IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No. 5:18-cv-589

COMMON CAUSE, 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 PLAINTIFFS' EMERGENCY MOTION TO REMAND

NOW COME the State of North Carolina, the North Carolina State Board of Elections, Joshua Malcolm, Ken Raymond, Stella Anderson, Damon Circosta, Stacy "Four" Eggers, IV, Jay Hemphill, Valerie Johnson, John Lewis, and Robert Cordle (collectively "State Defendants"),[1] by and through undersigned counsel, and hereby respond to Plaintiffs' Emergency Motion for Remand. As set forth below, the State Defendants agree that this case should be remanded to the Superior Court of Wake County.

PROCEDURAL BACKGROUND

Plaintiffs filed this matter in a North Carolina state court on November 13, 2018. The State Defendants, represented by the North Carolina Department of Justice, accepted service of the Summons and Complaint the same day. Plaintiffs filed an Amended Complaint on December 7, 2018 to revise the caption to accommodate changes of membership in the North Carolina State Board of Elections, while also adding additional plaintiffs.

[1] By order of a North Carolina three-judge panel entered December 27 in *Cooper v. Berger*, No. 18-CVS-3348, the current composition and membership of the State Board of Elections will no longer be in effect as of noon today. However, the change in composition of the State Board does not impact the position of the State Defendants on Plaintiffs' motion to remand.

Both complaints feature Plaintiffs' challenges to the districting plans for the North Carolina House and Senate passed by the North Carolina General Assembly in 2017 ("2017 Plans"). Plaintiffs asserted that the 2017 Plans constitute 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 did not challenge the 2017 Plans under the United States Constitution or any federal law. In short, Plaintiffs contend that the 2017 Plans unlawfully discriminate against voters who have voted for Democratic candidates.

On December 14, 2018, Defendants Representative David R. Lewis, in his official capacity as Senior Chairman of the House Select Committee on Redistricting; Senator Ralph E. Hise, Jr., in his official capacity as Chairman of the Senate 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 (collectively "Legislative Defendants") filed a Notice of Removal, removing this matter to Federal District Court.[2] The Legislative Defendants contend that removal is appropriate pursuant to 28 U.S.C. §§ 1443(2) and 1441(a). Specifically, the Legislative Defendants 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

[2] The Legislative Defendants' Notice of Removal purports to be on behalf of the State of North Carolina (although counsel for Legislative Defendants have not entered appearances on behalf of the State). However, the State, through this Response, objects to the removal and joins in Plaintiff's Motion to Remand. In claiming to act for the State, the Legislative Defendants rely on recent amendments to N.C. Gen. Stat. § 1-72.2. The Attorney General reserves the right to challenge, in an appropriate setting, the interpretation of § 1-72.2 that the Legislative Defendants appear to be advancing, as well as the validity of the relied-upon portions of § 1-72.2 under the North Carolina Constitution and other relevant law. But the Court need not address those unsettled state-law issues to rule on Plaintiffs' Motion to Remand. The remand motion presents multiple grounds for remand that do not depend on who represents the State in a lawsuit like this one.

requiring the Legislative Defendants to redistrict in a manner to that intentionally discriminates against African-American North Carolinians.

ARGUMENT

The State Defendants do not believe that removal was appropriate under applicable legal standards. Therefore, the State Defendants agree that this matter should be remanded.

A. Standard of Review

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) (providing 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 emphasis upon the application of a strict construction standard while considering removal is further heightened in the redistricting context. As this Court has noted, "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. 28 U.S.C. § 1443(2) does not support removal in this matter.

28 U.S.C. § 1443(2), commonly referred to as the "refusal clause," provides that a state court claim against a state officer may be removed to federal court if the officer is "refusing to do any act on the ground that it would be inconsistent with [any law providing for equal rights]." 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. 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, viable application of the refusal clause is available only when the state officer has refused to enforce a state law that is in actual conflict with federal equal rights. Neither of those circumstances exists here.

With *Stephenson*, this Court addressed a removal that was remarkably similar to the removal in this action, 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. Those Defendants, who included various State agencies and officers, removed the matter to this Court under 28 U.S.C. § 1443(2), and contended 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 remanding the case, this Court observed that the refusal clause is meant to provide a federal forum where state officers are sued for enforcing "equal protection in the face of strong public disapproval," but noted that, in the situation before the court, "it is not entirely clear what the [removing] defendants refuse to do, except fail to comply with state constitutional mandates."

Stephenson, 180 F. Supp. 2d at 785. This Court concluded that those 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, the Plaintiffs in this matter have exclusively asserted state law claims. Neither the State Defendants nor the Legislative Defendants have refused to do any related act on the grounds that it would be inconsistent with any law providing for equal rights. Likewise, Plaintiffs' claims do not conflict with either the VRA or the Equal Protection clause of the U.S. Constitution.

Rather, as in *Stephenson*, Plaintiffs allege that the current legislative districts do not fully comply with state law, and their complaint seeks the establishment of legislatives districts that comply with state law, as well as with federal law. Similar to the contentions made in *Stephenson*, the Legislative Defendants' assertion that they cannot effectively comply with the State constitution because of its impact upon the voting rights of specified constituent groups might raise a possible defense to the claim, but fails to authorize removal to this Court. *See Stephenson*, 180 F. Supp. 2d at 786; *see also Barbour v. Int'l Union*, 594 F.3d 315, 328 (4th Cir. 2010) ("[i]t is now settled law that a case may not be removed to federal court on the basis of a federal defense") (internal quotation omitted). Stated alternatively, 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).

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

As removal under 28 U.S.C. § 1443(2) is unavailable, the sole remaining basis for removal asserted by the Legislative Defendants is pursuant to 28 U.S.C. § 1441(a). However, it appears that 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) As the Fourth Circuit Court of Appeals 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 — i.e., the State of North Carolina, the State Board of Elections, and the members of the State Board of Elections —do not consent to removal of this matter.

Furthermore, removal under section 1441(a) requires that the federal court have original jurisdiction over the case. 28 U.S.C. § 1441(a); *see also Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331 (4th Cir. 2008). Here, Plaintiffs' claims arise only under state law. Plaintiffs do not assert any claims implicating federal law over which this Court may have original jurisdiction. Removal under section 1441(a) is therefore improper.

CONCLUSION

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

This the 28th day of December, 2018.

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CERTIFICATE OF SERVICE

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

This the 28th day of December, 2018.

/s/ Stephanie A. Brennan
Stephanie A. Brennan
Special Deputy Attorney General