IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

DEBORAH SPRINGER SUTTLAR, JUDY GREEN, FRED LOVE, in his individual and official capacity as State Representative, KWAMI ABDUL-BEY, CLARICE ABDUL-BEY, and PAULA WITHERS,

Plaintiffs,

v.

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas and in his official capacity as the Chairman of the Arkansas State Board of Election Commissioners; and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, WENDY BRANDON, JAMIE CLEMMER and JAMES HARMON SMITH III, in their official capacities as members of the Arkansas State Board of Election Commissioners,

Defendants.

Case No. 4:22-cv-368-KGB

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR REMAND

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INTRODUCTION

Six Black voters residing in Pulaski County, Arkansas brought suit in the Circuit Court of Pulaski County, Arkansas alleging that Arkansas's recently-enacted congressional map (the "2021 Map") violates their rights under two separate provisions of the Arkansas Constitution: Article 2, Section 3, which guarantees Free and Equal Elections, and Article 2, Sections 2, 3, and 18, which guarantee Arkansans equal protection under the state's laws. Plaintiffs' Complaint raises *no* claims under the U.S. Constitution or federal law. *See* Exhibit A (Plaintiffs' Complaint ("Compl.")). Their complaint alleges *only* Arkansas state law claims and exclusively seeks injunctive relief against Arkansas state officials—the Arkansas Secretary of State and the members of the Arkansas State Board of Elections—all sued only in their official capacities. *See id*. Rather than responding to those allegations and allowing the Arkansas State Courts to adjudicate these questions of Arkansas State law, those officials filed a notice removing this matter to this Court two days before their responsive pleading was due.

Defendants' notice of removal is facially improper. There is no plausible basis for federal subject matter jurisdiction in this case. Moreover, absent a finding that Defendants have waived their Eleventh Amendment immunity by removal, this Court lacks the authority to adjudicate Plaintiffs' claims under the *Pennhurst* doctrine, which bars a federal court from granting the precise relief that Plaintiffs seek here—an injunction against state officers in their official capacity based on state law claims. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984). Thus, to maintain jurisdiction over this matter, this Court would have to find both that: (1) there is a legitimate basis for federal subject matter jurisdiction over Plaintiffs' exclusively state-law based claims, and (2) Defendants have no claim to immunity against those claims in this Court under the Eleventh Amendment. Even then, this Court would be proceeding against principles of comity, to

conclude that—in a case in which Plaintiffs make *no* federal law claims—the federal court (and not the state court) is the proper venue for adjudication of Plaintiffs' state constitutional claims in the first instance. There is no reason for this Court to wade into this constitutional thicket.

Defendants cite two bases for removal, but neither is applicable or appropriate. *First*, Defendants' reliance on 28 U.S.C. § 1443(2)'s "refusal clause"—which protects state officials who are forced to choose between enforcing state law and "inconsistent" federal equal-rights laws—is misplaced. The "refusal clause" applies only to state officials' "refusal" to take actions. It does not permit removal by state officials defending enacted legislation against a state constitutional challenge, which is the case here. Plaintiffs are not accusing Defendants of "refus[ing] to enforce discriminatory state laws," *Baines v. City of Danville, Va*., 357 F.2d 756, 772 (4th Cir. 1966), *cert. granted, judgment aff'd sub nom*., 384 U.S. 890, but rather of enacting such laws in the first place. Nor does the "refusal clause" permit removal based on speculation that state courts will interpret state law to conflict with federal law. *See Common Cause v. Lewis*, 358 F. Supp. 3d 505, 510–11 (E.D.N.C. 2019), *aff'd*, 956 F.3d 246 (4th Cir. 2020); *see also Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 785 (E.D.N.C. 2001). Here, there are a near-infinite number of possible congressional maps that simultaneously comply with state law banning racial vote dilution and with federal law protecting racial minorities. Conflict is not inevitable, or even remotely likely. *Second*, Defendants' invocation of 28 U.S.C. § 1441 fares no better. There is no federal question jurisdiction because Plaintiffs assert exclusively state-law claims, and it is black letter law that Defendants' purported federal defenses do not create federal question jurisdiction supporting removal. Defendants cannot re-write Plaintiffs' Complaint to create federal jurisdiction.

