive branch of the State … to participate" in actions challenging state statutes. *Id.* And as for § 120-32.6(b), it simply confers authority "to the extent provided in" § 1-72.2(a).

Beyond obviously violating the North Carolina Constitution's separation of powers clause, Pls.Br.23, Legislative Defendants' theory that they can act independently of the Attorney General in representing the state's executive branch makes no sense and is exactly what the relevant statutes prohibit. If both the Governor and the General Assembly are "agents" and represent the "State as a whole," Resp.16, and both can speak for it independently, what is a court to do when they disagree? Legislative Defendants say this obvious problem does not matter because the Attorney General's brief opposing removal was not filed on behalf of the State itself, Resp.17, but it was, as its caption and first sentence makes clear. StateDefs.Br.1. And the absence of the Governor from this litigation, Resp.16, only confirms that the General Assembly *cannot* speak on behalf of the State; § 1-72.2(b) provides that the General Assembly is only the State when acting with the Governor. Otherwise, it is just the legislative branch.

Legislative Defendants argue that this Court should ignore the Attorney General's stated position that removal under the Refusal Clause was improper because "[t]he Attorney General's role is to obey the General Assembly's directives." Resp.18. That statement flouts basic principles of separation of

powers. The Attorney General is an elected official, not an employee of the General Assembly. Regardless, a federal court may not disregard the Attorney General's stated litigation position. The Attorney General is the state constitutional officer charged with "appear[ing] for the state" in litigation, N.C. Gen. Stat. § 114-2(1), and he has opposed removal.[4]

In any event, the General Assembly does not control the state's law-enforcement decisions and cannot assert on behalf of the state's executive branch that the state has refused to enforce a law based on a purported conflict with federal law. Regardless of whether the General Assembly "constitutes the State of North Carolina" for purposes of litigation (and it does not), Legislative Defendants' post-lawsuit litigation decisions are irrelevant to removal jurisdiction under § 1443(2). *Cf.* Resp.18-19. The Refusal Clause focuses on the removing defendant's actions *before* litigation commenced, tying removal to whether plaintiffs are suing the defendant "for" refusing to take some action. Legislative Defendants have it completely backwards when they say that "North Carolina satisfies or does not satisfy Section 1443(2) based on" whether it subsequently

[4] Legislative Defendants assert that the State of North Carolina "remains a party" because they were "never contacted" about the dismissal of the State and "did not consent." Resp.20. Plaintiffs filed a stipulation of voluntary dismissal of the State in the state court on February 13, 2019, and served Legislative Defendants with notice at the time. *See* https://www.brennancenter.org/sites/default/files/legal-work/2019-02-13-Voluntary%20Dismissal.pdf. No consent is needed under North Carolina law to voluntarily dismiss a defendant. N.C. R. Civ. P. 41(a)(1).

"choose[s]" to assert "an equal-rights-law defense" at trial. Resp.19. Removal jurisdiction must be present before trial, *Baines*, 357 F.2d at 765, and is assessed as of filing, *Wisc. Dep't of Corr.*, 524 U.S. at 390. Legislative Defendants' interpretation of § 1443(2) makes that assessment impossible, which alone is reason enough to reject their interpretation as objectively unreasonable.

In all events, any removal on behalf of the State was untimely. Pls.Br.27. Regardless of whether the General Assembly and the Attorney General jointly represent the state for certain purposes, service "shall" be made "upon the state" by serving the "Attorney General." N.C. Gen. Stat. § 1a-1(4)(j)(3). Legislative Defendants cite no authority for their argument that service on the State is "not complete until the General Assembly too was served." Resp.24.

