IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 19–1091(L), 19-1094

COMMON CAUSE; NORTH CAROLINA DEMOCRATIC PARTY; PAULA ANN CHAPMAN; HOWARD DUBOSE; GEORGE DAVID GAUCK; JAMES MACKIN NESBIT; DWIGHT JORDAN; JOSEPH THOMAS GATES; MARK S. PETERS; PAMELA MORTON; VIRGINIA WALTERS BRIEN; JOHN MARK TURNER; LEON CHARLES SCHALLER; REBECCA HARPER; LESLEY BROOK WISCHMANN; DAVID DWIGHT BROWN; AMY CLARE OSEROFF; KRISTIN PARKER JACKSON; JOHN BALLA; REBECCA JOHNSON; AARON WOLFF; MARY ANN PEDEN-COVIELLO; KAREN SUE HOLBROOK; KATHLEEN BARNES,

Plaintiffs–Appellees–Cross-Appellants

v.

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,

and

THE NORTH CAROLINA STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDY PENRY, Chairman of the North Carolina State Board of Elections and Ethics Enforcement; JOSHUA MALCOLM, Vice-Chair of the North Carolina State Board of Elections and Ethics Enforcement; KEN RAYMOND, Secretary of the North Carolina State Board of Elections and Ethics Enforcement; STELLA ANDERSON, DAMON CIRCOSTA, STACY EGGERS, IV, JAY HEMPHILL, VALERIE JOHNSON, JOHN LEWIS, and ROBERT CORDLE, Member of the North Carolina State Board of Elections and Ethics Enforcement,

Defendants.

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

Appellants' Motion To Expedite

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1091(L); 19-1094 Caption: Common Cause et al. v. Lewis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Philip E. Berger
(name of party/amicus)

who is a Defendant/Appellant/Cross-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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(a)(2)(B))? ☐YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑ NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Richard B. Raile Date: Jan. 28, 2019

Counsel for: Defendants/Appellants/Cross-Appellees

CERTIFICATE OF SERVICE

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I certify that on Jan. 28, 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:

/s/ Richard B. Raile
(signature)

Jan. 28, 2019
(date)

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No. 19-1091(L); 19-1094 Caption: Common Cause et al. v. Lewis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ralph E. Hise, Jr.
(name of party/amicus)

who is a Defendant/Appellant/Cross-Appellee, makes the following disclosure:
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Counsel for: Defendants/Appellants/Cross-Appellees

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No. 19-1091(L); 19-1094 Caption: Common Cause et al. v. Lewis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

David R. Lewis
(name of party/amicus)

who is a Defendant/Appellant/Cross-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Richard B. Raile Date: Jan. 28, 2019

Counsel for: Defendants/Appellants/Cross-Appellees

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No. 19-1091(L); 19-1094 Caption: Common Cause et al. v. Lewis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Timothy K. Moore
(name of party/amicus)

who is a Defendant/Appellant/Cross-Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Richard B. Raile Date: Jan. 28, 2019

Counsel for: Defendants/Appellants/Cross-Appellees

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No. 19-1091(L); 19-1094 Caption: Common Cause et al. v. Lewis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

State of North Carolina
(name of party/amicus)

who is a Defendant/Appellant/Cross-Appellee, makes the following disclosure:
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Signature: /s/ Richard B. Raile Date: Jan. 28, 2019

Counsel for: Defendants/Appellants/Cross-Appellees

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Jan. 28, 2019
(date)

APPELLANTS' MOTION TO EXPEDITE

Pursuant to FRAP 31(a)(2) and Circuit Local Rule 12(c), the Defendants-Appellants/Cross-Appellees ("Appellants")—North Carolina legislative leaders who represent the General Assembly and (per statute) the State of North Carolina—respectfully move this Court for an order expediting this appeal.[1] The Plaintiffs-Appellees/Cross-Appellants ("Plaintiffs" or "Appellees") consent to this motion and to the proposed expedited briefing schedule.

This case presents an unusual scenario in which a federal court's order remanding an action to state court is immediately appealable. *See* 28 U.S.C. § 1447(d). But, because the lower court's remand order is not stayed and the district court believes it lacks jurisdiction even to consider a stay motion, the underlying state-court action will proceed parallel to this appeal. As a result, if this Court concludes that remand was improper—a position the district court held has an objectively reasonable basis—then the costs of that state-court action will have been for nothing. The case will begin anew in federal court.

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[1] Appellants are the Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Senior Chairman of the North Carolina House Select Committee on Redistricting, and the Chairman of the North Carolina Senate Committee on Redistricting. Under state law, these officials have authority to represent North Carolina and to hire counsel of their choice for that purpose. *See* N.C. Gen. Stat. § 1-72.2.

For these reasons, and those articulated more fully below, expeditious consideration of this appeal is necessary to preserve this Court's practical ability to rule on questions expressly within its jurisdiction. The Court therefore should grant the motion and adopt the proposed briefing schedule recommended below.