While this matter does not involve any federal constitutional or statutory claims, it is nonetheless of utmost importance to Plaintiffs and countless other Arkansas voters. Delay in its

resolution threatens Plaintiffs with serious and irreparable harm. When other state actors have similarly (and improperly) attempted to use removal procedures to delay the prompt adjudication of voting litigation brought in state courts raising state law claims, federal courts have quickly and properly issued remand orders. This Court should do the same and promptly remand this case to the Circuit Court of Pulaski County, Arkansas for all further proceedings. And because Defendants lacked an objectively reasonable basis for removing this case, this Court should award attorneys' fees and costs to Plaintiffs.

BACKGROUND

In 2021, the Arkansas General Assembly passed Senate Bill 743 and its companion, House Bill 1982, to enact the 2021 Map, which dilutes the voting power of Arkansas' Black population by systemically cracking Black voters residing in Pulaski County, Arkansas among three different congressional districts. Plaintiffs are six Black Arkansas voters who live in the impacted districts and who subsequently filed a lawsuit to challenge the 2021 Map in the Pulaski County Circuit Court on March 21, 2022. In their Complaint, Plaintiffs allege that the 2021 Map violates the Arkansas Constitution – in particular, its Free and Equal Elections Clause, Art. 2 § 3, and Equal Protection Clause, Art. 2, §§ 2, 3, & 18. *See* Ex. A. Plaintiffs do not assert any federal constitutional claims or any other federal claims.

Named as Defendants in the lawsuit are the Arkansas Secretary of State and the Members of the State Election Board, all of whom enforce the 2021 Map and who are parties exclusively in their official capacity. Ex. A at ¶ 20 – 21. Defendants' answer to Plaintiffs' Complaint was due on or around April 27, 2022. But just days before that deadline, Defendants removed the case to this court. Notice of Removal ("Notice") (ECF No. 1). Because Defendants have no basis for removal, this Court must promptly remand this case back to the Pulaski County Circuit Court.

ARGUMENT

I. Legal Standard

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir. 2009). Removal jurisdiction is "completely statutory," and courts "cannot construe jurisdictional statutes any broader than their language will bear." *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 255 F.3d 478, 480 (8th Cir. 2001) (quoting *In re Cnty. Collector*, 96 F.3d 890, 895 (7th Cir. 1996)). Federal courts may only hear cases authorized by the Constitution and by federal statute. *Kokkonen*, 511 U.S. at 377.

As the removing party, Defendants must show, by a preponderance of the evidence, that federal jurisdiction exists, and that removal was proper. *See Altimore v. Mount Mercy Coll.*, 420 F.3d 763, 768 (8th Cir. 2005) (citing *Yeldell v. Tutt*, 913 F.2d 533, 537 (8th Cir. 1990)). "Because removal raises federalism concerns, any doubt as to the propriety of removal should be resolved in favor of remand to state court." *Heavner v. Nutrien Ag Sols., Inc.*, No. 4:20-CV-00370-KGB, 2020 WL 5204032, at *2 (E.D. Ark. Sept. 1, 2020) (citing *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 625 (8th Cir. 1997)).

Here, Defendants cannot meet their burden because removal jurisdiction is not just doubtful—it is clearly absent. There is no basis for removing this case under either the "refusal clause" of 28 U.S.C. § 1443(2) or § 1441, as Defendants erroneously assert.[1] Given the lack of any legitimate basis for removal of this exclusively state-law case, and the serious federalism concerns

[1] If the Court finds that Defendants' removal was improper under Section 1443(2) because the Complaint does not implicate a "refusal to act", this Court should also find that Defendants cannot use that as a basis to invoke appellate review. *Bauer, infra*.

raised by federal intervention in a redistricting dispute grounded only in state law, this Court should promptly remand this case to the Pulaski County Circuit Court.