II. Removal Was Objectively Unreasonable Because Judicial Estoppel and State Sovereign Immunity Preclude a Federal Forum for this Case

Legislative Defendants' removal was objectively unreasonable for additional independent reasons: principles of judicial estoppel and state sovereign immunity preclude a federal forum. Legislative Defendants do not dispute that the district court never addressed these independent grounds for remand, nor that it is *per se* an abuse of discretion for a court to deny relief without addressing all legally sufficient grounds for that relief. Pls.Br.59-60. Those facts alone overcome any "presumption in favor of the district court's denial of fees" based on the standard

of review. Resp.49. And Legislative Defendants' attempts to salvage the decision below on grounds the district court never discussed do not withstand scrutiny.

A. It Was Objectively Unreasonable for Legislative Defendants To Claim a Federal Forum Was Proper When They Successfully Argued the Opposite in *Covington*

Legislative Defendants repeatedly and successfully told both the federal district court and the Supreme Court in *Covington* that state-law challenges to the 2017 Plans may proceed *only* in state court. Pls.Br.48-51. It is objectively unreasonable, and an affront to the integrity of judicial proceedings, for Legislative Defendants to turn around and seek a federal forum in this case.

Legislative Defendants fault Plaintiffs for discussing estoppel arguments in two sections of their brief. Resp.37-38. But that just reflects that Legislative Defendants are estopped on two levels—they are estopped from asserting that the VRA's prerequisites are satisfied, *supra* p.11, and from asserting that federal court is an appropriate forum for a state-law challenge to the 2017 Plans.

Legislative Defendants also contend that because estoppel is an *affirmative* defense, the district court somehow was within its discretion to find Legislative Defendants' position reasonable without even "consider[ing]" Plaintiffs' estoppel arguments. Resp.53. But the district court never suggested that it was denying fees without addressing estoppel for that reason. And a claim can be unreasonable because it is plainly barred by a defense. Moreover, Plaintiffs raised estoppel in their motion to remand. At that point at the latest, to avoid a fee award, Legislative

Defendants were obligated either to consent to remand or offer an objectively reasonable response. They did neither.

Legislative Defendants' responses highlight the unreasonableness of their position. Denying any inconsistency, Legislative Defendants say that their assertions in *Covington* concerned federal courts' "jurisdiction" and "remedial" authority, whereas their assertions here concern "removal." Resp.41-42, 53. That is semantics. Removal is the procedural mechanism through which federal courts assume jurisdiction, including remedial authority, over state-court cases. If federal courts lack jurisdiction or remedial authority over state-law challenges to the 2017 Plans, as Legislative Defendants maintained in *Covington*, Legislative Defendants had no business removing such a challenge to federal court here.

Legislative Defendants assert that they "successfully convinced the *Covington* court of practically nothing and the Supreme Court of only slightly more." Resp.40 (quotation marks omitted). That assertion beggars belief. At Legislative Defendants' request, the *Covington* court rejected the plaintiffs' objection that remedial districts in Greene and Cabarrus Counties violated the state's Whole County Provision. *See* Pls.Br.5, 29, 50. If that result amounted to "practically nothing," it would be news to the *Covington* plaintiffs and the *Covington* court, which spent pages addressing the issue—not to mention the state legislators who now represent the resulting districts, and the thousands of North

Carolina voters who voted in those districts in 2018. On appeal, moreover, the Supreme Court accepted Legislative Defendants' argument that the district court lacked authority to redraw other districts on the ground that they violated the state constitution's mid-decade redistricting ban. *See* Pls.Br.30, 50. That holding also impacted many thousands of voters in the 2018 elections.

Legislative Defendants suggest that while their statements in *Covington* went to "jurisdiction," the courts rested their rulings on questions of "discretion" and "erroneous action." Resp.29, 41. That is wrong. The judicial decisions confirmed that the district court lacked "jurisdiction," 283 F. Supp. 3d at 428, or "authority," 138 S. Ct. at 2554, to address the *Covington* plaintiffs' state-law claims. Both words denote a court's "power to act." Resp.41.

