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' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR REMAND AND MOTION TO STAY

There is no plausible basis for federal subject matter jurisdiction in this case. There is no federal question jurisdiction under 28 U.S.C. § 1441 because, as Defendants admit, "this case raises only state-law claims." Defs.' Resp. in Opp'n to Mot. for Remand & Resp. to Mot. for Stay ("Resp.") at 14 n.5 (Dkt. No. 19). Defendants provide no reason why this Court should proceed against the principles of comity to assert jurisdiction. Nor does 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—provide a basis for removal. The "refusal clause" does

not apply to challenges to affirmative acts, such as the implementation of a redistricting map. The only thing Defendants "refuse" to do is comply with state constitutional mandates, and that is not a basis for a federal court to assert jurisdiction. There is no conflict between Plaintiffs' requested relief—a congressional map that complies with federal and state law—and federal law. For all the reasons previously discussed, and as addressed in this reply, the Court should remand this case to the Circuit Court of Pulaski County, which is the proper forum to adjudicate Plaintiffs' state-law claims. This Court should award Plaintiffs attorneys' fees and costs for being forced to oppose Defendants' meritless removal. Finally, because Defendants' request for a stay is both procedurally improper and meritless, it should be denied.

ARGUMENT

I. There is no federal subject matter jurisdiction in this case.

A. Plaintiffs' complaint does not raise a federal question.

As Defendants admit, Plaintiffs' complaint "raises only state-law claims." Resp. at 14 n.5. Accordingly, despite Defendants' best efforts to create one, this case does not raise a federal question under 28 U.S.C. § 1441, and it should be remanded to state court. Defendants intend to defend this case, at least in part, on the meritless ground that the Elections Clause bars a state court from ordering the relief Plaintiffs seek. *See* Defs.' Mot. to Dismiss at 2 (Dkt. No. 7). But it is black-letter law that Defendants cannot create federal question jurisdiction by raising a federal defense. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (holding that it is "settled law that a case may *not* be removed to federal court on the basis of a federal defense") (emphasis in original); *Stephenson v. Bartlett*, 180 F. Supp. 2d 779, 783 (E.D.N.C. 2001) ("[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.") (citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908)).

Interpreting all state constitutional redistricting claims as raising questions under the Elections Clause, as Defendants urge here, "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." *Common Cause v. Lewis*, 358 F. Supp. 3d 505, 514 (E.D.N.C. 2019) (rejecting theory of federal question jurisdiction and remanding to state court). As in *Common Cause*, where the legislative defendants attempted to remove a state law partisan gerrymandering claim to federal court, "federal law is not an 'affirmative element' of plaintiffs' claim or a prima facie case" under the Arkansas Constitution. *Id*. There is no federal question under the Elections Clause that is "necessarily raised" by Plaintiffs' state law claims. *See Rhode Island v. Shell Oil Prod. Co*., No. 19-1818, 2022 WL 1617206, at *6 (1st Cir. May 23, 2022) (finding federal question removal improper where defendants "pinpoint no specific federal issue that must necessarily be decided" for plaintiffs to prevail). Defendants' citation to a dissenting opinion in *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022), does not change the analysis. That case involved review of a possible federal question on appeal; it has no bearing on the issue here, which is whether a federal court has original jurisdiction to hear a case that solely involves state law claims. To the extent Defendants argue that only federal courts should have the power to adjudicate redistricting cases, 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) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.") (quoting *Growe v. Emison*, 507 U.S. 25, 34 (1993)). Indeed, "state courts have a significant role

in redistricting." *Growe*, 507 U.S. at 33 (citing *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Scott*, 381 U.S. at 409.

B. Plaintiffs challenge Defendants' implementation of Arkansas' new congressional districting plan ("the 2021 Map"), not any refusal to act.

The "refusal clause" under 28 U.S.C. § 1443(2) protects state officials who are forced to choose between enforcing state law and "inconsistent" federal equal-rights laws. It has no application here, where Plaintiffs allege sonly that the 2021 Map violates the state constitution, and any supposed conflict with federal law is based on speculation. Defendants mischaracterize the relief Plaintiffs seek as "race-based" and "not race-neutral" to support the erroneous argument that Defendants are "refusing" to provide Plaintiffs' requested relief because it is inconsistent with federal law or would create a conflict with federal law. Nothing could be further from the truth.

First, Defendants are not "refusing" to implement any remedial map because they have not been ordered to do so. This case is still in its infancy. 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. Plaintiffs allege that the 2021 Map (in effect now) violates the Arkansas Constitution. There is no alternative map at issue for Defendants to "refuse" to implement.