II. Removal is improper under 28 U.S.C. § 1443(2)'s refusal clause.

Defendants erroneously characterize their removal as pursuant to 28 U.S.C. § 1443(2), under what is known as its "refusal clause." Section 1443(2)'s "refusal clause" authorizes removal of "civil actions … *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) (emphasis added). But Section 1443(2) is inapplicable for the obvious reason that Plaintiffs do not allege that Defendants are "refusing to do" anything. Plaintiffs challenge the *enactment and enforcement* of a state law, not any "refusal" to act by the removing Defendants.[2] As for Defendants' argument that relief that the state court might grant in this case would be "inconsistent" with federal equal-rights law, it is not only speculative but incorrect, as multiple courts have held in rejecting the removal of similar state-

[2] As the Eighth Circuit held in *Bauer*, Defendants have no ability to appeal a remand based on their erroneous attempt to invoke Section 1443(2). *Bauer* concerned removal under the federal officer portion of Section 1443(2), but its logic applies equally to this case. The Court held:

> "Because the Board is not a federal officer or agent 'authorized to act with or for them in affirmatively executing duties under any federal law providing for equal rights," as required by *Greenwood*, it cannot take advantage of removal under section 1443(2). ***As it cannot avail itself of that section, the Board may not use the exception to the otherwise blanket cap on our appellate jurisdiction imposed by section 1447(d)."***

Bauer, 255 F.3d, at 482 (emphasis added). The precise reason the Eighth Circuit declined jurisdiction was because the Board could not "avail itself of [Section 1443(2)]." The same is true here. Defendants cannot avail themselves of removal under Section 1443(2) and, under binding Circuit precedent, cannot punch a ticket to an appeal of remand on this basis.

court redistricting lawsuits under the refusal clause. Each of these arguments is addressed in further detail below.[3]

The plain text of Section 1443(2)'s refusal clause makes clear that the provision authorizes removal only where the underlying civil action challenges a defendant's refusal to act, not a defendant's affirmative passage of a law. "By its express language, the remand suit must challenge a failure to act or enforce state law (by the defendant)." *City & Cnty. of S.F. v. Civ. Serv. Comm'n of S.F.*, 2002 WL 1677711, at *4 (N.D. Cal. July 24, 2002) ("[T]he 'refusal to act' clause is unavailable where the removing party's *action*, rather than its *inaction*, is the subject of the state-court suit."); *see also Detroit Police Lieutenants and Sergeants Ass'n v. City of Detroit*, 597 F.2d 566, 568 (6th Cir. 1979) (holding the refusal clause did not apply because "no one has . . . attempted to punish [the defendants] for refusing to do any act inconsistent with any law providing equal rights"); *Mass. Council of Constr. Emps., Inc. v. White*, 495 F.Supp. 220, 222 (D. Mass. 1980) ("At any rate, the 'refusal' clause is unavailable in this case, where the defendants' actions, rather than their inaction, are being challenged"). Thus, in *Thornton v. Holloway*, the Eighth Circuit held that a lawsuit alleging defamation under state law could not be removed pursuant to the "refusal clause" on the grounds that it conflicted with Title VII, because the removing defendants did "not point out any act that they refused to do." 70 F.3d 522, 523 (8th Cir. 1995).