Legislative Defendants' assertion that they had no "intent to mislead" the district court, Resp.42 (quotation marks omitted), disintegrates under the slightest scrutiny. Plaintiffs of course had the "burden to plead and prove estoppel," *id.*, but flatly inconsistent statements do not become acceptable merely because they are made before the other side has a chance to point them out. And no "guess"-work, *id.*, was required for Legislative Defendants to realize that their statements in *Covington* contradicted their entire removal gambit. On their face, those statements are irreconcilable with their position here, but Legislative Defendants failed to alert the district court upon removing the case.

Legislative Defendants continue to insist that they were free to attempt to abuse the judicial process so long as they did so through inconsistent "statements of law, not fact." Resp.40. That is a dim view of the duty of candor and good faith that any litigant owes to the judiciary, let alone litigants who are public officials. But in any event, Legislative Defendants' statements in *Covington* and this case are "factually incompatible," *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998)—a given challenge to the 2017 Plans can proceed either in state court (as Legislative Defendants asserted in *Covington*) or in federal court (as they assert here), but not both. And Legislative Defendants do not dispute that this Court and the Supreme Court both have applied estoppel to statements that are just as "legal" as Legislative Defendants' statements here. Pls.Br.52.

In a desperate attempt to turn the tables, Legislative Defendants fault Plaintiffs' *counsel* for purportedly taking different positions in different cases on behalf of different clients. Resp.38-39, 49. But parties are estopped, not lawyers. *See* N.C. Rules of Prof. Conduct 1.7, cmt. 24. Regardless, the positions were not inconsistent. *Covington*'s holding about the role of "political considerations," Resp.39, concerned the original, racially-gerrymandered districts that no longer exist. As for prior statements about racially-polarized voting in North Carolina, Resp.38, Plaintiffs argue here that Legislative Defendants could not have refused

to act on the ground of compliance with federal equal-rights law when *Legislative Defendants* denied the existence of racial bloc voting sufficient to trigger the VRA.

No remand to the district court is necessary on estoppel. Unlike in *Bartels by & through Bartels v. Saber Healthcare Grp., LLC*, 880 F.3d 668, 680-81 (4th Cir. 2018), on which Legislative Defendants rely, Resp.38, 53 & n.4, all of the relevant facts here are apparent from the record. This Court can resolve now whether the requirements for estoppel are met and render the removal objectively unreasonable such that fees are warranted.

B. It Was Objectively Unreasonable for Legislative Defendants To Remove When State Sovereign Immunity Precludes a Federal Forum

Eleventh Amendment sovereign immunity independently bars federal jurisdiction over this case. Pls.Br.54. Legislative Defendants contend that state sovereign immunity "may not be invoked by a plaintiff to control the forum." Resp.3, 44 (quotation marks omitted); *see id.* at 54 (similar). But it is the State Defendants, not Plaintiffs, who have invoked sovereign immunity here by refusing to waive it and instead "object[ing] to the removal and join[ing] in Plaintiffs' Motion to Remand." JA463 n.2. On appeal, the State Defendants again make clear that allowing removal would improperly "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." StateDefs.Br.6. Plaintiffs have not invoked state sovereign immunity themselves;

they have merely explained why Legislative Defendants have not and cannot waive that immunity unilaterally, over the Attorney General's and the State Defendants' objection.

Legislative Defendants maintain that they can unilaterally waived immunity because state law supposedly "authorizes the General Assembly … to represent the State in federal court." Resp.44. Plaintiffs have already explained why Legislative Defendants' readings of § 1-72.2 and § 120-32.6 are wrong and unconstitutional. Pls.Br.24-26, 56-57; *supra* pp.16-18. But it is not enough even for Legislative Defendants to establish that their reading of those statutes is correct and constitutional. To avoid fees, Legislative Defendants must show that they had a reasonable basis to assert that their authority to unilaterally waive sovereign immunity was *so clear* that federal jurisdiction is free from doubt. Pls.Br.57-58, 61-62. Legislative Defendants do not dispute that they cannot meet that demanding standard here.

