IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 5:19-cv-452

REBECCA HARPER, et. al., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al., Defendants.	STATE DEFENDANTS' RESPONSE TO EMERGENCY MOTION TO REMAND

NOW COME Defendants, The North Carolina State Board of Elections ("SBOE"); Damon Circosta, in his official capacity as chairman of the SBOE; Stella Anderson, in her official capacity as member of the SBOE; Kenneth Raymond, in his official capacity as member of the SBOE; Jeff Carmon, in his official capacity as member of the SBOE; and David C. Black, in his official capacity as member of the SBOE (collectively, "State Defendants"), by and through undersigned counsel, and hereby respond to Plaintiffs' Emergency Motion for Remand.

NATURE OF THE CASE

Plaintiffs filed this matter in a North Carolina state court on September 27, 2019. (D.E. 5-1) Plaintiffs challenge North Carolina's 2016 congressional map ("2016 Map"). Plaintiffs assert that the 2016 Map is an unlawful partisan gerrymander in violation of sections 10, 12, 14, and 19 of Article I of the North Carolina Constitution, which guarantee Free Elections, Freedom of Assembly, Freedom of Speech, and Equal Protection to all North Carolinians, respectively. Plaintiffs do not challenge the 2016 Map under the United States Constitution or any federal law. In short, Plaintiffs contend that the 2016 Map unlawfully discriminates against voters who have voted for Democratic candidates.

RELEVANT FACTS

As set forth above, Plaintiffs filed this matter in a North Carolina state court on September 27, 2019. (D.E. 5-1) The State Defendants, represented by the North Carolina Department of Justice, accepted service of the Summons and Complaint the same day.

On September 30, Plaintiffs filed a motion for preliminary injunction, asking the state court to enjoin the administration of the 2020 primary and general elections under the 2016 Map and to set a remedial process that creates a new plan that complies with the North Carolina Constitution. (D.E. 5-1) Concurrently, Plaintiffs filed a motion for expedited briefing and resolution on their motion for preliminary injunction. (D.E. 5-1)

On October 10, the state court entered an order requiring responses to Plaintiffs' motion for a preliminary injunction by 5:00 p.m. on October 21 and setting a hearing on Plaintiffs' motion in state court for 10:00 a.m. on October 24. (D.E. 5-1)

On October 14, Defendants Representative David R. Lewis, in his official capacity as Senior Chairman of the House Standing Committee on Redistricting; Senator Ralph E. Hise, Jr., in his official capacity as Chairman of the Senate Standing Committee on Redistricting; Warren Daniel, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting; Paul Newton, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting; Speaker of The North Carolina House of Representatives Timothy K. Moore; and President Pro Tempore of The North Carolina Senate Phillip E. Berger ("Legislative Defendants") filed a Notice of Removal removing this matter to this Court.[1] (D.E. 5) The Legislative

[1] The Notice of Removal purports to be on behalf of Defendant State of North Carolina, but the State is not a named party in the case and counsel for Legislative Defendants have not entered appearances on behalf of the State. The only named State defendants are the State Board and its members, sued in their official capacities for their connection to the administration of elections under redistricting plans. These State Defendants are represented by the Attorney General and the

Defendants contend that removal is appropriate pursuant to 28 U.S.C. §§ 1443(2) and 1441(a). In short, they contend that the remedy sought by Plaintiffs would violate the Voting Rights Act ("VRA") and the Equal Protection Clause of the United States Constitution by requiring the Legislative Defendants to intentionally discriminate against African-American North Carolinians in redistricting.

The next day, Plaintiffs filed an emergency motion to remand, urging this Court to promptly remand this case in light of the briefing deadlines and hearing on the plaintiffs' motion for preliminary injunction set by the state court. (D.E. 18)

ARGUMENT

Removal is not appropriate in this case. The State Defendants agree that this matter should be remanded. Furthermore, given the State Defendants' interest in the fair and effective administration of elections and the press of time before the upcoming elections that this case could impact, the State Defendants respectfully agree with Plaintiffs that remand should be expedited.

North Carolina Department of Justice. *See, e.g.*, Section 7(2) of Article III of the North Carolina Constitution; N.C. Gen. Stat. § 114-2. No State Defendants have consented to the removal of this matter and neither Legislative Defendants nor their private counsel (who do not represent the State Defendants) may make removal decisions on behalf of the State Defendants. In addition, State Defendants have not consented to any waiver of immunity. Because the State is not a party to this litigation, its immunity cannot be waived. To the extent that Legislative Defendants purport to waive immunity of State Defendants, they cannot because neither they nor their private counsel represent State Defendants. Only State Defendants and the Attorney General may waive immunity on behalf of State Defendants in litigation. In any event, this Court need not resolve Legislative Defendants' interpretation of their removal and waiver authority because it is clear that removal is otherwise improper. Legislative Defendants' interpretation raises unsettled issues of state law. The State Defendants and the Attorney General reserve the right to address these issues in an appropriate setting.

I. Remand Is Appropriate

A. Legal Standard

This Court has previously adhered to "the general proposition that 'removal statutes are to be strictly construed against removal, with any doubt in a particular case to be resolved against removal.'" *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 784 (E.D.N.C. 2001) (quoting, *Storr Office Supply v. Radar Business Systems*, 832 F. Supp. 154, 156 (E.D.N.C. 1993)); *see also Korzinski v. Jackson*, 326 F. Supp. 2d 704, 706 (E.D.N.C. 2004) (stating that the court must "resolve all doubts in favor of remand"). Strict construction against removal is required "[b]ecause removal jurisdiction raises significant federalism concerns" *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148, 151 (4th Cir. 1994) (citation omitted).

The importance of strict construction in reviewing a removal is further heightened in the redistricting context. Federal courts have repeatedly acknowledged that "the redistricting process is primarily the province of the states." *Stephenson*, 180 F. Supp. 2d at 782. "The Constitution leaves with the States the primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). "Federal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place." *Voinovich v. Quilter*, 507 U.S. 146, 157 (1993)

B. This Court should follow the remand order issued in *Common Cause v. Lewis*, No. 5:18-CV-589-FL.

This Court correctly ordered remand to state court in *Common Cause v. Lewis* – a closely related case involving many of the same parties.[2] That case involved a partisan gerrymandering

[2] While the Legislative Defendants appealed several months ago and requested expedited treatment for the appeal, that case proceeded to trial in state court without a ruling from the Fourth Circuit.

challenge to state legislative districts. In that case, as here, legislative defendants removed the case without the consent of state defendants represented by the Attorney General's office, including the State[3], the SBOE, and SBOE members. The Legislative Defendants in that case made arguments nearly identical to those raised here.

