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

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.	)	Case No: _____

TO: THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Defendants Representative David R. Lewis, Senator Ralph E. Hise, Jr., Senator Warren Daniel, Senator Paul Newton, Speaker Timothy K. Moore, and President Pro Tempore Philip E. Berger, as agents of the General Assembly (the "General Assembly" or "Legislative Defendants") and the State of North Carolina, *see* N.C. Gen. Stat. §§ 1-72.2, 120-32.6(b) in accordance with the requirements of 28 U.S.C. § 1443(2) and 1446, hereby give notice and remove to this court the civil action bearing the Case No.: 19-CVS-12667, which is now pending in the General Court of Justice, Superior Court Division, Wake County, North Carolina.

In support of this Notice of Removal, the General Assembly shows the Court as follows:

1. Plaintiffs initiated this action in the General Court of Justice, Superior Court Division, Wake County, North Carolina, Civil Action No. 19-CVS-12667, on September 27, 2019, by filing the Complaint.

2. The Legislative Defendants were served with the Summons and Complaint on September 30, 2019. The North Carolina Department of Justice and Attorney General, who is not a party, was served on September 27, 2019. A complete copy of all process, pleadings, and orders served upon Legislative Defendants is attached as **Exhibit 1** to this Notice of Removal. 28 U.S.C. § 1446(a). These documents constitute the pleadings to date.

3. As required by 28 U.S.C. § 1446(b), this Notice of Removal is filed with this Court within thirty (30) days of service of process on the Legislative Defendants and on the North Carolina Department of Justice and Attorney General.

4. The Complaint purports to allege claims under the North Carolina Constitution.

5. Nevertheless, removal here is appropriate under 28 U.S.C. § 1443(2).

6. Removal is appropriate under 28 U.S.C. § 1443(2), which provides for removal of state-court actions against state officials "for refusing to do any act on the ground that would be inconsistent" with "any [federal] law providing for equal rights…."

7. This provision is satisfied, and 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) (quotations omitted). The state official's federal-law defense need not ultimately be meritorious so long as there is a colorable conflict between the official's

federal-law duties under equal-rights law and the alleged state-law duties. *See, e.g., New Haven Firefighters Local 825 v. City of New Haven*, 2004 WL 2381739, at *1 (D. Conn. Sept. 28, 2004).

8. The Complaint seeks equitable relief from all Defendants, including the General Assembly. The equitable relief is not limited to enjoining the current congressional redistricting plan; Plaintiffs also demand "a new congressional districting plan that complies with" their view of the North Carolina Constitution. Complaint, Prayer for Relief ¶ (c); *see also* Compl. ¶ 5.

9. Plaintiffs' requested relief, to be effective, will require affirmative cooperation from some agent of North Carolina. The General Assembly is the body responsible for redistricting under the North Carolina Constitution, and Plaintiffs' need for equitable relief from the General Assembly stems from that role. Further, because an official-capacity suit is, in truth, a suit against the State, and all its component parts, Plaintiffs' requested relief will require the affirmative cooperation of the State itself. Their failure to name the State specifically as a party does not change the fundamental character of their suit as one against the state for equitable relief.

10. Affirmative cooperation can be refused. Plaintiffs' demand for a court-drawn map if the General Assembly does not redistrict in accord with Plaintiffs' state-law theory is a form of state-court coercion that triggers the possibility of refusal under 28 U.S.C. § 1443(2).

11. Independently, Plaintiffs will seek to impose an obligation on North Carolina, sued through its agents, to administer elections under Plaintiffs' preferred

redistricting scheme. The General Assembly, through its officers named as Defendants here, represents the State according to state statute. By comparison, the members of the North Carolina Board of Ethics and Elections Enforcement are not tasked with representing the State by any statute. The General Assembly, speaking for the State, can refuse Plaintiffs' demand for affirmative state cooperation in this second, independent sense.

12. In both these independent senses, the General Assembly's resistance to Plaintiffs' state-law theory qualifies as "refusing" an "act" within the meaning of 28 U.S.C. § 1443(2). The relevant "acts" here include both the act necessary to create new legislation and the State's "act" of implementing that new legislation.