This standard follows straightforwardly from two basic principles—a waiver of sovereign immunity is ineffective unless "unequivocally expressed," *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (quotation marks omitted), and "[i]f federal jurisdiction is doubtful, a remand is necessary," *Mulcahey v. Columbia Organic Chemicals Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994). Legislative Defendants suggest that the "unequivocal"-statement rule applies only where a state statute

itself allegedly waives sovereign immunity, and not where it allegedly authorizes a state official to do so through litigation conduct. Resp.46-47, 55.

In *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613 (2002), however, the Supreme Court expressly held that "the litigation act the State takes that creates [a] waiver" must possess the requisite "clarity." *Id.* at 620. Courts thus have "not read *Lapides* as sanctioning a different or lesser test for the clarity with which the State must consent to federal jurisdiction in the context of waiver by litigation, as compared with waiver by statute." *Maysonet-Robles v. Cabrero*, 323 F.3d 43, 53 (1st Cir. 2003). "[A]s with statutory waiver, the State's litigation conduct must be unambiguous." *Id.* at 52. Here, it is at best unclear whether Legislative Defendants have authority to waive immunity on behalf of the State. It certainly is not clear enough to make federal jurisdiction beyond doubt.

As Plaintiffs explained, courts often award fees under § 1447(c) in analogous circumstances. Pls.Br.62-63 & n.5. Legislative Defendants' only response—these cases concern fraudulent joinder, not sovereign immunity, Resp.55 n.6—misses the point. The fraudulent joinder cases are *analogous* because the standards to show fraudulent joinder and waivers of sovereign immunity are similarly difficult to satisfy. In both contexts, the party invoking federal jurisdiction must show that state law is clearly settled in their favor. In the cases Plaintiffs cite, courts awarded fees because the parties invoking federal

jurisdiction may have had reasonable state-law arguments on the merits, but they had no reasonable argument that their state-law positions were *clearly* correct. So too here. Even if Legislative Defendants had colorable arguments that they represent the State (which they do not), they have no reasonable basis to assert that their authority is clear enough to waive the State's sovereign immunity.

Contrary to Legislative Defendants' assertions, Resp.54-55, nothing about this is inconsistent with *Martin*, 546 U.S. 132. *Martin* holds that to avoid fees, the removing defendant's asserted "right to remove" need only be "objectively reasonable," not "obvious." *Id.* at 140. Here, however, in order to show that their *right to remove* was objectively reasonable, Legislative Defendants must show that their *underlying state-law authority to waive sovereign immunity* was beyond reasonable dispute. This heightened standard reflects the extraordinary nature of the removal here. Legislative Defendants are seeking to snatch this case from state court and instead have a federal court interpret the state constitution and decide whether to enjoin state executive officials from enforcing a state redistricting plan under state law. It is entirely appropriate that Legislative Defendants need unmistakably clear statutory authority to do that, and must pay fees and costs if they do not have it.

Finally, even if Legislative Defendants' authority were unequivocally clear, they have not validly exercised that authority because they undisputedly filed their

removal notice more than 30 days after the Attorney General's office accepted service on behalf of the State. Pls.Br.27, 57. Legislative Defendants assert that service was not complete until they accepted service as well, Resp.3, 24, 47, but that argument is objectively wrong for the reasons already stated, *supra* p.19.

CONCLUSION

This Court should reverse the district court's denial of fees and costs.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Response and Principal Brief of Plaintiffs-Appellees-Cross-Appellants complies with the type-volume limitation of Federal Rule of Appellate Procedure Rule 28.1(e)(2)(B). The brief contains 6,494 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because the brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on April 8, 2019, I caused the foregoing Reply Brief of Plaintiffs-Appellees-Cross-Appellants to be filed via ECF, and service was accomplished on all counsel of record by that means.

/s/ *R. Stanton Jones*
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