Nos. 19–1091(L), 19–1094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

COMMON CAUSE, et al.,

Plaintiffs–Appellees–Cross-Appellants

v.

DAVID R. LEWIS, et al.;

Defendants–Appellants–Cross-Appellees,

and

THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT et al.,

Defendants.

Appeal from the United States District Court
For the Eastern District of North Carolina
No. 5:18-cv-00589
The Honorable Louise W. Flanagan

Opposition to Motion To Dismiss

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OPPOSITION TO MOTION TO DISMISS

The North Carolina General Assembly's appeal is not moot. Plaintiffs successfully challenged the 2017 North Carolina House and Senate redistricting plans in the North Carolina Superior Court, but a victory for the General Assembly in this appeal would reinstate those 2017 plans for future elections. That is because the 2019 plans enacted in response to the Superior Court's judgment expressly provide that, if that judgment becomes "inoperable" or "ineffective," the 2017 plans will supersede the 2019 plans as the operative plans. If this Court vacates the district court's remand order—as it should—the state court's ruling will be rendered inoperable, and the 2017 plans will spring back into effect by their own terms.

Plaintiffs are wrong that the state court's judgment will remain binding even if the General Assembly is found to have properly removed this case to federal court. Congress twice rejected that outcome. It did so, first, by creating the unique and rarely used civil-rights removal provision at issue here, the "refusal" clause of 28 U.S.C. § 1443(2), and, second, by providing that a remand order rejecting removal under this provision "shall be reviewable by appeal or otherwise," 28 U.S.C. § 1447(d). The sole reported case to address a state-court judgment's validity under these statutes concluded that vacatur of

the remand order would "set aside" the state-court judgment. *Wisconsin v. Glick*, 782 F.2d 670, 672 n.* (7th Cir. 1986). That should be the result here.

For these reasons, and those set forth below, this Court remains capable of affording the General Assembly relief, and the motion to dismiss should be denied. At a minimum, the motion presents an unresolved "difficult issue," *Bryan v. BellSouth Comm., Inc.*, 492 F.3d 231, 241 (4th Cir. 2007), that should carry with the case and decided by the merits panel after oral argument.

ARGUMENT

A case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quotations omitted). Here, the Court can afford relief to the General Assembly by vacating the district court's remand order. That order supplied the jurisdictional foundation for the North Carolina Superior Court's judgment invalidating the 2017 redistricting plans. *See* 28 U.S.C. § 1446(d). A decision by this Court "that the remand was improper would require" that ruling "to be set aside." *Wisconsin v. Glick*, 782 F.2d 670, 672 n.* (7th Cir. 1986). Because this would afford the General Assembly meaningful relief, this case is not moot.

Plaintiffs' attacks on this simple rationale and straightforward result are unpersuasive.

I. The 2019 Redistricting Plans, By Their Own Terms, Will Revert to 2017 Plans if This Appeal Succeeds

Plaintiffs' contention (at 7) that the General Assembly has "enacted new state House and state Senate plans" that "will govern the 2020 elections regardless of the outcome of this appeal" is flat wrong. The 2019 redistricting statute provides:

> The plan adopted by Section 1 of this act is effective for the elections for the year 2020 unless the North Carolina appellate courts reverse or stay the decision of the Wake County Superior Court in 18 CVS 014001 holding unconstitutional G.S. 120-2(a) as it existed prior to the enactment of this act (or the decision is otherwise enjoined, made inoperable, or ineffective), and in any such case the prior version of G.S. 120-2(a) is again effective.

N.C. Sess. Law 2019-220 § 2.[1] Thus, the continued operation of the 2019 plans is contingent on the continued viability of the Superior Court's judgment. If it is "set aside," *Glick*, 782 F.2d at 672 n.*, the ruling will become "inoperable" or "ineffective" under that plain text. The 2019 redistricting statute will automatically be negated, and the 2017 plans will spring back into effect.