The same reasoning applies here. The passage of a redistricting plan, which is what Plaintiffs challenge here, is an affirmative act, ***not*** a refusal to act, and therefore not a proper basis for removal under Section 1443(2). In fact, in a case with the same procedural posture as this one,

[3] Defendants do not assert that the first clause of Section 1443(2), the "color of authority" clause, authorizes removal here. Nor could they. That clause applies only to federal officers. *See City of Greenwood, Miss. v. Peacock*, 384 U.S. 808, 815 (1966); *see also Bauer, supra*. Here, Defendants are all state officers.

the Fourth Circuit affirmed the remand of a constitutional partisan gerrymandering challenge brought under the North Carolina Constitution, because "plaintiffs' state court action is not brought against the [Defendants] 'for refusing to do' anything." *Common Cause* 358 F. Supp. 3d at 510–11 (quoting 28 U.S.C. § 1443(2)), *aff'd*, 956 F.3d 246 (4th Cir. 2020). Instead, the plaintiffs "challenge[d] an action already completed, in the form of the [redistricting plan] . . ." *Id.*; *see also Stephenson*, 180 F. Supp. 2d at 785 (remanding redistricting challenge in part because "it is not entirely clear what defendants refuse to do, except fail to comply with state constitutional mandates"). The Fourth Circuit affirmed the district court's finding plaintiffs' prayer for relief—which sought to enjoin the defendants from implementing the map—underscored the point that the plaintiffs were not challenging the defendants' "refus[al] to do any act," and therefore, removal under Section 1443(2) was improper. *Id.*

Similarly, here, Plaintiffs challenge the affirmative implementation of the 2021 Map as a violation of the Arkansas Constitution, and not any refusal by Defendants to act. Plaintiffs' prayer for relief—a declaration that the 2021 Map is unconstitutional, an injunction against its implementation, and an order directing the adoption of a valid map—underscores the fact that Plaintiffs are not challenging a "refusal" by the Defendants. Ex. A at ¶¶ 24 and 25. Plaintiffs are not accusing Defendants of "refus[ing] to do any act on the ground that it would be inconsistent with a law guaranteeing equal rights," *Thornton*, 70 F.3d at 523, but rather of implementing a law that violates Plaintiffs' equal rights.

The fact that Plaintiffs do not challenge any refusal to act is sufficient to justify remand in this case. It is not necessary to also analyze the second part of Section 1443(2) regarding whether a ruling in Plaintiffs' favor in state court would create a colorable conflict between state and federal law, because the "conflict" test only applies if a removing defendant satisfies the first part of

Section 1443(2), which requires a refusal to act. *See id.* (declining to address whether there was a colorable conflict with federal law because defendants "have not alleged that they have refused to do any act on the ground that it would be inconsistent with a law guaranteeing equal rights"); *see also City & Cnty. of S.F.*, 2002 WL 1677711, at *4 ("Even if there had somehow been a 'refusal to act,' defendants would still have to show a 'colorable conflict between state and federal law leading to [their] refusal to follow plaintiff's interpretation of state law because of a good faith belief that to do so would violate federal law.'") (quoting *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995)).

But, in any event, Defendants cannot satisfy the "colorable conflict" part of the inquiry either. To assert a colorable conflict between state and federal law sufficient to justify removal under Section 1443(2), Defendants must demonstrate that a ruling in Plaintiffs' favor in state court would *necessarily* create a conflict between state and federal law. *See Alonzo*, 68 F.3d at 946; *Sexson v. Servaas*, 33 F.3d 799, 801, 804 (7th Cir. 1994). Plaintiffs are not seeking to impact minority populations in a way that would violate federal law, and Defendants have no basis to assume or assert that among the innumerable potential remedial plans, there are none that could simultaneously satisfy state and federal law. *See Stephenson*, 180 F. Supp. 2d at 785 (rejecting argument about potential conflict with federal law where "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.'" (alterations in original)). Plaintiffs seek a map that fully complies with both state and federal law. Defendants do not assert that such a map is impossible, nor can they. Their claims that a victory for Plaintiffs in state court would compel violations of federal law are speculative, unsupported, and insufficient to establish a colorable conflict between state and federal law.