The court remanded the case for several reasons, as set forth in its memorandum of decision, which is attached hereto as Exhibit 1. First, the court rejected the Legislative Defendants' attempt to invoke the refusal cause, 28 U.S.C. § 1443(2), because (1) the case was not brought against the Legislative Defendants for refusing to do anything, (2) the Legislative Defendants have only a legislative role (as opposed to a law enforcement role), and (3) any implication of the refusal clause was speculative because it was unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting laws. (Ex. 1 at 7-10) Second, the court rejected the Legislative Defendants' attempt to remove plaintiffs' state-law claims pursuant to 28 U.S.C. § 1441(a) because a mere defense that raises a federal question is inadequate to confer federal jurisdiction. (Ex. 1 at 14-15) The court's decision was correct and should be followed here.

1. 28 U.S.C. § 1443(2) does not support removal in this matter.

Under 28 U.S.C. § 1443(2), a state officer sued in state court may remove the case to the federal courts if the officer is 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). This section is commonly known as the "refusal clause." Removal under the refusal clause is available to "state officers who *refused* to enforce discriminatory state laws in conflict with [equal rights law] and who were prosecuted in the state courts because of their refusal to enforce state law." *Baines v.*

[3] In that case, the State was initially named but later was voluntarily dismissed as a party.

City of Danville, 357 F.2d 756, 772 (4th Cir. 1966) (emphasis added); *accord City of Greenwood v. Peacock*, 384 U.S. 808, 824 n.22 (1966). Thus, the state officer must have refused to enforce a state law and there must be an actual conflict with federal equal rights; neither of which exists in this matter.

As set forth above, in *Common Cause* the court rejected Legislative Defendants' attempt to invoke the removal clause in a partisan gerrymandering case challenging the state legislative districts. This case is not distinguishable.

Furthermore, in *Stephenson*, this Court addressed a removal that was remarkably similar to this matter, and found that 28 U.S.C. § 1443(2) did not support removal. The plaintiffs in *Stephenson* sued in state court contending that the North Carolina House and Senate plans violated the North Carolina Constitution. The defendants, which (in that case) included the various State agencies and officers, removed the matter to this Court under 28 U.S.C. § 1443(2) contending that "the plaintiffs seek to compel defendants . . . to act in a manner inconsistent with or in violation of the Voting Rights Act and the equal protection principles of the Constitution of the United States." *Stephenson*, 180 F. Supp. 2d at 785. The plaintiffs moved for remand. In ruling for the plaintiffs, this Court noted that the refusal clause was meant to provide a federal forum where state officers are sued for upholding "equal protection in the face of strong public disapproval," but "it is not entirely clear what the defendants refuse to do, except fail to comply with state constitutional mandates." *Id.* at 785. This Court remarked that the plaintiffs were "merely 'seeking an alternative apportionment plan which also fully complies with federal law but varies from the defendants' plan only in its interpretation of state law.'" *Id.* at 785 (citations omitted).

Similarly, Plaintiffs in this matter have asserted claims under state law only. The Legislative Defendants do not contend that they refused to do any act, and Plaintiffs' claims do

not conflict with either the VRA or the Equal Protection Clause of the U.S. Constitution. Rather, as in *Stephenson*, Plaintiffs herein seek districts that comply fully with both federal law and state law. As noted in *Stephenson*, the Legislative Defendants' assertion that, in effect, they cannot comply with the state constitution because of its effect on the voting rights of specified constituent groups raises a possible *defense* to the suit, but is otherwise insufficient to remove this matter to this Court. *See id.* at 786. The Legislative Defendants "cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 399 (1987).

2. 28 U.S.C. § 1441(a) does not support removal in this matter.

Because removal under 28 U.S.C. § 1443(2) is not available in this matter, as discussed above, the sole remaining basis for removal asserted by the Legislative Defendants is removal pursuant to 28 U.S.C. § 1441(a). However, the Legislative Defendants have failed to comply with that statute. Where removal occurs "solely under section 1441(a), *all defendants* who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A) (emphasis added). As the Fourth Circuit has held, "all defendants must consent to removal" under § 1441(a). *Mayo v. Bd. of Educ. of Prince George's Cty.*, 713 F.3d 735, 741 (4th Cir. 2013). The State Defendants have not consented, and do not consent, to removal of this matter.

C. The *Rucho* case established that federal courts lack jurisdiction over partisan redistricting cases.

After the *Common Cause* remand order, the United States Supreme Court resolved any doubt concerning the propriety of removal under the circumstances. In *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019), the Supreme Court held that the federal courts lack subject matter jurisdiction to hear a partisan redistricting challenge to the very congressional districts at issue

under the U.S. Constitution. The Supreme Court determined that partisan gerrymandering claims based on state constitutions and state statutes belong in state courts. *Id.* at 2507. Accordingly, removal is inappropriate here because this Court lacks jurisdiction to even hear the case.

II. The State Defendants Request That The Court Rule As Promptly As Possible.

The 2020 primaries are currently scheduled to be held in March 2020. As the State Defendants recently informed the state court in *Common Cause*, for the fair and effective administration of the 2020 primary elections, the State Defendants would need finality about the maps by at least December 15. Exhibit 2.

In light of this tight timeframe, the State Defendants supported Plaintiffs' motion to expedite consideration of their preliminary injunction motion and stand ready to abide by the deadlines set by the state court in its order on Plaintiffs' motion. Now, the State Defendants respectfully request that this Court promptly remand this case so that the state court has the opportunity to consider Plaintiffs' preliminary-injunction motion on the schedule it set.

CONCLUSION

For the foregoing reasons, the State Defendants agree that this matter should be remanded to state court on an expedited basis.

This the 21st day of October, 2019.