Binding precedent holds that this case is not moot. In *Hunt v. Cromartie*, 524 U.S. 541 (1999), the Supreme Court rejected an assertion that an appeal

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[1] https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H1020v4.pdf (last visited Dec. 2, 2019). Notably, the General Assembly recently enacted a new congressional districting plan, and the legislation does *not* contain this savings language.

from an adverse redistricting decision was moot because the new law "provides that the State will revert to the 1997 districting plan upon a favorable decision of this Court." *Id.* at 545 n.1. The facts are the same here, and the same result must follow.

Meanwhile, Plaintiffs rely on *Stephenson v. Bartlett*, No. 02-01041, ECF No. 64 (4th Cir. May 16, 2002), a decision that is unreported and not publicly available on an electronic database. *But see* Fed. R. App. P. 32.1(b) (requiring service of a copy of a cited authority "that is not available in a publicly accessible electronic database"). Plaintiffs fail to identify any analogous savings language in that case. This reliance smacks of desperation. Binding Supreme Court authority that Plaintiffs have failed to bring to this Court's attention directly forecloses Plaintiffs' argument. Their reliance on an unreported and unavailable order is baseless.

Plaintiffs' citation (at 8) to the efforts of "implementing the new plans" is also unavailing because plan implementation and election administration would also revert automatically to the 2017 plans in the event of vacatur in this appeal. The General Assembly expressly provided that the 2019 plans will lose the force of law the moment the Superior Court's judgment becomes "inoperable." Plaintiffs appear to believe that principles governing courts' powers to affirmatively interfere with elections apply here. *See Purcell v.*

Gonzalez, 549 U.S. 1, 5 (2006). But those principles do not apply to a legislature's power to legislate state law. The choice to revert elections to the 2017 plans is a state legislative choice. The General Assembly enacted the provision knowing that some election disruption might result. It is best positioned to respond to any disruption with appropriate legislation. And, in any event, its choice is not subject to equitable limits that bind courts.

II. The State Court's Judgment Will Be Set Aside on a Favorable Ruling in This Case

Plaintiffs are also wrong (at 9) in contending that the North Carolina Superior Court's "final judgment must receive full faith and credit by the federal courts." That final judgment is only as valid as the district court's remand order, and Congress both provided a federal forum for this case and afforded the General Assembly a right to appeal the adverse remand order. If the order is vacated, the state-court judgment will be "set aside." *Glick*, 782 F.2d at 672 n.*.

A. Congress Twice Provided Exceptions to Full Faith and Credit

Plaintiffs' reliance on the full faith and credit statute, 28 U.S.C. § 1738, is unfounded. This is but one act of Congress that can be, and has been, superseded by others. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 468 (1982); *Red Fox v. Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977).

1. Removal in this case was predicated on the "refusal" clause of Section 3 of the Civil Rights Act of 1866, which allows a "defendant" to remove an action brought for the defendant's "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 provides a federal venue for civil-rights defenses, and Congress's choice in providing that venue is entirely inconsistent with binding the federal courts to state judgments in the very same actions.

The Supreme Court recognized as much in *Allen v. McCurry*, 449 U.S. 90 (1980). That decision held that 42 U.S.C. § 1983 does not provide an exception to full faith and credit, but it contrasted that statute with Section 3 of the Civil Rights Act of 1866:

> To the extent that Congress in the post–Civil War period did intend to deny full faith and credit to state-court decisions on constitutional issues, it expressly chose the very different means of postjudgment removal for state court defendants whose civil rights were threatened by biased state courts and who therefore "are denied or cannot enforce [their civil rights] in the courts or judicial tribunals of the State." Act of Apr. 9, 1866, ch. 31, § 3, 14 Stat. 27.

Id. at 99 n.14.[2] The section cited and the sentence quoted contains the "refusal" clause at issue in this case. And the Supreme Court's reasoning that a unique

[2] This provision is reprinted in the addendum of legal authorities to the General Assembly's opening brief in this appeal at ALA2, ECF No. 39-2 at 4.

"removal" provision "for state court defendants" provides an exception to full faith and credit applies in full force here. The "refusal" clause did not simply expand the scope of federal jurisdiction; it also vested the defendant with the right to choose the federal forum over the state forum.