13. Section 2 of the Voting Rights Act ("VRA") applies to the entire State of North Carolina. VRA § 2 is a federal-law provision providing for "equal rights" within the meaning of 28 U.S.C. § 1443(2).

14. The Equal Protection Clause of the Constitution applies to the entire state of North Carolina. The Equal Protection Clause is a federal-law provision providing for "equal rights" within the meaning of 28 U.S.C. § 1443(2).

15. A colorable conflict between state constitutional redistricting requirements and the dictates of the Voting Rights Act and Equal Protection Clause supports removal under Section 1443(2). *Cavanagh v. Brock*, 577 F. Supp. 176, 180 (E.D.N.C. 1983).

16. Representative David R. Lewis is a state official covered under Section 1443(2). Representative Lewis is Senior Chairman of the House Select Committee on Redistricting. Representative Lewis has been sued in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law

requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from Representative Lewis in his official capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

17. Senator Ralphs E. Hise, Jr., is a state official covered under Section 1443(2). Senator Hise is Chairman of the Senate Committee on Redistricting. Senator Hise has been sued in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from Senator Hise in his official capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

18. Senator Warren Daniel is a state official covered under Section 1443(2). Senator Daniel is Co-Chairman of the Senate Committee on Redistricting. Senator Daniel has been sued in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from Senator Daniel in his official

capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

19. Senator Paul Newton is a state official covered under Section 1443(2). Senator Daniel is Co-Chairman of the Senate Committee on Redistricting. Senator Newton has been sued in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from Senator Newton in his official capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

20. Speaker Timothy K. Moore is a state official covered under Section 1443(2). Speaker Moore is Speaker of the House of Representatives. Speaker Moore has been sued in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from Speaker Moore in his official capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

21. President Philip E. Berger is a state official covered under Section 1443(2). President Berger is President Pro Tempore of the Senate. President Berger has been sued

in this matter in his official capacity as a representative of the General Assembly, which is alleged to have violated state-law requirements related to redistricting and against which affirmative equitable relief is sought requiring a new redistricting plan or, alternatively, state-court seizure of the General Assembly's redistricting authority. But, as described below, the affirmative relief sought from President Berger in his official capacity as a representative of the General Assembly and the State would be inconsistent with federal law that protects racial equality in voting.

22. The Legislative Defendants have all been sued in their official capacities on behalf of the General Assembly, which enacted the congressional plan challenged. They have been sued for the purpose of obtaining affirmative relief in the form of a new plan to by administered, under compulsion of court order, by North Carolina—which Legislative Defendants also represent—in future elections. Plaintiffs claim that the 2016 maps violate provisions of the North Carolina Constitution. The Prayer for Relief asks this Court to enjoin the Legislative Defendants from taking these actions and to require the Legislative Defendants to re-draw the 2016 plans or, alternatively, seize the Legislative Defendants' legislative power and redistrict the state itself.

23. As representatives of the State of North Carolina and the General Assembly, which exercises the State's sovereignty in the most immediate way, Legislative Defendants are empowered to waive the State's sovereign immunity for a suit purporting to enforce state law against the State court. By filing this motion to remand, they waive the State's sovereign immunity for the purposes of this case.

24. Both the actions Plaintiffs demand and their theories of relief create direct conflicts with federal law guaranteeing equal protection—namely, the Voting Rights Act and the Equal Protection Clause.

A. The Voting Rights Act

25. One conflict arises because one of the congressional districts challenged satisfies the State's obligations under the Voting Rights Act, and Plaintiffs demand that the racial composition of this district be dramatically altered. In particular, Plaintiffs' Complaint identifies multiple districts as containing a high percentage of Democratic Party constituents. They refer to these districts as "packed." But, in North Carolina, there is a strong correlation between racial and political identity, so removing Democratic Party constituents from these districts will necessary reduce the percentage of African American voting-age persons.