FACTUAL BACKGROUND

On November 19, 2018, Plaintiffs—North Carolina residents and organizations—filed this case in North Carolina Superior Court, challenging state House and Senate redistricting plans drawn over a year earlier in September 2017. Those 2017 plans were drawn and enacted under federal-court supervision to remedy violations of the Equal Protection Clause. *See Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018). Indeed, the federal court chose to "adopt the…remedial districts in the 2017 Plans for use in future elections in the State." *Id.* at 458; *see also id.* ("We direct Defendants to implement the Special Master's Recommended Plans.").

Plaintiffs' action challenges those very remedial districts. It seeks an order forbidding North Carolina from using them in further elections and mandating that the General Assembly draw new districts—or else cede its sovereign redistricting power to the state court to create and implement new districts in its stead. Plaintiffs' complaint states theories under the North

Carolina Constitution, which (they claim) guarantees each political party an equal right to translate votes for its legislative candidates into seats in the legislature.

The Speaker of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Senior Chairman of the North Carolina House Select Committee on Redistricting, and the Chairman of the North Carolina Senate Committee on Redistricting were all named as defendants, and they filed a notice of removal on their behalf and on behalf of the State of North Carolina, which state law authorizes them to represent in litigation. *See* N.C. Gen. Stat. § 1-72.2. Their basis of removal was the "refusal" clause of 28 U.S.C. § 1443(2).[2] That provision authorizes removal of state-court actions, including those founded solely in state law, that seek to impose state-law duties "inconsistent" with federal law "providing for equal rights." *Id.*; *see generally White v. Wellington*, 627 F.2d 582, 587 (2d Cir. 1980).

Appellants contended that Plaintiffs' proposed state-law redistricting duties conflict with the Equal Protection Clause and the Voting Rights Act in several ways. For one thing, Plaintiffs demand that the General Assembly

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[2] They also removed under 28 U.S.C. § 1441(a), but a remand order rejecting removal under that statute is not immediately appealable, so Appellants will not press this basis for removal in this proceeding.

depart from a map directly imposed by a federal court implementing the Equal Protection Clause. *See Alonzo v. City of Corpus Christi*, 68 F.3d 944, 946 (5th Cir. 1995) (upholding removal where plaintiffs sought state-court-mandated departure from a federal-court-ordered redistricting plan). For another, Plaintiffs' demand for representatives of their preferred political party (the Democratic Party) to win more seats would require dismantling minority crossover districts, given the "inextricable link between race and politics in North Carolina." *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). Dismantling minority crossover districts on purpose would violate the Fourteenth and Fifteenth Amendments; doing so even unintentionally would expose North Carolina to Voting Rights Act claims, since the existing minority crossover districts currently shield the state from Section 2 claims that otherwise might be viable given "that racially polarized voting between African Americans and whites remains prevalent in North Carolina." *Id.* at 225.

Plaintiffs filed an emergency motion to remand and for attorneys' fees, and the district court granted that motion in part. It agreed with Plaintiffs both that the asserted conflicts between Plaintiffs' state-law theories and federal equal-protection law are speculative—notwithstanding the plain-as-day demand for departure from the federal-court-ordered plans—and that

Appellants, as legislative officers, do not qualify as state officials capable of "refusing to do any act" under Section 1443(2)—notwithstanding the breadth of the phrase "any act" and state statutes inserting these officials into the enforcement process and authorizing them to represent the State itself. *See, e.g.*, N.C. Gen. Stat. § 120-32.6. The district court therefore ordered the case to be remanded to state court.

The district court, however, rejected Plaintiffs' motion for attorneys' fees. The court found that Appellants "did not lack an objectively reasonable basis for seeking removal" and observed that their "removal petition sets forth in detail their grounds for removal and they have comprehensively briefed the issues arising from their removal, including with reference to a wide range of case law." Mem. Op. at 17, *Common Cause v. Lewis*, No. 5:18-CV-589 (E.D.N.C. Jan. 7, 2019), 2019 WL 123879, at *7, ECF No. 48. It found that Appellants "exercised their rights under that law to assert grounds for removal to this court." *Id.*

The day after the remand order issued, Appellants moved the court for an order confirming that the 30-day automatic stay of Rule 62(a) was applicable, affording time for Appellants to seek a stay (if they so elected). *See, e.g.*, *Northrop Grumman Tech. Servs., Inc. v. DynCorp Int'l LLC*, 2016 WL 3180775, at *1 (E.D. Va. June 7, 2016) (concluding that the 30-day automatic

stay period applies to remand orders from which an appeal may be taken). The district court denied the motion because, prior to Appellants' motion, the clerk of court had already mailed a certified copy of the remand order to the state court, transferring jurisdiction to that court. Order at 4–6, *Common Cause v. Lewis*, No. 5:18-CV-589-FL (E.D.N.C. Jan. 17, 2019), 2019 WL 248881, at *1–3, ECF No. 53. The court concluded from this that it lacked jurisdiction to address whether a stay is in place (or might be instituted).