Plaintiffs fail to explain how the "refusal" clause is consistent with full faith and credit—because it is not. By their logic, a state court could order an official to implement a state policy of express segregation in schools, and, so long as the state court beat the federal court of appeals to a judgment, this ruling would bind the federal courts—notwithstanding the right of removal. This use of the statute is not hypothetical. *See, e.g.*, *Bohlander v. Indep. Sch. Dist. No. One of Tulsa Cty., Okla.*, 420 F.2d 693, 694 (10th Cir. 1969) (vacating remand order arising from state-court action seeking to enjoin desegregation of public schools). Plaintiffs' position that Congress in 1866 intended to bind federal courts to judgments from state courts on civil-rights issues in racially sensitive matters is untenable.

2. Congress created a second exception to full faith and credit by providing an express right of appeal over "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443." 28 U.S.C. § 1447(d). That right of appeal is affirmative and mandatory: such a remand order "*shall be reviewable by appeal* or otherwise." *Id.* (emphasis added).

It would be illogical and entirely self-defeating to interpret this express right of appeal from this limited class of remand orders to provide no avenue of relief. That is what Plaintiffs posit in contending that the federal courts are bound by the ultimate determinations of the very "State court from which [the case] was removed." *Id.*

This reading violates the statutory text. Just as statutory review of "discrimination charges previously rejected by state agencies would be pointless if the federal courts were bound by such agency decisions," and thus constitutes an exception to full faith and credit, *Kremer*, 456 U.S. at 470 n.7, the right to appeal "an order remanding a case to the State court from which it was removed," 28 U.S.C. § 1447(d), would be pointless if a state-court judgment issued while the appeal is pending were held to bind the federal courts notwithstanding the outcome of the appeal. *See also Brown v. Felsen*, 442 U.S. 127, 135 (1979) (finding exemption to *res judicata* in bankruptcy proceedings because of "Congress' intention to commit…[those] issues to the jurisdiction of the bankruptcy court); *Daniels v. Allen*, 344 U.S. 443, 500, 506 (1953) (denying *res judicata* in habeas cases because full faith and credit would give "the State court…final say which the Congress, by the Act of 1867, provided it should not have"). Likewise, by Plaintiffs' reasoning, the statute creating the Supreme Court's power to review final state-court judgments on a

petition for certiorari is equally nugatory. *See* 28 U.S.C. § 1257(a). As they would have it, the Supreme Court is bound to give those judgments full faith and credit and thus cannot review them. This is, of course, wrong, and it shows how a right of appeal cannot coexist with the full-faith-and-credit theory Plaintiffs espouse.

Plaintiffs' reading also violates the statutory structure. The removal provisions divest the state court from which the action was removed of jurisdiction, 28 U.S.C. § 1446(d), and condition the return of jurisdiction on an "order of remand," *id.* § 1447(c). It is that very "order remanding a case to the State court from which it was removed" that Congress provided "shall be reviewable by appeal or otherwise." *Id.* § 1447(d). That express right of review renders the remand order subject to vacatur in the court of appeals, which, in turn, divests the state court of jurisdiction, and "the parties [are] forced to restart in federal court." *Sykes v. Texas Air Corp.*, 834 F.2d 488, 491 (5th Cir. 1987). Nothing in the text or structure suggests that Congress somehow intended the state-court judgment to continue to bind the federal courts even if the remand order is vacated, and that notion is absolutely inconsistent with an express right of appeal.

B. A Favorable Ruling Would Negate the State Court's Jurisdiction

Plaintiffs' motion fails for the independent reason that full faith and credit does not apply to a judgment that "was entered without jurisdiction." *Midessa Television Co. v. Motion Pictures for Television, Inc.*, 290 F.2d 203, 204 (5th Cir. 1961). If this Court holds that remand was improper, that would deprive the state-court judgment of its jurisdictional foundation. "In other words, removal divests the state court of jurisdiction and precludes any state-court/federal-court conflict." *Wolf v. Deutsche Bank Nat'l Tr. Co. for Am. Home Mortg. Inv. Tr. 2007-1*, 745 F. App'x 205, 208 (5th Cir. 2018) (quotation marks omitted). The right of appeal over the remand order necessarily allows this Court to rule on whether remand was proper, and the question presented here is whether the state court had jurisdiction in the first instance. A ruling that it did not would deprive its judgment of any entitlement to full faith and credit.