Second, Plaintiffs do not seek any relief that would violate federal law, and they do not accuse Defendants of "refus[ing] to enforce discriminatory state laws," *Baines v. City of Danville*, 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. Plaintiffs' request for relief is not controversial. They seek the adoption of "a valid congressional plan that does not unconstitutionally dilute the vote of Black

voters in Arkansas." Compl. at 24 (Dkt. No. 2). In other words, Plaintiffs seek the adoption of a congressional map that, unlike the 2021 Map, does not violate the Arkansas Constitution. Any number of potential maps could satisfy these criteria.

To the extent Defendants argue that Plaintiffs' complaint expressly seeks the adoption of a congressional map that places Jefferson and Pulaski Counties in the same congressional district, Resp. at 6, 7 (quoting Compl. ¶ 3), and that such a request constitutes a race-based action that would violate or conflict with federal law, Defendants read the allegations in Plaintiffs' complaint out of context. Plaintiffs' complaint alleges that, "despite the fact that Jefferson and Pulaski Counties are geographically contiguous and have large numbers of Black voters . . . neither county has ever been drawn together in a district that includes the eastern and southeastern portions of the state, where the state's most predominantly Black counties are located." Compl. ¶ 3. Plaintiffs make those descriptive allegations to support their vote dilution claim, but they do not request that any particular remedial map be implemented. Again, Plaintiffs seek the adoption of "a valid congressional plan that does not unconstitutionally dilute the vote of Black voters in Arkansas." Compl. at 24. There is simply no reason to believe that any remedial map implemented by the Circuit Court of Pulaski County would violate federal law; Defendants' musings to the contrary are purely speculative and cannot support removal. *See, e.g.*, *Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995) (rejecting argument that the mere potential for a conflict between state and federal law is insufficient to justify removal under § 1443(2)).

The cases cited by Defendants on this point are inapposite. The case law is clear that a colorable conflict exists under the removal clause only where a victory for the plaintiffs would *necessarily* create a conflict with federal law, which is not the case here. *See Sexson v. Servaas*, 33 F.3d 799, 801, 804 (7th Cir. 1994) (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); *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).

Defendants' discussion of *Cavanagh v. Brock*, 577 F. Supp. 176 (E.D.N.C. 1983), fails to respond to any of the arguments made in Plaintiffs' motion about why *Cavanagh* is readily distinguishable from this case. To reiterate, the court in *Cavanagh* found that there was a colorable conflict between state and federal law because the plaintiffs sought compliance with amendments to the North Carolina Constitution that the U.S. Attorney General had *already refused* to preclear, meaning that 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. *See id.* at 178. No such finding has been made here; there is only Defendants' speculation of a possible conflict, which is insufficient.

Common Cause v. Lewis, in which the federal court remanded a redistricting case that had been removed under the refusal clause, is nearly identical to this case. Defendants' attempts to distinguish it fail. That the defendants in *Common Cause* were not state officials charged with implementing the challenged redistricting plan was merely one of the many reasons removal was improper in that case. *See* 358 F. Supp. 3d at 513, 515 (finding no basis for removal jurisdiction under either 28 U.S.C. § 1443(2) or § 1441(a)). It does not follow that removal is proper in this case merely because Plaintiffs have sued the right party—the state officials who must implement the 2021 Map. Removal is improper here, just as it was in *Common Cause*, because "it is uncertain

and speculative whether the ultimate relief sought in plaintiffs' complaint . . . would conflict with federal law." *Id.* at 513.

At bottom, Defendants argue that the consideration of race—*any* consideration of race—conflicts with the Equal Protection Clause. This is not the law. "[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution." *Crawford v. Bd. of Educ.*, 458 U.S. 527, 538 (1982). Under Defendants' theory, the Equal Protection Clause would prohibit any state court challenge to state action that disadvantages racial minorities, because such a challenge would necessarily consider race.[1] In the redistricting context, it is permissible for legislatures to consider race among other criteria to ensure compliance with federal law prohibiting odious practices such as racial vote dilution. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

Plaintiffs seek a map that fully complies with both state and federal law, and Defendants have no basis to assume or assert that it is impossible to implement such a map without violating the law. *See Stephenson*, 180 F. Supp. 2d at 785. A ruling in Plaintiffs' favor in state court would not necessarily create a colorable conflict between state and federal law, and removal under § 1443(2) is thus improper.