JOSHUA H. STEIN
Attorney General

/s/ Paul M. Cox
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CERTIFICATE OF SERVICE

This is to certify that the undersigned caused the foregoing STATE DEFENDANTS' RESPONSE TO EMERGENCY MOTION TO REMAND to be filed and served on all counsel of record using the CM/ECF filing system

This the 21st day of October, 2019.

/s/ Paul M. Cox
Paul M. Cox
Special Deputy Attorney General

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:18-CV-589-FL

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC; PAULA ANN CHAPMAN; HOWARD DUBOSE; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; EDWIN M. SPEAS, JR.; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES; ANN MCCRACKEN; JACKSON THOMAS DUNN, JR.; ALYCE MACHAK; WILLIAM SERVICE; DONALD RUMPH; STEPHEN DOUGLAS MCGRIGOR; NANCY BRADLEY; VINOD THOMAS; DERRICK MILLER; ELECTA E. PERSON; DEBORAH ANDERSON SMITH; ROSALYN SLOAN; JULIE ANN FREY; LILY NICOLE QUICK; JOSHUA BROWN; and CARLTON E. CAMPBELL, SR., Plaintiffs, v. REPRESENTATIVE DAVID R. LEWIS In his official capacity as Senior Chairman of the House Select Committee on	)	MEMORANDUM OPINION

Redistricting; SENATOR RALPH E. HISE, JR. In his official capacity as Chairman of the Senate Committee on Redistricting; SPEAKER OF THE HOUSE TIMOTHY K. MOORE; ANDY PENRY Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM Vice-Chair of the North Carolina State Board of Elections & Ethics Enforcement; KEN RAYMOND Secretary of the North Carolina State Board of Elections & Ethics Enforcement; STELLA ANDERSON Member of the North Carolina State Board of Elections & Ethics Enforcement; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; DAMON CIRCOSTA Member of the North Carolina State Board of Elections & Ethics Enforcement; STACY "FOUR" EGGERS, IV Member of the North Carolina State Board of Elections & Ethics Enforcement; JAY HEMPHILL Member of the North Carolina State Board of Elections & Ethics Enforcement; VALERIE JOHNSON Member of the North Carolina State Board of Elections & Ethics Enforcement; JOHN LEWIS Member of the North Carolina State Board of Elections & Ethics Enforcement; THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ROBERT CORDLE Member of the North Carolina State Board of Elections & Ethics Enforcement,

Defendants.

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This matter came before the court on plaintiffs' emergency motion for remand (DE 5). On January 2, 2019, the court granted the motion, remanded the matter to state court, and denied plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c).[1] The court memorializes herein its reasoning for this decision.

STATEMENT OF THE CASE

Plaintiffs commenced this action in Superior Court of Wake County on November 13, 2018, and filed amended complaint on December 7, 2018, asserting that districting plans enacted by the North Carolina General Assembly in 2017 for the North Carolina House of Representatives and Senate (the "2017 Plans") are unconstitutional and invalid under the North Carolina Constitution. Plaintiffs seek the following relief from the state court, sitting as a three-judge panel:

a. Declare that each of the 2017 Plans is unconstitutional and invalid because each violates the rights of Plaintiffs and all Democratic voters in North Carolina under the North Carolina Constitution's Equal Protection Clause, Art. I, § 19; Free Elections Clause, Art. I, § 5; and Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14;

b. Enjoin Defendants, their agents, officers, and employees from administering, preparing for, or moving forward with the 2020 primary and general elections for the North Carolina General Assembly using the 2017 Plans;

c. Establish new state House and state Senate districting plans that comply with the North Carolina Constitution, if the North Carolina General Assembly fails to enact new state House and state Senate districting plans comporting with the North Carolina Constitution in a timely manner;

d. Grant Plaintiffs such other and further relief as the Court deems just and appropriate.

[1] Also now pending before the court is a Motion For Order Confirming Applicability of Stay of Judgment under Rule 62(a) (DE 45), which the court will address by separate order.

(Am. Compl. p.75).[2]

Plaintiffs are Common Cause, the North Carolina Democratic Party, and 38 individual registered Democrat voters. Defendants Representative David R. Lewis; Senator Ralph E. Hise, Jr.; Speaker of the House Timothy K. Moore; and President Pro Tempore of the North Carolina Senate Philip E. Berger, are members of the North Carolina Senate and House named in their official capacities (collectively, the "Legislative Defendants"). Additional defendants are the State of North Carolina, the North Carolina State Board of Elections and Ethics Enforcement, and individual officers and members of the North Carolina State Board of Elections and Ethics Enforcement (collectively, the "State Defendants").[3]

On December 14, 2018, the Legislative Defendants filed a notice of removal in this court. The notice of removal states that it is filed also on behalf of the State of North Carolina in the following respect: "Pursuant to N.C. Gen. Stat. § 1-72.2, the legislative branch of North Carolina state government is considered the 'State of North Carolina' in actions challenging statutes enacted by the North Carolina General Assembly along with the executive branch of state government." (Notice of Removal (DE 1) at 3 n. 1).[4] The notice of removal is signed by counsel who has entered an appearance on behalf of the Legislative Defendants. (Id. at 16; Notices of Appearance (DE 2,

[2] A copy of plaintiffs' amended complaint is filed at docket entries 1 and 32 (DE 1, 32). For ease of reference, page numbers in citations to documents in the record specify the page number showing on the face of the underlying document rather than the page number specified in the court's electronic case filing (ECF) system.

[3] In their response to the motion to remand, the State Defendants note prior changes and ongoing uncertainty in the composition and membership of the North Carolina State Board of Elections and Ethics Enforcement. Because these changes do not impact the analysis herein, the court adheres to individual State Defendants' names as referenced in the original complaint, and as reflected in the court's docket, in the caption of this order, for ease of reference.

[4] All subsequent filings by the Legislative Defendants in this court have been made also on behalf of the State of North Carolina in this manner, such that references in this opinion to filings or arguments made by the Legislative Defendants are to be understood as including the specification that they are made also on behalf of the State of North Carolina in the respect quoted above in the text.

3)). Attached to the notice of removal are copies of the state court pleadings and certain documents filed in state court,[5] as well as the Legislative Defendants' state court notice of filing of notice of removal.