Plaintiffs' citation (at 10) to the statutory language that a state court may "proceed with such case" after the initial remand order is mailed to the state court, 28 U.S.C. § 1447(c), again ignores the right to appeal the remand order. This language simply provides that there is no automatic stay of the remand order; it does not immunize it from vacatur. The statute "does not condition appellate jurisdiction on whether the district court stays its order of remand." *BP Am., Inc. v. Oklahoma ex rel. Edmondson*, 613 F.3d 1029, 1033 (10th Cir.

2010) (Gorsuch, J.); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008) ("Congress did not require a defendant to seek a stay" to obtain appellate jurisdiction over a remand order). Nor can the statute plausibly be read to confer appellate jurisdiction with one hand and deprive the appeals courts' power to issue relief with the other. Rather, if the state court proceeds to try the case to a judgment, it does so at its own (and the parties') risk that the proceedings will have been for naught—just as any litigant who takes action in reliance on a judgment subject to review assumes the risk of reversal or vacatur that, in turn, compromises the litigant's basis of reliance.

Plaintiffs, in sum, ask the Court "to take [its] editing pencils to what Congress has written." *BP Am., Inc.*, 613 F.3d at 1033. Section 1447(d) does not say, "shall be reviewable by appeal or otherwise *unless or until the state court issues a decision on remand*." It simply provides: "shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d); *see also BP Am., Inc.*, 613 F.3d at 1033. (rejecting similar effort to rewrite appeal provision). The right of appeal necessarily includes the right to obtain appellate review and relief from the order subject to review.

C. Precedent Supports the General Assembly's Position

1. There appears to be only one reported federal appellate decision on the impact of an appellate reversal of a remand order in a Section 1443

case, and it supports the General Assembly's position. The Seventh Circuit in *Wisconsin v. Glick*, 782 F.2d 670 (7th Cir. 1986), held that it had jurisdiction over an appeal from a remand order arising from a state criminal prosecution even though the removing party "has been tried and convicted in the state court while the cases were pending here." *Id.* at 672 n.* It explained that the "statute permits appellate review when the removal was based on § 1443," and therefore "a decision that the remand was improper would require [the removing party's] conviction to be set aside." *Id.* It concluded that the case was not moot and it had jurisdiction even though it affirmed the remand order and, indeed, found the reliance on Section 1443 to have "no conceivable foundation." *Id.* at 674.

Plaintiffs do not address *Glick* and cite no reported decision involving removal under Section 1443 or a provision subject to an express right of appeal. Plaintiffs' request for a circuit split from a motions panel is troubling.

2. Equally troubling is their mischaracterization of this Court's decision in *Bryan v. BellSouth Communications, Inc.*, 492 F.3d 231 (4th Cir. 2007), which they say (at 11) "held…that state court final judgments entered on remand must receive full faith and credit by federal courts, even if an appellate court later determines that the remand was improper." That is false. *Bryan* stated: "*We need not…resolve this difficult issue*." 492 F.3d at 241 (emphasis

added). Resolution was not necessary because the state court did not reach a final judgment, and the question of full faith and credit was hypothetical and merited discussion only because the lower court commented on it. *See id.* at 239–42. A court obviously cannot have "held" something that it expressly did not "resolve," and Plaintiffs' misstatement is inexplicable.

It is true that *Bryan* was skeptical of the theory that appellate vacatur of a remand order nullifies a state-court judgment issued between the (erroneous) remand and appellate decision, but it went only so far as to state that the "nullity argument gives us pause." *Id.* at 241. It did not reject the position or even rule on it. Also, *Bryan* did not consider the "refusal" clause of 28 U.S.C. § 1443(2) or the express provision for appellate review in this unique context. (See above § II.B.)