26. For example, paragraphs 78-82 of the Complaint attack Congressional District 1 ("CD 1"). Plaintiffs claim that CD 1 is a "packed Democratic district." Compl. ¶ 78. They assert that the packing is accomplished by placing the "most Democratic VTDs" in certain counties in CD 1 instead of "more moderate and Republican VTDs." Compl. ¶¶ 80-81. The Complaint therefore calls for the legislature to replace "Democratic VTDs" with "more moderate and Republican VTDs."

27. But the Legislative Defendants intend to defend this charge, *inter alia*, by presenting evidence demonstrating that CD 1 is a minority "crossover" district. For example, in *Harris v. McCrory*, 159 F.Supp.3d 600 (M.D.N.C. 2016), Congressman Butterfield testified about the appropriate level of BVAP in CD 1. A copy of this testimony

is attached as **Exhibit 2**. Congressman Butterfield has been the U.S. Representative from CD 1 since 2004. Ex. 2, at 160. Prior to that, he held numerous elected offices. Ex. 2, at 158-60. During private practice as a lawyer in this area of the state, Congressman Butterfield engaged in voting rights litigation. Ex. 2, at 159. As such, he is intimately familiar with the voting patterns in CD 1 and the extent to which racially polarized voting affects elections. Ex. 2 at 172-75, 199-200. In *Harris*, Congressman Butterfield testified that in his experience two out of three white voters in the area encompassing CD 1 would not vote for a black candidate. Ex. 2 at 174, 199-200. In his experience, in order for black voters to be able to elect their candidate of choice in CD 1, the district's BVAP should ideally be at 47% and no lower than 45%. Ex. 2 at 201-02. The current BVAP of the district is 44.46% (https://www3.ncleg.gov/GIS/Download/District_Plans/DB_2016/Congress/2016_Contingent_Congressional_Plan_-_Corrected/Reports/DistrictStats/SingleDistAdobe/rptDistrictStats-1.pdf), just shy of the 45% level at which Congressman Butterfield testified is necessary for black voters to elect their candidate of choice. As such, the district is protected from being intentionally dismantled under VRA § 2.

28. To be sure, race was not the predominant factor in the creation of CD1, but the VRA does not turn on motive, and recent Supreme Court precedent anticipates that VRA districts should be drawn with minimal or no attention to racial data. A VRA plaintiff would not have to prove anything with respect to the intent of how CD1 was drawn to prove a VRA violation, and intent has no bearing on whether the VRA protects it from being dismantled, as Plaintiffs demand.

29. Although VRA § 2 cannot be used as a sword to require states to create crossover districts, the Supreme Court has made clear that states may create crossover districts "as a matter of legislative choice or discretion" in order "to choose their own method of complying with the Voting Rights Act." *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009). Thus, creating a crossover district is a valid *shield* against a Voting Rights Act claim that might otherwise by meritorious. CD 1, as a crossover district, therefore complies with the Voting Rights Act and precludes a valid claim of liability under a law guaranteeing equality.

30. Plaintiffs' theory of state law—which the Legislative Defendants contest—would require the Legislative Defendants to drop the African American voting-age population in CD 1 and thereby dismantle the district. It would no longer be a crossover district. Importantly, Plaintiffs are *not* contending that CD 1 should be a majority-minority district. To the contrary, they demand that African American voting-age population be *removed* from the district.

31. The need to drop CD1's BVAP results from the correlation between race and political affiliation in North Carolina. Removing Democratic residents of CD1 will necessarily result in dropping its BVAP. Although polarized voting has been alleged to be in decline in some portions of North Carolina, CD1 is in the northeastern part of the state, populated by white voters who lean Republican. Given these dynamics, Congressman Butterfield's testimony about the appropriate level of BVAP in CD1 is credible and likely to be born out be the evidence in this case.

32. Legislative Defendants' Voting Rights Act concerns are not merely speculative. Instead, Legislative Defendants' concerns are bolstered by two recent cases: *Common Cause v. Rucho*, 139 S. Ct. 2484 (2019) ("*Rucho*") and *Common Cause v. Lewis*, 2019 WL 4569584 (N.C.Super.) (Sept. 3, 2019) ("*Lewis*").