Plaintiffs filed an emergency motion to remand on December 17, 2018. In support of the motion, plaintiffs filed a memorandum attaching the following documents: 1) acceptance of service filed in state court on November 19, 2018, on behalf of the State Defendants; 2) plaintiffs' motion filed in state court on November 20, 2018, for expedited discovery and trial and for case management order; 3) emails between state trial court administrator and counsel; and 4) certain district court and Supreme Court filings made in Covington v. North Carolina, No. 15-CV-399 (M.D.N.C.) ("Covington").

On December 18, 2018, the court set a December 28, 2018, deadline for any responses to the motion to remand. The Legislative Defendants filed an answer to the complaint on December 21, 2018. On the same date, the State Defendants moved for extension of time to answer.

On December 28, 2018, the State Defendants responded to the motion to remand, stating that they agree the matter should be remanded.[6] That same date, the Legislative Defendants filed a response in opposition to remand, attaching documents filed in Covington, and two other cases: 1) Dickson v. Rucho, 11 CVS 16896 (Superior Court of Wake County), and 2) Stephenson v. Bartlett, 4:01-CV-171-H (E.D.N.C.). Plaintiffs replied in support of remand on December 30, 2018, relying

[5] Legislative Defendants filed on December 20, 2018, an amended Exhibit 1 to their notice removal that includes an additional document filed in state court on November 20, 2018, comprising a motion by plaintiffs' for expedited discovery and trial and for case management order.

[6] The State of North Carolina, through its response, also "objects to the removal" where it "purports to be on behalf of the State of North Carolina," noting that "[t]he Attorney General reserves the right to challenge, in an appropriate setting, the interpretation of [N.C. Gen. Stat.] § 1-72.2 that the Legislative Defendants appear to be advancing . . . . [b]ut the Court need not address those unsettled state-law issues to rule on Plaintiffs' Motion to Remand." (State Defendants' Resp. (DE 39) at 2 n. 2)

upon a North Carolina Senate hearing transcript.

On January 2, 2019, the court granted plaintiffs' motion to remand, stating:

> This matter is before the court on plaintiffs' emergency motion to remand (DE 5). The court having fully considered the matter and the briefing by the parties, it is hereby ORDERED that plaintiffs' motion is GRANTED. This case is REMANDED to the General Court of Justice, Superior Court Division, Wake County, North Carolina, for further proceedings. The court DENIES plaintiffs' request for costs and expenses under 28 U.S.C. § 1447(c). A memorandum opinion memorializing the court's reasoning for this decision will follow. In light of remand, the clerk is DIRECTED to terminate as moot the pending motion for extension of time to file answer (DE 34).

(Order (DE 44) at 3).

COURT'S DISCUSSION

A. Standard of Review

In any case removed from state court, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). "The burden of establishing federal jurisdiction is placed upon the party seeking removal." Mulcahey v. Columbia Organic Chemicals Co., 29 F.3d 148, 151 (4th Cir. 1994). "Because removal jurisdiction raises significant federalism concerns, [the court] must strictly construe removal jurisdiction." Id. "If federal jurisdiction is doubtful, a remand is necessary." Id.; see Palisades Collections LLC v. Shorts, 552 F.3d 327, 336 (4th Cir. 2008) (recognizing the court's "duty to construe removal jurisdiction strictly and resolve doubts in favor of remand").

B. Analysis

The Legislative Defendants rely upon two independent statutory provisions as a basis for removal, which the court will address in turn below.

1. 28 U.S.C. § 1443(2)

The Legislative Defendants assert that removal is appropriate under a subsection of 28 U.S.C. § 1443 that provides for removal of state-court actions against a defendant "for refusing to do any act on the ground that it would be inconsistent with" any "law providing for equal rights." (Notice of Removal ¶ 6).

Section 1443 provides in its entirety as follows:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. § 1443 (emphasis added).

This "statute . . . has been described as a text of exquisite obscurity." Baines v. City of Danville, Va., 357 F.2d 756, 759 (4th Cir. 1966) (en banc) (internal quotations omitted). The Supreme Court and the Fourth Circuit both interpreted the meaning of the provisions of § 1443 in separate cases in 1966, where each court observed, with respect to the quoted text emphasized above:

> The refusal language was added by amendment in the House with the explanation that it was intended to enable state officers who refused to enforce discriminatory state laws in conflict with Section 1 of the Civil Rights Act of 1866 and who were prosecuted in the state courts because of their refusal to enforce state law, to remove their proceedings to the federal court.

Id. at 772; see City of Greenwood, Miss. v. Peacock, 384 U.S. 808, 824 n.22 (1966). Since that

time, it appears that neither the Supreme Court nor the Fourth Circuit has interpreted the "refusing" clause in subsection (2).

In Cavanagh v. Brock, 577 F. Supp. 176 (E.D.N.C. 1983), a three-judge panel of this court held that a state court action "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans as precleared on April 30, 1982, by the Attorney General," was properly removed to this court under the "refusal" clause of § 1443. Id. at 179-180. By contrast, in Stephenson v. Bartlett, 180 F. Supp. 2d 779 (E.D.N.C. 2001), this court held that a state court action "challenging the redistrict plans proposed by the North Carolina General Assembly" was not properly removed to this court under the "refusal" clause of § 1443. Id. at 781, 785-786. Two other federal district courts have held that state court actions challenging legislative district plans were not properly removed under the "refusal" clause of § 1443. See Brown v. Fla., 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002); Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992).

Against this legal background, applicability of § 1443 to plaintiffs' action is doubtful for several reasons. First, plaintiffs' state court action is not brought against the Legislative Defendants "for refusing to do" anything. 28 U.S.C. § 1443(2). Rather, plaintiffs challenge an action already completed, in the form of the 2017 Plans, as "unconstitutional and invalid." (Am. Compl. p. 75). Legislative Defendants are "necessary parties" in any such suit where "the validity or constitutionality of an act of the General Assembly or a provision of the Constitution of North Carolina is the subject of an action." N.C. Gen. Stat. § 120-32.6; see N.C. R. Civ. P. 19(d). Plaintiffs' prayer for injunctive relief further reinforces this point, where they seek to enjoin defendants from "administering, preparing for, or moving forward with the 2020 primary and

general elections . . . using the 2017 plans," which not a legislative activity. (Am. Compl. ¶ 75). Finally, they do not seek an injunction compelling the Legislative Defendants to act, but rather call upon the state court to establish new plans "if the North Carolina General Assembly fails to" do so. (Id.) (emphasis added). In such circumstances, as this court already has observed, "it is not entirely clear what the defendants refuse to do." Stephenson, 180 F. Supp. 2d at 785.