Nor could it have because there was no Section 1443 removal asserted and no unique right of appeal. The case involved discretionary remand in a class-action case, evaded the bar on review of 28 U.S.C. § 1447(d), and thus slipped into the residual appellate jurisdiction of 28 U.S.C. § 1291 under the doctrine of *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996). *See Bryan v. BellSouth Comm., Inc.*, 377 F.3d 424, 428 (4th Cir. 2004). Section 1291, in turn, merely provides that "courts of appeals…shall have jurisdiction of appeals from all final decisions of the district courts…." 28 U.S.C. § 1291. This

presents a less compelling case for an exception to the full faith and credit statute than exists here. In any event, *Bryan* did not consider whether it created such an exception. Instead, its dictum addressed the impact of vacatur on state-court jurisdiction.

3. Even on that issue *Bryan* was unpersuasive. *Bryan* posited that, during the pendency of an appeal of a remand order, "state and federal courts have concurrent jurisdiction." 492 F.3d at 241. But the removal statute does not provide for concurrent jurisdiction or treat removed cases as parallel proceedings. It provides, instead, that *either* the state court has jurisdiction *or* the federal court has it. 28 U.S.C. §§ 1446(d), 1447(d). Nothing in the removal statute suggests that *both* might have jurisdiction to rule on the case, and the statute makes every effort to avoid that befuddling occasion. Consequently, the right of appeal is necessarily the right to an appellate ruling on *which* court—state *or* federal—had jurisdiction all along.

Bryan did not address the text or structure of the removal statute—let alone its unique facet of an express appeal right in this rare class of cases—but instead cited the "filed-rate doctrine," which the Supreme Court inferred from the Federal Power Act and which applies to federal administrative reasonable-rate decisions under that Act. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986) (cited in *Bryan*, 492 F.3d at 241). Reading the removal

statute by reference to the Federal Power Act is an odd approach to this question, since the statutes have little to nothing in common. And it is questionable whether *Bryan* even interpreted the filed-rate doctrine correctly. It provides that state jurisdiction over electric rates is preempted and gives a federal administrative authority "exclusive jurisdiction over" these rates. *Id.* at 966. *Bryan*'s reference to "concurrent jurisdiction" is, to say the least, hard to follow. 492 F.3d at 241.

What's more, *Bryan* appreciated the cogency behind the "nullity" position even though it also expressed skepticism. It appreciated, for example, that "the vacatur of the decision returns the parties to their original positions, before the now-vacated order was issued." *Id.* It also appreciated that a federal ruling on the question of jurisdiction may "result in the nullification of the proceedings in state court by virtue of the Supremacy Clause." *Id.* at 241 n.5. But it ultimately set aside those points in favor of a generic concern for amorphous "issues of comity," opining that the nullity theory "would perhaps be giving the state court system less respect than it is due." *Id.* at 241. But the question of "respect" is ultimately one for Congress, and *Bryan* had little to say even of the statutory issues implicated (indirectly) in the case before it. It said nothing of the statutory issues here. This dictum is not controlling many times

over, and it provides no basis for any mootness ruling here, let alone a *summary* ruling.

4. Plaintiffs' other cited authorities are even less relevant.

Dudley-Barton v. Service Corp. International, 653 F.3d 1151 (10th Cir. 2011), said nothing about full faith and credit; it simply held that "when a plaintiff voluntarily dismisses its claims in state court, the pending federal appeal of the district court's order of remand filed pursuant to 28 U.S.C. § 1453(c) becomes moot." *Id.* at 1152. There was no voluntary dismissal in state court here. As discussed below (§ III), the General Assembly continued to press its defenses until the North Carolina Superior Court rejected them.

Likewise, although *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987), does address full faith and credit, it does so only in one sentence of unconsidered dictum. *Id.* at 490. It did not consider the text or structure of Section 1447(d) or any other removal provision, but rather interpreted bankruptcy removal which is subject to an express *prohibition* on appeals. *See id.* at 489. *Sykes* also had no occasion to consider whether a right to appeal creates a full faith and credit exemption or whether vacatur of the remand order deprives the state court of jurisdiction, and its one sentence should not be deemed persuasive on either point.

