

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.” *Grove 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 State³, 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.

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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