Second, plaintiffs' action is not removable by the Legislative Defendants because they have only a legislative role, rather than a law enforcement role. The Supreme Court, the Fourth Circuit en banc, and other federal courts have recognized that the "refusal" clause of § 1443 was intended to apply to "state officers who refused to enforce" state laws. Baines, 357 F.2d at 759 (emphasis added); see Peacock, 384 U.S. at 824 n.22 (noting clause was "intended to enable State officers . . . . refusing to enforce" state laws in reference to federal equal protection laws). Indeed, one federal court has stated that "the privilege of removal is conferred . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." Burns v. Bd. of Sch. Comm'rs of City of Indianapolis, Ind., 302 F. Supp. 309, 311-12 (S.D. Ind. 1969) (emphasis added); see also Wolpoff v. Cuomo, 792 F. Supp. 964, 968 (S.D.N.Y. 1992) ("It is untenable to argue . . . that Congress intended that the statute could or should be used by legislators sued solely because of their refusals to cast votes in a certain way."). While such interpretations have been expressed in dicta, they raise sufficient doubt regarding applicability of § 1443 to state legislators to preclude removal jurisdiction here.

Third, as this court found in Stephenson, here also "it is unknown whether plaintiffs' attempt to enforce the provisions of the North Carolina constitution would run afoul of federal voting law," and "any implication of the refusal clause is speculative." 180 F. Supp. 2d at 785. Thus, as in

Stephenson, "plaintiffs are merely 'seeking an alternative apportionment plan which also fully complie[s] with federal law but varie[s] from the defendants' plan only in its interpretation of state law.'" 180 F. Supp. 2d at 785 (quoting Sexson v. Servaas, 33 F.3d 799, 804 (7th Cir. 1994)) (brackets in original).

In sum, it is doubtful that § 1443 applies to confer removal jurisdiction in this case. Arguments raised by the Legislative Defendants in favor of removal under § 1443 are insufficient to overcome this doubt. At the outset, the court notes that the Legislative Defendants cite no case in which state legislators were permitted to remove to federal court under the refusal clause in a suit challenging enactment of state redistricting law. Cases cited by the Legislative Defendants are all inapposite on the basis of one or several factors set forth above.

For example, the Legislative Defendants cite to Cavanagh, where this court permitted removal of a state court suit challenging enactment of North Carolina redistricting law. But, Cavanagh does not discuss removal by state legislators; rather, it describes the action as "seeking declaratory and injunctive relief restraining the state of North Carolina from implementing the reapportionment plans." 557 F. Supp. at 176 (emphasis added). Nor does Cavanagh mention the enforcement limitation described in Peacock and Baines. See, e.g., Wolpoff, 792 F.Supp. at 968 (distinguishing Cavanagh on this basis in remanding legislator's removal of state suit challenging districting plan).

The Legislative Defendants also rely upon Alonzo v. City of Corpus Christi, 68 F.3d 944 (5th Cir. 1995), where the court affirmed removal of a state suit challenging a city's method of electing city council members, where the city alleged a colorable conflict between a prior federal consent decree and the relief sought in state court. Legislative Defendants argue that they are in an

analogous position to the defendants in Alonzo. But, Alonzo is distinguishable on multiple critical fronts. In Alonzo, the plaintiffs' suit was described as a challenge "of the City's use of [the existing] system in its elections," and thus the City properly removed under the refusal clause. 68 F.3d at 946. Alonzo did not discuss the "refusal" element as it applies to legislators in contrast to officials who enforce or implement state law. Alonzo would only be analogous to the instant case if the State Defendants in addition to the Legislative Defendants had sought removal under § 1443, but here the State Defendants oppose removal. Furthermore, the federal consent decree in Alonzo, "mandate[d]" a specific existing "5-3-1 system" in elections, whereas the federal law applicable here does not mandate the specific existing apportionment to the exclusion of no others. See North Carolina v. Covington, 138 S.Ct. 2548, 2555 (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.").

The Legislative Defendants similarly rely upon a series of federal cases from the 1970s in which school boards were permitted to remove state-law challenges to school desegregation plans. None of these, however, were removed by legislators or state actors who did not enforce or implement legislation. Indeed, the first of these, Burns, opined that the "refusal" clause of § 1443 conferred the "privilege of removal . . . only upon state officers who refuse to enforce state laws discriminating on account of race or color." 302 F.Supp. at 311-12. In Burns, defendant state officials and school board members were "threatened with punishment for contempt if they disobey the order of a state court and refuse to undo their actual and contemplated transfer of teachers on the

ground that to do so would be inconsistent with such federal law." Id. at 312 (emphasis added).[7] Comparison to the instant case is inapt, on both fronts, where plaintiffs do not seek to enjoin Legislative Defendants directly, and where Legislative Defendants are not charged with implementing or enforcing their own legislation. See Wright v. North Carolina, 787 F.3d 256, 262-63 (4th Cir. 2015).

The Legislative Defendants cite several cases for the proposition that removal is appropriate where there is a "colorable conflict between state and federal law." White v. Wellington, 627 F.2d 582, 587 (2d Cir. 1980); e.g., Alonzo, 68 F.3d at 946; New Haven Firefighters Local 825 v. City of New Haven, No. CIV.3:04CV1169(MRK), 2004 WL 2381739, at *1 (D. Conn. Sept. 28, 2004). As an initial matter, this statement of the type of conflict required is a stretch of the language of the removal statute, which references in its text inconsistency only between the act being refused and federal equal protection law. See 28 U.S.C. § 1443(2) (permitting removal of a state civil action "for refusing to do any act on the ground that it would be inconsistent with such [federal equal protection] law") (emphasis added). This distinction is important in the instant context, where it is doubtful there has been a refusal to act within the application of this removal provision on the part of the Legislative Defendants. Where a refusal to act is itself doubtful and uncertain, any conflict