Defendants incorrectly claim that asserting "the potential," for such a conflict suffices, Notice at ¶ 5. But that is not the standard. In every case on which Defendants rely, the federal court retained jurisdiction only when a ruling in the plaintiffs' favor in state court would force defendants to expressly violate federal civil rights law. Mere speculative conflict does not suffice.[4] The Eighth Circuit has yet to weigh in on the proper standard, but federal courts that have considered this issue uniformly hold that the mere potential for a conflict between state and federal law is insufficient to justify removal under Section 1443(2). *Brown v. Florida*, 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002) (remanding redistricting case and describing defendants' conflict between state and federal law argument as "speculative"); *News–Texan Inc. v. City of Garland, Tex.*, 814 F.2d 216, 218 (5th Cir.1987) (affirming remand to state court on the ground that city's assertion of conflict was patently invalid).

There is particularly good reason to reach this conclusion in redistricting cases. If Defendants' theory of Section 1443(2) were accepted, it would mean that "any state constitutional attack on [a] state's redistricting plans would necessarily raise a federal issue" and be subject to removal, because state officials will always be able to speculate that altering the current plans could conflict with federal requirements. *Stephenson,* 180 F. Supp. 2d at 785. This would run

[4] Indeed, *all* of the cases upon which Defendants rely involved markedly different circumstances and none stand for the "potential" conflict standard that Defendants now urge this Court to adopt. *See Sexson*, 33 F.3d at 801, 804 (noting district court found colorable conflict when defendants claimed that "any redistricting plan which complied with [state law] would *necessarily* violate [federal law]," but affirming subsequent remand when it became clear that victory for plaintiffs would *not necessarily* violate federal law) (emphasis added); *Alonzo*, 68 F.3d at 946 (finding colorable conflict where plaintiffs were expressly seeking noncompliance with federal consent decree); *Greenberg v. Veteran*, 889 F.2d 418, 421 (2d Cir. 1989) (finding colorable conflict where incorporation of village under Village Law would produce racial discrimination under federal law); *White v. Wellington*, 627 F.2d 582, 585 (2d Cir. 1980) (where EEOC found that the challenged state law resulted in Title VII violations, finding colorable conflict where, if defendants violated state law, they were required to do so by Title VII).

directly contrary to the Supreme Court precedent which requires "federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself." *Growe v. Emison*, 507 U.S. 25, 33 (1993).

Here, the General Assembly enacted the 2021 Map and Plaintiffs filed their challenge to the 2021 Map in state court. Federal court involvement in state legislative apportionment is a last resort. That Plaintiffs bring only state law claims strengthens this point. *Cavanagh v. Brock*, which Defendants rely on because the district court permitted removal of a redistricting lawsuit involving state law claims, does not hold otherwise. 577 F. Supp. 176, 180 (E.D.N.C. 1983) (three-judge court). To the contrary, the court found that there was a colorable conflict because the plaintiffs sought compliance with amendments to the North Carolina Constitution that the U.S. Attorney General had *already refused* to preclear. State election officials removed the case because their "noncompliance with the commands of the [state constitutional] amendments was mandated by its need to comply with the requirements of federal law." *Id.* at 179. In other words, the U.S. Attorney General had already found that the enforcement of the state law at issue would have *compelled* state officials to violate federal law. No such finding has been made here. And the *Brock* court did not address the fact that Section 1443(2)'s refusal clause applies only to refusals to act. *See, e.g.*, *Thornton*, 70 F.3d at 523.

In this case, Defendants cannot demonstrate that a ruling in Plaintiffs' favor in state court would necessarily create a conflict between state and federal law. Defendants' inflammatory claim that Plaintiffs seek maps drawn using a "race-based litmus test," Notice at ¶ 3, is simply wrong. Plaintiffs seek "the adoption of a valid congressional plan that does not unconstitutionally dilute Black voting power in violation of the Arkansas Constitution." Ex. A at ¶ 13. Arkansas could enact