33. In *Lewis*, a three-judge panel of the Wake County Superior Court entered a judgment finding that certain North Carolina legislative districts violated the state-law theory Plaintiffs posit in their Complaint in this case. In concluding that the challenged districts were supposedly partisan "outliers", the court credited and relied upon the expert analysis by Dr. Jowei Chen. 2019 WL 4569584, at *17-*28. Dr. Chen created an algorithm that he used to draw thousands of simulated legislative districts. Dr. Chen's algorithm relied only on neutral, non-partisan criteria to draw the simulated districts. Dr. Chen's simulated districts therefore embodied the principles Plaintiffs contend apply under the North Carolina Constitution. *See id*. at *18-*28.

34. In *Common Cause v. Rucho*, a challenge to the very same congressional redistricting plan at issue in this case, the United States Supreme Court recently decided that partisan gerrymandering claims present a nonjusticiable issue for federal courts. 139 S. Ct. at 2506-07. In the district court proceedings, however, Dr. Chen used his algorithm method to draw thousands of simulated congressional plans for North Carolina. As in *Lewis*, Dr. Chen's algorithm relied only on neutral, non-partisan criteria to draw the simulated districts. As in *Lewis*, Dr. Chen's simulated districts therefore embody the principles Plaintiffs contend apply under the North Carolina Constitution. 318 F.Supp.3d 777, 874-877 (2018).

35. On September 30, 2019, Plaintiffs in the instant case filed a motion for preliminary injunction. In support of that motion, Plaintiffs attached a new expert report from Dr. Chen analyzing the 2016 Congressional Plan. A copy of Dr. Chen's report is attached as **Exhibit 3**. In his report, Dr. Chen states that his analysis in the instant case is based upon the same simulated districts he created in *Rucho*. Exhibit 3, at ¶¶ 7-8.

36. In *Lewis*, the Superior Court's Decree ordered the General Assembly to redraw the challenged legislative districts according to Plaintiffs' state-law theory. To satisfy this state-court command, the General Assembly adopted maps simulated by Dr. Chen, with minor modifications. As a result, the General Assembly incorporated the political and racial outcomes that Dr. Chen's simulated maps achieved. It had no choice but to do so in some way, given the state-court order to redraw.[1]

37. An order from the state court to apply neutral redistricting criteria for the purpose of complying with Plaintiffs' desire to replace "Democratic VTDs" with more "moderate and Republican VTDs" will destroy CD 1's status as a crossover district. This is not speculative as evidence from Dr. Chen in *Rucho* demonstrates. As explained above, Dr. Chen created thousands of non-partisan congressional maps using his computer

[1] In that instance Plaintiffs presented—only at the remedial stage—evidence that they claimed undercut any showing of polarized voting. That evidence, however, is not relevant here. CD1 comprises the following counties: Durham (partial), Granville, Vance, Warren, Halifax, Northampton, Hertford, Gates, Bertie, Washington, Martin, Edgecombe, Pitt (partial), and Wilson (partial). Out of all these counties, the Plaintiffs' VRA filing in *Lewis* covered only Pitt and therefore lacks probative value for assessing voting patterns in CD1. Other evidence in the *Lewis* case also did not address all these counties or the most probative elections. No evidence exists, to the General Assembly's knowledge, undercutting Congressman Butterfield's first-hand knowledge and sworn testimony that a 45% BVAP is necessary to create an equal-opportunity district.

algorithm. According to evidence admitted at the *Rucho* trial, *not a single one* of Dr. Chen's thousands of maps drew a district in the area of CD 1 with a BVAP at or above 45% or even 44%. Most of the districts were at a BVAP meaningfully below the BVAP level Congressman Butterfield testified would be necessary to preserve the minority ability to elect in CD1. See DX5038, attached as **Exhibit 4**. Moreover, as demonstrated by DX5038, only 262 of Dr. Chen's thousands of maps drew any district with a BVAP of at least 40%. Many of the maps drew districts in the area of CD 1 that were below 40%. Therefore, it is highly likely that the relief requested by the Plaintiffs in this case will require the dismantling of CD 1 as a crossover district.