On January 22, Appellants filed a timely notice of appeal. Notice of Appeal, *Common Cause*, No. 5:18-CV-589-FL, ECF No. 54. The Court has jurisdiction under 28 U.S.C. § 1447(d), which expressly states that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

On January 23, Plaintiffs filed a notice of cross-appeal, challenging the district court's denial of attorneys' fees. Notice of Cross-appeal, *Common Cause*, No. 5:18-CV-589-FL, ECF No. 56.

ARGUMENT

This is among the rare cases where a federal court's order remanding an action to state court triggers an immediate right of appeal. Just as Appellants "exercised their rights under the law to assert grounds for removal" in the district court, Mem. Op. at 17, *Common* Cause, No. 5:18-CV-589, 2019 WL

123879, at *7, ECF No. 48, they intend to exercise their rights to assert those ground for removal in this Court. *See* 28 U.S.C. § 1447(d). Nevertheless, the lower court's remand order is not stayed, and the district court believes it lacks jurisdiction even to consider a stay motion.[3] Accordingly, the underlying state-court action will proceed parallel to this appeal.

That parallel track poses a problem from the standpoint of judicial and litigation economy because, unlike a scenario where the first of two parallel proceedings to finish settles both actions under the preclusion doctrine, this Court's ruling will determine whether the state court has a right to proceed at all. If this Court concludes that remand was improper—a position the court below conceded has an objectively reasonable basis—then the state-court action must halt at whatever stage it reaches, and the case must return immediately to federal court to begin anew. This Court therefore should move quickly to resolve this case to ensure that its future adjudication of this matter imposes the least cost possible to the parties and the state court.

The risk that the state proceeding will reach an advanced phase before this Court rules is especially severe because Plaintiffs have moved to expedite

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[3] Appellants, to be sure, disagree with the district court's jurisdictional ruling and have challenged it expressly in their notice of appeal. The ruling, however, would add an additional layer of legal issues to be resolved before Appellants could establish the stay factors.

the state-court action. Although the state court has yet to rule on that request or otherwise set case deadlines, it is possible that the case will go to trial this spring or summer. By comparison, the ordinary course of proceedings in this Court would render this case ripe for argument and adjudication sometime in autumn, 2019, if not later. By then, the parallel state action may be at the post-judgment or appellate stage. That would prejudice Appellant's right to assert legitimate bases of removal to this Court, which has a statutory right and duty to consider those bases, and this Court's ability to adjudicate issues within its jurisdiction—which it has "a virtually unflagging obligation to exercise." *Gannett Co. v. Clark Const. Grp., Inc.*, 286 F.3d 737, 741 (4th Cir. 2002) (quotation and edit marks omitted).

Expediting this case is unlikely to impose a significant burden on the parties or the Court. This case was resolved on legal grounds with no record materials and no hearing. The appendices will not be extensive and can be prepared in short order, and it is unnecessary to order a transcript. Further, in the district court, the parties "comprehensively briefed the issues arising from their removal, including with reference to a wide range of case law," Mem. Op. at 17, *Common* Cause, No. 5:18-CV-589, 2019 WL 123879, at *7, ECF No. 48, so they (or at least Appellants) are prepared to provide appellate briefing on short notice.

Accordingly, Appellants propose that the following briefing schedule, or a substantially similar one, will be appropriate for this case:

February 18: Defendants–Appellants–Cross-Appellees' Principal Brief due;

March 11: Plaintiffs–Appellees–Cross-Appellants' principal and response brief due;

March 25: Defendants–Appellants–Cross-Appellees' response and reply Brief due;

April 8: Plaintiffs–Appellees–Cross-Appellants' reply brief due.

Pursuant to Circuit Local Rule 27(a), counsel for Appellants contacted counsel for Appellees in advance of making this motion and are informed that Appellees consent to the relief requested, including the proposed timeline.[4] Since this is a time-sensitive motion, Appellants respectfully request that any responsive brief be ordered due on or before Friday, February 1.

CONCLUSION

For the foregoing reasons, the Court should expedite this case and order the briefing schedule recommended above.

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[4] In negotiating over this issue, Appellants agreed not to rely on this expedition as a basis to stay, delay or otherwise lengthen the schedule in the state court proceedings. However, if the state court or one of its members *sua sponte* raises the question whether the existence of the Fourth Circuit proceeding should be a basis to stay, delay, or otherwise alter the schedule in the state court proceedings, Appellants did not waive the right to any position in response such a query initiated by the state court.

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DATE: January 28, 2019

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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 2,031 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14 point size.

DATE: January 28, 2019

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