a congressional plan based on traditional redistricting criteria such as compactness and contiguity, that does not dilute the voting power of Arkansas's Black population. And it is proper for legislatures to consider race where doing so is narrowly-tailored to ensure compliance with laws prohibiting practices such as vote dilution. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017). A legislature's consideration of race as a factor in redistricting is improper only where (1) race is *a predominant factor*, and (2) the plan does not withstand strict scrutiny. *Id.* Even the cases that Defendants cite in support of their proposition that *any* consideration of race in the drawing of new maps would "run afoul of the Voting Rights Act and Equal Protection Clause," Notice at ¶ 3, undermine that very argument. As the Supreme Court explained in *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245 (2022), "districting maps that sort voters on the basis of race" are valid when "narrowly tailored to achieving a compelling state interest." 142 S. Ct. at 1248 (quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995), and citing *Shaw v. Reno*, 509 U.S. 630, 643 (1993)). Because it is possible for a remedial map to consider race while complying with both state and federal law, removal is improper. *See Senators v. Gardner*, No. Civ.02–244–M, 2002 WL 1072305, at *1 (D.N.H. May 29, 2002) (rejecting Section 1443(2) removal of a legislative redistricting case and remanding to state court because "defendants have failed to make even a colorable claim that, if the New Hampshire Supreme Court is forced to intervene and formulate a redistricting plan, defendants' compliance with that plan would *compel* them to violate the Voting Rights Act") (emphasis added).

At this point in the litigation, Defendants' claims that any remedial map would compel them to violate the VRA and Equal Protection Clause are also entirely speculative. The litigation is just beginning; Defendants have yet to even file a responsive pleading in state court. The Circuit Court of Pulaski County has yet to consider whether the 2021 Map violates the Arkansas

Constitution such that a remedial plan would be necessary, and it is not yet known what remedy it would order if it were to find a violation. Defendants cannot allege a conflict between Plaintiffs' desired remedy and federal law because "it is unknown whether plaintiffs' attempt to enforce the provisions of the [Arkansas] constitution would run afoul of federal voting law," and therefore "any implication of the refusal clause is speculative." *Common Cause*, 358 F. Supp. 3d at 511; *see also Brown v. Florida*, 208 F. Supp. 2d 1344, 1351 (S.D. Fla. 2002) (where state court had not even begun to address whether the relevant redistricting plan violated state law and what remedy would apply if a state-law violation were found, "at the present there [was] not a colorable conflict between federal and state law," and the defendant's "reliance on the 'refusal' clause [was] therefore 'speculative"').

III. Removal is improper under 28 U.S.C. § 1441 because there is no federal question jurisdiction.

Defendants' second stated basis for removal, 28 U.S.C. § 1441, is similarly ill-conceived. "Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Where, as here, there is no diversity of citizenship, federal question jurisdiction is required for a federal court to have subject matter jurisdiction. *Id.* There is no federal question in this case. Plaintiffs assert claims that arise exclusively under the Arkansas Constitution. They do not assert any claims "arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, nor do their state constitutional claims require a court to construe federal law. Under the well-pleaded complaint rule, Plaintiffs are the masters of their complaint. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). Defendants cannot misconstrue Plaintiffs' claims to manufacture federal jurisdiction. *Stephenson*, 180 F. Supp. 2d at 783 (citing *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908)) ("[W]hat is essentially a state law claim cannot

be transformed into a federal one by the mere assertion, either anticipated by plaintiffs or raised by defendants, of a federal defense.").

Defendants are mistaken that the potential defenses they raise—the VRA and the Equal Protection Clause—are sufficient to invoke federal question jurisdiction that would justify removal. It is "settled law that a case may *not* be removed to federal court on the basis of a federal defense." *Caterpillar Inc.*, 482 U.S. at 393. "A defense that raises a federal question is inadequate to confer federal jurisdiction." *Merrell Dow*, 478 U.S. at 808. A federal district court rejected a similar argument by defendants in *Stephenson*, 180 F. Supp. 2d at 786, a case that is remarkably similar to this one. There, the plaintiffs' complaint raised issues of state law only, and it was defendants' defense under the VRA—namely that they could not comply with the state constitution because of its effect on the voting rights of specified constituent groups—that arguably raised a federal issue. *Id.* The court rejected that argument: "As the Supreme Court has made clear, however, 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.'" *Id.* (quoting *Caterpillar, Inc.*, 482 U.S. at 399). "To allow removal in this case would give defendants the power to select the forum in which the claim is litigated." *Id.* This is exactly what Defendants attempt to do here, and this Court should similarly reject Defendants' argument and remand the case to state court. *See Mulcahey v. Columbia Organic Chem. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) ("If federal jurisdiction is doubtful, a remand is necessary.").