Meanwhile, the mootness ruling in *Virginia v. Banks*, 498 F. App'x 229 (4th Cir. 2012) (unreported), turned on the fact that the circuit court would have directed the district court to remand to the state court for further state criminal proceedings, but the party who removed had already been tried, convicted, and "*served his sentence*." *Id.* at 230 (emphasis added). Accordingly, "there [was] nothing to remand," *Id.* at 231, and, given the defendant failed to properly challenge his convictions and already served his sentence, there was "no remedy [the circuit] court or the district court [could] provide under these circumstances." *Id.* There is no criminal sentence or service here or anything else resembling the facts in *Banks*.

Perhaps Plaintiffs' closest cases are two unreported cases from the Ninth Circuit, *Nevada v. Hobson*, 934 F.2d 324 (9th Cir. 1991) (unreported), and *California v. Clay*, 709 F. App'x 466 (9th Cir. 2018) (unreported), but they too fall well short of the mark. Neither addresses the full-faith-and-credit issues discussed above in a meaningful way, and *Clay* involved a "plea agreement" that "waiv[ed]" the removing party's "right to removal and her right to raise defenses to the charges against her in state court." 709 F. App'x at 467. These decisions provide no basis for ignoring the Supreme Court's word on the subject, the language of two applicable statutes, and Congress's clear will.

D. The Law-of-the-Case Doctrine Is Inapplicable for the Same Reasons Full Faith and Credit Does Not Apply

Plaintiffs' law-of-the case argument (at 13–15) falls with their full-faith-and-credit argument and adds nothing to it. As explained above (§ II.A–C), Congress provided a right of appeal to determine whether remand was proper. If this Court vacates the district court's remand order, the state-court judgment will not merit full faith and credit (because Congress created two exceptions to full faith and credit) and will have no jurisdictional foundation (because vacatur would mean the federal court had jurisdiction all along). For the same reasons, the law-of-the-case doctrine cannot apply here any more than it binds a higher court with proper jurisdiction to a lower court's ruling that is contingent on affirmance on appeal. *See Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (observing that, "of course," a lower-court ruling does not bind the appellate tribunal).

Indeed, the law-of-the-case doctrine is federal common law that has been displaced by Sections 1443 and 1447(d). As discussed, a right to an appeal is entirely inconsistent with binding the appellate court to a decision predicated on the ruling under review, so 1447(d) displaces this doctrine. And, like full faith and credit, the doctrine is displaced even more directly by Section 1443, which creates a federal forum for these federal defenses. "[T]he 'refusal' clause does not make removal turn on whether the right asserted can be vindicated in

the state court." *Bridgeport Ed. Ass'n v. Zinner*, 415 F. Supp. 715, 723 (D. Conn. 1976). Congress afforded a right to remove to allow federal courts to resolve the removal issues, and it absolutely contravenes the "refusal" clause to bind a federal court to a state-court ruling issued in the face of a valid removal.

III. The Refusal Clause Remains a Sound Basis for Removal

Plaintiffs' final argument, that the "refusal" clause elements are no longer met, is as unavailing as their others. The General Assembly continues to object to the Superior Court's ruling, and its subsequent compliance does not negate that objection. The General Assembly advanced its defenses before the Superior Court, *see* Ex. A, Pre-Trial Brief 40–45, and obtained an adverse ruling on the merits, Pls' MTD Ex. D at 343–346, ECF No. 71-2 at 418–421. At no point did the General Assembly abandon the defenses.