[7] Other school board cases cited by defendants are similar. See, e.g., Mills v. Birmingham Bd. of Ed., 449 F.2d 902, 904 (5th Cir. 1971) (plaintiff teacher sought "to enjoin the Board from transferring her" and obtained the requested injunction from state court prior to removal by defendants); Linker v. Unified Sch. Dist. No. 259, Wichita, Kan., 344 F. Supp. 1187, 1189 (D. Kan. 1972) (plaintiffs sought to enjoin defendant school district from "operating under" and "implement[ing]" a desegregation plan); Bridgeport Ed. Ass'n v. Zinner, 415 F. Supp. 715, 717 (D. Conn. 1976) (plaintiff teachers and association claimed that alleged that three appointments were made by defendant school board and officials in violation of municipal law and contract); Buffalo Teachers Fed'n v. Bd. of Ed. of City of Buffalo, 477 F. Supp. 691, 692 (W.D.N.Y. 1979) (plaintiff teachers sought and obtained state court order "restraining the Board from taking any action" in carrying out teacher hiring and promotions).

between such refusal and federal law also is uncertain. See Stephenson, 180 F.Supp. 2d at 785.

In any event, the cases cited by the Legislative Defendants illustrating a "colorable conflict between state and federal law" are inapposite, because they do not involve a purported conflict between a state constitution and the federal constitution,[8] much less in a state where, as here, the state supreme court has already pronounced that "compliance with federal law is . . . an express condition to the enforceability of every provision in the State Constitution." Stephenson v. Bartlett, 355 N.C. 354 , 375 (2002). In such circumstances, the court adheres to its earlier analysis in Stephenson, finding the purported conflict uncertain and speculative. The court recognizes the detailed arguments on the merits advanced by both the Legislative Defendants and plaintiffs' regarding whether plaintiffs' "view" or "interpretation" of state law can be reconciled with federal law and Covington. (Leg. Defs' Opp. (DE 42) at 14). For purposes of the present jurisdictional determination, however, under which doubts must be resolved in favor of remand, and where it is already doubtful that § 1443(2) applies at all to Legislative Defendants, it suffices that it is uncertain and speculative whether the ultimate relief sought in plaintiffs' complaint in the form of new plans "comporting with the North Carolina Constitution" would conflict with federal law. (Am. Compl. p. 75); see Stephenson, 180 F.Supp.2d at 785.

For all the reasons stated above separately and in combination, Legislative Defendants have

[8] See, e.g., White, 627 F.2d at 585 (plaintiffs asserted violations of a "city charter and civil service rules and regulations, all having the force of state law"); Alonzo, 68 F.3d at 945 (plaintiffs asserted violations of Texas Equal Rights Amendment and Voting Rights Act); Greenberg v. Veteran, 889 F.2d 418, 420 (2d Cir. 1989) (plaintiffs asserted violation of "Village Law," state statute, and First Amendment, against city official); New Haven Firefighters Local 825, 2004 WL 2381739 at *1 (plaintiffs asserted violations of the "Charter of the City of New Haven and New Haven's Civil Service Rules and Regulations"); Buffalo Teachers Fed'n, 477 F. Supp. at 692 (plaintiffs asserted claims, and state court entered injunction, pursuant to "the New York State Education Law" and "the terms of [a] collective bargaining agreement").

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not demonstrated that removal under 28 U.S.C. § 1443 is proper under the circumstances of this case.

2. 28 U.S.C. § 1441(a)

"[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court." 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Under the "well-pleaded complaint rule," "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California, 463 U.S. 1, 10 (1983). "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Plaintiffs' action falls squarely within this jurisdictional limitation. Plaintiffs assert solely state law claims under the North Carolina Constitution. Although defendants have asserted a conflict with federal law as a defense to plaintiffs' claims, "it is now settled law that a case may not be removed to federal court on the basis of a federal defense." Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). Indeed, in both Cavanagh and Stephenson, this court determined that state constitutional redistricting challenges did not arise under federal law, despite defendants' assertion of a conflict with federal law. Cavanagh, 577 F. Supp. at 180; Stephenson, 180 F. Supp. 2d 783-784. In light of this law, removal jurisdiction under § 1441(a) is doubtful.

The Legislative Defendants, nonetheless, contend that federal law is "necessarily raised" here because demonstrating compliance with federal law is an "affirmative element" plaintiffs' claim

or a "prima facie" claim under the North Carolina constitution. "[E]ven where a claim finds its origins in state rather than federal law," the Supreme Court has "identified a special and small category of cases in which arising under jurisdiction still lies." Gunn v. Minton, 568 U.S. 251, 258 (2013). "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Id.

The premise of Legislative Defendants' argument is flawed, however, because federal law is not an "affirmative element" of plaintiffs' claim or a prima facie case under the North Carolina Constitution. Legislative Defendants rely upon the North Carolina Supreme Court's statement in Stephenson that "compliance with federal law is not an implied, but rather an express condition to the enforceability of every provision in the State Constitution." 355 N.C. at 375. But, a reference to an "express condition to enforceability" is not the same as an element of a claim or prima facie case, and Stephenson says nothing about the elements of a claim or prima facie case under the State Constitution. Moreover, as this court suggested in Stephenson, interpreting all state constitutional redistricting claims in this manner as arising under federal law would result without limitation in "perpetual federal intrusion" in an area where federal-state balance has been carefully crafted by Congress and the Supreme Court. See, e.g., Growe v. Emison, 507 U.S. 25, 34 (1993) ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.").

Defendants also rely upon N. Carolina by & through N. Carolina Dep't of Admin. v. Alcoa Power Generating, Inc., 853 F.3d 140, 147 (4th Cir. 2017), as an example of a state law claim removable because of a necessary federal question. That case, however, is instructively

distinguishable, where it involved a claim of "state ownership of navigable waters." Id. at 147. In finding jurisdiction, applying a body of Supreme Court precedent in that area of law, the court recognized that "navigability for title" was "governed by federal law" Id. (citing United States v. Utah, 283 U.S. 64 (1931); PPL Montana, LLC v. Montana, 565 U.S. 576 (2012)). "[T]he question of navigability was thus determinative of the controversy, and that is a federal question." Id. (quoting Utah, 283 U.S. at 75). Here, there is no comparable body of Supreme Court precedent stating that the redistricting claims raised by plaintiffs necessarily must be resolved only by reference to federal law.