Finally, to the extent Defendants argue that federal jurisdiction is proper because Plaintiffs' claims involve elections, and therefore "aris[e] under the Constitution, laws, or treaties of the United States," Notice at ¶ 6 (quoting 28 U.S.C. 1331, and citing U.S. Const. art. I, sec. 4, cl. l), they are wrong. The Supreme Court has repeatedly "emphasized that 'reapportionment is primarily

the duty and responsibility of the State through its legislature or other body, rather than of a federal court.'" *Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993) (quoting *Growe*, 507 U.S. at 34). Directly contrary to Defendants' argument, "federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Id.* at 157.

IV. The *Pennhurst* doctrine and concerns of comity separately counsel against exercising federal jurisdiction.

Even if the Court were to find that there was a basis for Defendants' removal, it could not adjudicate Plaintiffs' claims unless it also found that Defendants have waived Eleventh Amendment sovereign immunity by their decision to remove this matter to federal court. Such a finding would be consistent with Eighth Circuit precedent. *See Church v. Missouri*, 913 F.3d 736, 742 (8th Cir. 2019) ("The State removed this case to federal court, waiving its Eleventh Amendment immunity.") (*citing Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002)). Absent such a waiver, the *Pennhurst* doctrine is a further bar to this removal action. Plaintiffs seek injunctive relief barring Arkansas's Secretary of State and members of the Arkansas State Board of Election Commissioners from implementing the 2021 Map, on the grounds that it violates state law. *Pennhurst*, which holds that Eleventh Amendment state sovereign immunity prevents federal courts from granting injunctive relief against "state officials on the basis of state law," forecloses federal jurisdiction over such claims. 465 U.S. at 106. Federal jurisdiction over Plaintiffs' state law claims collides with the principles of federalism and comity that animate the Eleventh Amendment. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.*; *see also Bacon v. Neer*, 631 F.3d 875, 880 (8th Cir. 2011) (finding plaintiff's alleged injury not redressable in federal court where federal court has no jurisdiction to enjoin state officials from enforcing state law); *City of Ozark, Ark. v. Union Pac. R.R. Co.*, No. 2:14-CV-02196, 2014 WL

12729170, at *4 (W.D. Ark. Dec. 10, 2014) (holding, under *Pennhurst*, federal district court "lacks the authority to order State officials to conform their conduct to state law"). Federal judicial interference in such a case is precisely what *Pennhurst*, and the principles of federalism underlying it, were meant to prevent. *See id.*

V. Plaintiffs are entitled to attorneys' fees under 28 U.S.C. § 1447(c).

This Court should award fees because Defendants' notice of removal is objectively unreasonable for the reasons described. *See TASA Grp. v. Mosby*, No. 4:05-CV-00938 GTE, 2005 WL 1922571, at *1 (E.D. Ark. Aug. 9, 2005) (finding no objectively reasonable basis for removal and awarding fees under 28 U.S.C. § 1447 in part because case cited by Defendant did not support her position). This result is expressly contemplated by 28 U.S.C. § 1447(c), which states that, "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). Courts award fees under § 1447(c) where the removing party lacked an objectively reasonable basis for seeking removal. *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). This is precisely such a case.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion and immediately remand this case to the Circuit Court of Pulaski County. The Court should also award Plaintiffs their reasonable attorneys' fees and costs incurred as a result of Defendants' meritless removal.

Respectfully submitted,

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**Motion for Pro Hac Vice Forthcoming*