The General Assembly's ultimate compliance with the Superior Court's order is irrelevant. The fact that a party "merely submitted to perform the judgment of the court" does not deprive the party's "right to seek reversal of that judgment by writ of error or appeal." *Mancusi v. Stubbs*, 408 U.S. 204, 207 (1972). Because a stay is not automatic, even on appeal of a Section 1443 remand order, "further state proceedings are not avoidable and participating therein cannot constitute an involuntary waiver of appeal." *Fosdick v. Dunwoody*, 420 F.2d 1140, 1141 n.1 (1st Cir. 1970). The fact that the General

Assembly has since complied with the Superior Court's order, rather than submit to seizure of its legislative authority in a court-led redistricting, is neither a waiver of the right to remove nor an abandonment of its basis of refusal. Again, the General Assembly conditioned its new redistricting legislation on the Superior Court's judgment remaining valid notwithstanding this appeal (see above § I), establishing yet again its protest of the judgment.

Plaintiffs erroneously read the "refusal" clause to require a defendant to place all eggs in that basket and, on failing to remove the case, continue to fight to the point of contempt or whatever punishment may apply (here, the state court's imposition of its own redistricting plan). Plaintiffs cite nothing for this proposition, and it is inconsistent with the allowance for pleading of alternative theories and defenses. Naturally, in whatever forum adjudicates it, a colorable defense may ultimately fail. But, in providing a federal forum for the defense, Congress did not require removing defendants to commit to violating any and all adverse court orders en route to finality. What matters here is that the General Assembly continued to press its defenses before the Superior Court, and the Superior Court (as Plaintiffs emphasize) ruled against

the General Assembly on them. That was sufficient to preserve its refusal and its right to appeal. *Mancusi*, 408 U.S. at 207; *Fosdick*, 420 F.2d at 1141 n.1.[3]

For these reasons, Plaintiffs are also wrong (at 16–17) that the case is moot because the General Assembly "waived [its] argument" before the Superior Court. As noted, the General Assembly did not waive this argument; it pressed the argument until the Superior Court *rejected it*. Only then did the General Assembly state that it lacked "affirmative evidence" of the type the Superior Court required. Pls' MTD Ex. A at 25, ECF No. 71-2 at 26. The General Assembly *also* stated that it "disagrees with the premises of this portion of the decree," and it objected to the "very high burden on the General Assembly's options for attempting to comply with the Voting Rights Act." *Id.* A federal court would not have imposed that high of a burden, and, had the right standard been applied, the result would have been different.

But this only underscores the General Assembly's live (and valid) claim to a federal forum. Like a state court in the segregation era that might impose any number of obstacles to implementing federal equal-protection law, the Superior Court here treated federal law as a non-factor and something the

[3] This case is therefore not like a case where, in the state court, the defendant abandons the case by dropping or settling it. *See, e.g.*, *Clay*, 709 F. App'x at 467; *Dudley-Barton v. Serv. Corp. Int'l*, 653 F.3d at 1152.

General Assembly should have to satisfy under the strictest state-court scrutiny. *Id.* at 25 (objecting to the Superior Court's "belief that no Voting Rights Act considerations are raised in this remedial proceeding"). A federal court would not have imposed these burdens (or, at least, the General Assembly is entitled in this appeal to argue as much), and that is why Congress created a right of removal in this unique class of cases.

CONCLUSION

The Court should deny Plaintiffs' motion to dismiss. Alternatively, if the Court finds any modicum of merit in their contentions, it should defer a decision to the merits panel for resolution after oral argument. As noted, the issues Plaintiffs raise are issues of first impression, and a reported decision of this Court calls them "difficult." *Bryan*, 492 F.3d at 241. A summary dismissal on issues of first impression would be improper.

DATE: December 2, 2019

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Local Rule 26.1, DAVID R. LEWIS, Senior Chairman of the North Carolina House Select Committee on Redistricting; RALPH E. HISE, JR., Chairman of the North Carolina Senate Committee on Redistricting; Timothy K. Moore, Speaker of the North Carolina House of Representatives; PHILIP E. BERGER President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; Defendants–Appellants–Cross-Appellees, make the following disclosures:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held

entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (*amici curiae* do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

No.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

DATE: December 2, 2019

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CERTIFICATE OF SERVICE

I certify that on December 2, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing corrected motion complies with the type-volume limitation in FRAP 27(d)(2)(A). According to Microsoft Word, the motion contains 5,122 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14 point size.

DATE: December 2, 2019

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