Therefore, the Legislative Defendants have not met their burden of demonstrating removal jurisdiction under 28 U.S.C. § 1441(a). In sum, where the court lacks jurisdiction under both grounds asserted by the Legislative Defendants, remand is required.[9]

3. Costs and Expenses

"An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

> Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied. In applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case. For instance, a plaintiff's delay in seeking remand or failure to disclose facts necessary to determine jurisdiction may affect the decision to award attorney's fees. When a court exercises its discretion in this manner, however, its reasons for departing from the general rule should be faithful to the purposes of awarding fees under § 1447(c).

Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). Plaintiffs have not demonstrated that

[9] Because the court finds jurisdiction lacking under the removal provisions asserted by the Legislative Defendants, the court does not reach additional arguments plaintiffs raise in support of remand, including procedural defect in removal under § 1441(a); sovereign immunity under Penhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); and judicial estoppel.

they are entitled to costs and expenses, including attorney fees, under the circumstances of this case. The Legislative Defendants did not lack an objectively reasonable basis for seeking removal. Their removal petition sets forth in detail their grounds for removal and they have comprehensively briefed the issues arising from their removal, including with reference to a wide range of case law.

Plaintiffs suggest that an award of fees is warranted because Legislative Defendants' timed their removal to cause "maximum delay and disruption." (Pls' Mem. at 29). However, Legislative Defendants' did not act outside of the time limits set forth in the removal statute. They exercised their rights under that law to assert grounds for removal to this court, and they followed this court's order for expedited briefing on plaintiffs' motion to remand.

In sum, the court declines in its discretion to award costs and expenses in light of both the substance and timing of the removal petition.

CONCLUSION

Based on the foregoing reasons, the court granted plaintiffs motion to remand and denied plaintiffs' request for costs and expenses.

SO NOTICED, this the 7th day of January, 2019.

LOUISE W. FLANAGAN
United States District Judge

EXHIBIT 2

STATE OF NORTH CAROLINA

COUNTY OF WAKE

COMMON CAUSE, et al.,

Plaintiffs,

v.

REPRESENTATIVE DAVID LEWIS in his official capacity as Senior Chairman of the House Select Committee on Redistricting; et al.,

Defendants.

FILED
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BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

NOTICE OF FILING:
AFFIDAVIT OF KAREN BRINSON BELL

NOW COMES Defendants the North Carolina State Board of Elections and its members (collectively "State Defendants"), by and through the undersigned counsel, and hereby submit the attached Affidavit of Karen Brinson Bell in support of State Defendants' Memorandum on Election Administration and Deadlines. A copy of that Memorandum is being delivered to the Court via email to the Trial Court Administrator, pursuant to the Case Management Order in this action.

Respectfully submitted this 4th day of October, 2019.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing document in the above titled action upon all parties to this cause by depositing a copy by email and addressed as follows:

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This the 4th day of October, 2019.

Stephanie A. Brennan
Special Deputy Attorney General

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE, et al.,

Plaintiffs,

v.

REPRESENTATIVE DAVID LEWIS in his official capacity as Senior Chairman of the House Select Committee on Redistricting; et al.,

Defendants.

AFFIDAVIT OF
KAREN BRINSON BELL

I, Karen Brinson Bell, swear under penalty of perjury, that the following information is true to the best of my knowledge and state as follows:

1. I am over 18 years old. I am competent to give this affidavit, and have personal knowledge of the facts set forth in this affidavit. I have consulted with senior staff at the State Board in the preparation of this affidavit.

2. I currently serve as the Executive Director of the North Carolina State Board of Elections (the "State Board"). I became Executive Director of the State Board effective June 1, 2019. My statutory duties as Executive Director include staffing, administration, and execution of the State Board's decisions and orders. I am also the Chief State Elections Official for the State of North Carolina under the National Voter Registration Act of 1993 and N.C.G.S. § 163-27 (2019 Spec. Supp.). As Executive Director, I am responsible for the administration of elections in the State of North Carolina. The State Board has supervisory responsibilities for the 100 county boards of elections, and as Executive Director, I provide guidance to the directors of the county boards.

3. In our state, the county boards of elections administer elections in each county,

including, among other things, providing for the distribution of voting systems, ballots, and pollbooks, training elections officials, conducting absentee and in-person voting, and tabulation and canvassing of results. The State Board is responsible for development and enhancement of our Statewide Elections Information Management System ("SEIMS"), which includes managing functions that assign voters to their relevant voting districts, a process known as "geocoding." The State Board also supports the county boards and their vendors in the preparation and proofing of ballots.

4. For North Carolina House and Senate districts, the geocoding process starts when the State Board receives legislative district shapefiles, which include geographic data setting the boundaries for legislative districts. The State Board's staff then works with county board staff to use the shapefiles to update the voting jurisdictions that are assigned to particular addresses in SEIMS. This process then allows the State Board to work with county board staff and ballot-preparation vendors to prepare ballots. The State Board must perform an audit of the geocoding to ensure its accuracy before ballot preparation.

5. The amount of time required for geocoding generally corresponds with the number of district boundaries that are redrawn within the counties. In this case, I understand that there are 37 counties that are subject to remedial redistricting, between the state House and Senate maps, and a significant number of those counties are likely to have newly drawn district boundaries within the counties' borders. Staff estimates that, given what we currently know, geocoding would likely take between 17 and 21 days (including holidays and weekends) for the 2020 primary for state legislative offices, depending on the degree of change to intracounty district lines.

6. Ballot preparation and proofing can begin after geocoding is complete and

candidate filing closes. For the 2020 primary elections, candidate filing for state legislative districts occurs between noon on December 2, 2019, and noon on December 20, 2019. *See* N.C.G.S. § 163-106.2(a). The process of generating and proofing ballots is complex and involves multiple technical systems and quality-control checkpoints that precede ballot printing and the coding of voting machines. This includes proofing each ballot style for content and accuracy, ballot printing, and delivery of all ballot materials to county boards. Staff estimates that, given what we currently know, ballot preparation and proofing would likely take between 17 and 21 days (including holidays and weekends) for the 2020 primary for state legislative offices, depending on the number of ballot styles to prepare, which largely depends on the degree of change to intracounty district lines, and the number of contested nominations.