II. The Court should deny Defendants' request to stay this action.

Plaintiffs have moved to stay this action pending resolution of the Motion for Remand. Defendants do not oppose that request. Resp. at 14. Instead of stopping there, however, Defendants

[1] Defendants' position would effectively insulate any racially discriminatory law from state court review. If, for example, the Legislature were to pass a law requiring the use of separate water fountains for Black and White Arkansans, and a plaintiff brought suit requesting relief that would "allow Black Arkansas to use the same water fountains as White Arkansans," the remedy would violate the federal Equal Protection Clause under Defendants' theory because it would require the consideration of race. This radical position is simply not the law. The refusal clause has never been interpreted to prevent state courts from remedying racial discrimination. Quite the opposite.

shoehorn into their response brief a separate affirmative request for the Court to stay this action pending resolution of another case in federal court, *Simpson v. Hutchinson*, No. 4:22-cv-00213-JM-DRS-DPM ("*Simpson v. Hutchinson*"). The Court should deny this request.

As a threshold matter, Defendants' request for a stay is improper and may be rejected because it does not comply with the Local Rules of this Court. Under Local Rule 7.2(a), Defendants are required to file a motion to stay and a brief in support. This Court may deny Defendants' requested relief for failure to comply with the local rules. *See, e.g.*, *Garrett v. Andrews*, No. 4:12CV00230-JLH-JTK, 2013 WL 1897165, at *2 (E.D. Ark. Apr. 12, 2013), *report and recommendation adopted*, No. 4:12CV00230-JLH-JTK, 2013 WL 1897162 (E.D. Ark. May 3, 2013) (striking motion for failure to comply with Local Rule 7.2(a)).

Even if Defendants' request for a stay was properly before the Court, it should deny the request because the Court must have subject matter jurisdiction before ruling on any motions. *See, e.g., Curry v. Pleasurecraft Marine Engine Co*., No. 13-03139-CV-S-GAF, 2013 WL 12205046, at *1 (W.D. Mo. May 28, 2013). Because the Court lacks subject matter jurisdiction over this action, it should be promptly remanded to the Circuit Court of Pulaski County and Defendants' motion should be denied. Indeed, it is settled law that "[a]ny order remanding a matter to state court for lack of subject matter jurisdiction necessarily denies all other pending motions." *Carlson v. Arrowhead Concrete Works, Inc*., 445 F.3d 1046, 1052 (8th Cir. 2006) (quoting *Dahiya v. Talmidge Int'l, Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004)).

Finally, if the Court considers Defendants' motion on the merits—and it should not for the reasons explained above—it should deny it because it severely prejudices Plaintiffs, would not cause hardship or inequity to Defendants, and would not serve judicial economy. *See Simpson v. Wright Med. Tech., Inc*., No. 5:17-CV-00062 KGB, 2020 WL 3318001, at *1 (E.D. Ark. June 18,

2020). While this case and *Simpson v. Hutchinson* both challenge the 2021 Map, the two cases raise unique and different legal claims and theories. Plaintiffs' two-count complaint raises claims *exclusively* under the Arkansas Constitution. In contrast, the seven-count *Simpson v. Hutchinson* complaint raises five claims under the U.S. Constitution (including a racial gerrymandering claim, a one-person-one-vote claim, and a First Amendment claim alleging violations of the freedom of association and freedom to petition), and one claim under the federal Voting Rights Act. None of those complex claims are at issue in this case.

Moreover, "[i]n the reapportionment context, the [Supreme] Court has required 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*, 507 U.S. at 33) (emphasis in original). This court should therefore defer to Arkansas state courts to resolve Plaintiffs' claims which arise exclusively under the Arkansas Constitution. Finally, a stay pending resolution of *Simpson v. Hutchinson* would cause further delay in the resolution of Plaintiffs' claims, which are separate and apart from those raised by the plaintiffs in *Simpson v. Hutchinson.* There is no set timeline for when *Simpson v. Hutchinson* will be resolved, and further delay of the resolution of Plaintiffs' claims threatens Plaintiffs with serious and irreparable harm. Defendants are not harmed absent a stay; they are attempting to stay this case to cause further delay and deny Plaintiffs the opportunity to obtain relief for their injuries. Plaintiffs have requested a prompt remand so as to avoid any further delay in adjudicating this action. Defendants' request for a stay should be denied.

CONCLUSION

For the reasons stated herein, as well as those provided in Plaintiffs' briefs in support of their motions for remand and stay, the Court should grant Plaintiffs' motion to immediately remand

this case to the Circuit Court of Pulaski County and their unopposed motion to stay all further proceedings in this Court. This Court should deny Defendants' motion to stay this case pending disposition of *Simpson v. Hutchinson*. Finally, the Court should also award Plaintiffs reasonable attorneys' fees and costs incurred to remand this case following Defendants' meritless removal.

Respectfully submitted,

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