38. The General Assembly's contention that CD 1 preserves African American voting strength to ensure equality in voting is a defense to Plaintiffs' state-law challenge. To satisfy Plaintiffs' state law theory, a map with their criteria and the resulting political and racial impact must be adopted. There appears to be no way to satisfy Plaintiffs' state-law theory and create a district in northeast North Carolina in which black residents can maintain an equal opportunity to elect their preferred candidate of choice. Section 1443(2) creates a federal forum for this defense. Under Section 1443(2), the defense need not be proved as a factual matter at this time. The defense is colorable and supports removal.

B. The Equal Protection Clause

39. A conflict also arises between Plaintiffs' asserted state-law theories and Legislative Defendants' obligations under federal law because affording Plaintiffs the relief they request would require intentionally dismantling this crossover district.

40. But intentionally dismantling this district would violate the equal-protection prohibition on intentionally "cracking" communities composed of racial minorities. This too is a direct conflict between the alleged state-law duties Plaintiffs assert (wrongly, in the General Assembly's view) and the dictates of a federal law guaranteeing equality. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) ("And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments."); *see also Reno v. Bossier Parish School Bd*., 520 U. S. 471, 481–482 (1997).

41. The racial composition of CD1 is something the General Assembly, or a court, cannot help but know, and it would be readily apparent that, in drawing it as Plaintiffs demand, the General Assembly would be cracking the black community. The General Assembly would then have a choice: (1) draw it at 45% BVAP or above in violation of Plaintiffs' state-law theory, (2) use racial data with a predominantly racial purpose to achieve a "non-packed" district at 45% BVAP by intentionally excluding white Democratic voters, or (3) draw it at 45% BVAP without that predominantly racial purpose and violate Plaintiffs' state-law theory. Options (1) and (2) violate the Equal Protection Clause; option (3) violates Plaintiffs' state-law theory. That is a "conflict."

42. Under Section 1443(2), these defenses need not be proved as a factual matter at this time. The defenses are colorable and support removal.[2]

[2] The General Assembly acknowledges that a judge in this district earlier this year remanded a removal from Legislative Defendants in the *Lewis* case that was also based upon 28 U.S.C. § 1443(2). *Common Cause v. Lewis*, 358 F.Supp.3d 505 (2019). Legislative Defendants respectfully disagreed with that decision and exercised their right to appeal it. *Common Cause v.*

43. Consistent with 28 U.S.C. § 1446(d), the Legislative Defendants are concurrently filing a Notice of Filing of Notice of Removal with the Clerk of Court for the General Court of Justice, Superior Court Division, Wake County, North Carolina, a copy of which is attached hereto as **Exhibit 5**. Consistent with Local Rule 5.3 a Civil Cover Sheet is attached hereto as **Exhibit 6**, and a Supplemental Removal Cover Sheet, is attached hereto as **Exhibit 7.**

44. Venue is proper in this District under 28 U.S.C. § 1441(a) because this District embraces the place where the removed state court action is pending.

45. Consent from the other Defendants in this action who have not (at least as of yet) sought removal is unnecessary because consent is only required when "a civil action is removed *solely* under section 1441(a)." 28 U.S.C. § 1446(b)(2)(A). That is not the case here.

WHEREFORE, the Legislative Defendants give notice that this action has been removed to the United States District Court for the Eastern District of North Carolina.

Respectfully submitted, this the 14th day of October, 2019.

Lewis, No. 19-1091 (4th Cir. Jan. 24, 2019). As of the date of the instant removal petition, the Fourth Circuit has not yet ruled on the merits of the appeal. Legislative Defendants believe that the district court decision was erroneous for the reasons stated in their appellate briefing and that the instant removal is therefore warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing the existing district court opinion, or establishing new law.

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CERTIFICATE OF SERVICE

It is hereby certified that on this date the foregoing **Notice of Removal** was duly served upon all other parties to this matter by mailing a copy thereof, via Federal Express addressed to:

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