7. Geocoding and candidate filing may occur concurrently, although that is not ideal because the completion of geocoding permits candidates and county boards to verify if a candidate desiring to file for election lives in a particular district. It is possible, however, to check candidate eligibility while geocoding is still taking place.

8. Geocoding and ballot preparation must occur consecutively, however, not concurrently. Ballots cannot be prepared until the proper geographical boundaries for voting districts are set in SEIMS. Additionally, the end-of-year holidays could pose difficulties for available staff time for the State Board, county boards, and vendors. Therefore, the total time required for geocoding and ballot preparation is likely between 34 and 42 days (including holidays and weekends).

9. Under N.C.G.S. § 163-227.10(a), the State Board must begin mailing absentee ballots 50 days prior to the primary election day, unless the State Board authorizes a reduction to 45 days or there is "an appeal before the State Board or the courts not concluded, in which case

the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal." The federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) requires that absentee ballots that include elections for federal office be made available by 45 days before a primary election, *see* 52 U.S.C. § 20302(a)(8)(A), unless I request a waiver of this requirement based on a legal contest delaying the preparation of ballots (or another enumerated hardship), and that waiver is granted by the federal official designated to administer UOCAVA, *see id.* § 20302(g). The state requesting a waiver must present a comprehensive plan that provides absentee UOCAVA voters sufficient time to receive and submit absentee ballots they have requested in time to be counted in the federal election.[1] Based on the current primary date of March 3, 2020, for state legislative districts, 50 days before the primary election falls on January 13, 2020, and 45 days before the primary election falls on January 18, 2020.

10. In sum, the State Board would need to receive the shapefiles for geocoding and ballot preparation between now and 34 to 42 days before the deadline for distributing absentee ballots. Currently, that deadline is January 13, 2020, which means the shapefiles must arrive between now and December 2–10, 2019. If that deadline were moved to January 18, 2020, the shapefiles would need to arrive between now and December 7–15, 2019.

11. If the deadlines for distributing absentee ballots were extended beyond what is required by UOCAVA, the State Board would also have to factor in additional administrative steps that must be prepared before in-person voting occurs. Currently, early voting is set to begin on February 12, 2020 for the 2020 primary.

12. Before in-person voting occurs, the State Board must work with county boards to load data onto physical media cards that are placed in voting tabulation machines, a process called

[1] https://www.fvap.gov/uploads/FVAP/EO/2012_waiver_guidance.pdf.

"burning media." The media cards ensure that the tabulators anticipate the layout of ballots and properly attribute votes based on the ballot markings. The county boards must also conduct logic and accuracy testing to ensure that tabulation machines accurately read ballots and to correct any errors in coding. Staff estimates that burning media, preparing ballot marking devices and tabulators, and logic and accuracy testing would likely take the counties 14 days. After that process, the State Board works with the county boards to conduct a mock election, which takes one day, and generally affords two weeks thereafter to remedy any technical problems identified during the mock election. That two-week period could be reduced, but the State Board generally believes that the two-week period fully insures against risks associated with technical problems that may be identified in the mock election.

13. Accordingly, regardless of when the absentee ballot distribution deadline falls, allowing 29 days after ballots have been prepared to prepare for in-person election voting is preferable. Under the current deadlines for distributing absentee ballots, which falls roughly a month before early voting begins, these processes can be accommodated. The time requirements for these processes would only become relevant if the absentee distribution deadline is shortened to less what is currently required by UOCAVA.

14. If the Court were to order a separate primary for state legislative districts, a different set of administrative requirements would be triggered.

15. First, it is not technically possible to perform geocoding while in-person voting is occurring, and it is difficult to perform geocoding during the canvass period after the election. This is because making changes in SEIMS related to geocoding inhibits the actual voting process. County canvass takes place 10 days following an election. Generally, at that point, geocoding may begin, assuming no recount has been ordered. Accordingly, we recommend that geocoding for any separate legislative primary not begin any earlier than March 14, 2020. Relying on the aforementioned estimates, it would take between 34 and 42 days after March 14, 2020, to geocode and prepare

ballots for a separate primary. Candidate filing could occur before or simultaneous with geocoding.

16. Second, state law regarding the deadline for distributing absentee ballots would again require 50 days' time prior to the primary election day, unless the State Board reduced that time to 45 days or there is "an appeal before the State Board or the courts not concluded, in which case the board shall provide the ballots as quickly as possible upon the conclusion of such an appeal." N.C.G.S. § 163-227.10(a). The federal UOCAVA deadline would not apply if the primary did not involve federal offices.

17. Third, one-stop early voting would have to begin 20 days before the primary election day under N.C.G.S. § 163-227.2(b). Accordingly, all of the administrative processes that must occur before in-person voting begins (geocoding, ballot preparation, burning media, preparing touch-screen ballots, logic and accuracy testing, mock election, and technical fix period, among other things), which are estimated to take between 63 and 71 days total, would need to occur between March 14, 2020, and 20 days before the date of the separate primary.

18. Fourth, there are additional administrative challenges that counties would face if a separate legislative primary were held (assuming that the legislative primary were not to coincide with a second primary that may need to be held in any event, due to an unresolved nomination contest from the March primary). Chief among these challenges would be recruiting poll workers and securing polling locations, along with the associated costs. Increasingly, county elections officials have found it necessary to spend more time recruiting early voting and election day poll workers, especially because of statutorily mandated early voting hours weekdays from 7 a.m. to 7 p.m. and technological advances in many counties now require that elections workers be familiar with computers. Additionally, a large portion of precinct voting locations in the state are housed in places of worship or in schools, with still others located in privately owned facilities. Identifying and securing appropriate precinct voting locations and one-stop early

voting sites requires advance work by county board of elections staff and coordination with the State Board.

This concludes my affidavit.

This the 4th day of October, 2019.

Karen Brinson Bell, Executive Director
N.C. State Board of Elections

Sworn to and subscribed before me this 4 day of October, 2019.

LATANYA N GANT
My Commission Expires
NOTARY PUBLIC
February 11, 2024
JOHNSTON COUNTY, NC

(Notary Public)

My commission expires: February 11, 2024