No. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

NORTH CAROLINA STATE	)	
CONFERENCE OF THE	)	
NATIONAL ASSOCIATION FOR	)	
THE ADVANCEMENT OF	)	
COLORED PEOPLE,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Wake County
	)	COA19-384
TIM MOORE, in his official	)	
capacity, PHILIP BERGER,	)	
in his official capacity,	)	
	)	
Defendants-Appellants.	)	

****

BRIEF OF DEMOCRACY NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

****

INDEX

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 3

I. THE COURT OF APPEALS ERRED IN SEVERAL SIGNIFICANT RESPECTS 4

A. The Opinion incorrectly describes the definitions and legality of gerrymandering and the districts at issue in this case 4

B. The Opinion ignores strong evidence that the federal panel in *Covington*, the plaintiffs, and the United States Supreme Court deemed the 2017-18 Session of the General Assembly to have lost legitimacy 11

II. THE OPINION INCORRECTLY CHARACTERIZES THE LEGALITY OF PARTISAN GERRYMANDERING 14

A. The Supreme Court did not declare partisan gerrymandering is legal 15

B. Partisan gerrymandering violates the North Carolina Constitution 21

III. MULTIPLE STATES HAVE EMPHASIZED THE IMPORTANCE OF FREE AND EQUAL ELECTIONS UNDER THEIR STATE CONSTITUTIONS 25

IV. PARTISAN GERRYMANDERING IS AN UNPOPULAR PRACTICE THAT RESULTS IN POLITICAL ENTRENCHMENT 30

A. Political parties and the public reject partisan gerrymandering. 31

B. Other states have begun to outlaw partisan gerrymandering..... 33

C. Partisan gerrymandering allows political entrenchment 34

CONCLUSION.. 37

CERTIFICATE OF SERVICE 38

TABLE OF AUTHORITIES

Cases **Page(s)**

Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n
576 U.S. 787 (2015) 4, 21, 30, 34, 36

Beer v. United States,
425 U.S. 130 (1976) 10

Bethune-Hill v. Va. State Bd. of Elections,
137 S. Ct. 788 (2017) 4

Bush v. Vera,
517 U.S. 952 (1996) 6

Common Cause v. Lewis,
No. 18CVS014001, 2019 N.C. Super. LEXIS 56
(N.C. Super. Ct. Sept. 3, 2019) 15, 22-26, 29

Covington v. North Carolina,
283 F. Supp. 3d 410 (2018) 13

Covington v. North Carolina,
267 F. Supp. 3d 664 (M.D.N.C. 2017) 3, 12

Covington v. North Carolina,
316 F.R.D. 117 (M.D.N.C. 2016) 6, 8-12

Davis v. Bandemer,
478 U.S. 109 (1986) 17

Gill v. Whitford,
138 S. Ct. 1916 (2018) 1, 18-19

Jeness v. Fortson,
403 U.S. 431 (1971) 34, 36

Johnson v. DeGrandy,
512 U.S. 997 (1994) 9

League of Women Voters of Pa. v. Pennsylvania,
178 A.3d 737 (Pa. 2018) 27-28

Miller v. Johnson,
515 U.S. 900 (1995) 10

NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016) 35-36

N.C. State Conf. of the NAACP v. Moore,
No. COA19-384, slip op. (N.C. Ct. App. Sept. 15, 2020) .... *passim*

N.C. State Conf. of the NAACP v. Moore,
No. 18CVS9806, 2019 WL 2331258 (N.C. Super. Ct. Feb. 22, 2019) 29

North Carolina v. Covington,
137 S. Ct. 1624 (2017) 12, 14

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) .... *passim*

Shaw v. Hunt,
517 U.S. 899 (1996) 6

Shaw v. Reno,
509 U.S. 630 (1993) 11

Stephenson v. Bartlett,
355 N.C. 354, 562 S.E.2d 377 (2002) 23, 29

Thornburg v. Gingles,
478 U.S. 30 (1986) 7

Vieth v. Jubelirer,
541 U.S. 267 (2004) 16-18

Vieth v. Pennsylvania,
188 F. Supp. 2d 532 (M.D. Pa. 2002) 16

Voinovich v. Quilter,
507 U.S. 146 (1993) 12

Weinschenk v. State,
203 S.W.3d 201 (Mo. 2006) 26-27

Wise v. Lipscomb,
437 U.S. 535 (1978) 12

Constitutional Provisions **Page**

Colo. Const. art. V, §§ 44, 46 33

Fla. Const. art. III, § 20(a) 33

Mich. Const. art. IV, § 6 33

Mo. Const. art. III, § 3 33

N.C. Const. art. I, § 10 28

N.C. Const. art. I, § 19 29

N.C. Const. art. II, §§ 8, 9 34

Statute **Page**

Del. Code Ann. Tit. xxix, § 804 (2017) 34

Iowa Code § 42.4(5) (2016) 33-34

52 U.S.C. § 10304(b) 9-10

Other Authorities **Page**

Andrew Chin et al., *The Signature of Gerrymandering in Rucho v. Common Cause*, 70 S.C. L. Rev. 1241 (2019) 19

Alan S. Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution*, 56 HARV. J. ON LEGIS. 1 (2019) 31, 32

Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L.J. 400 (2015) 35

Democratic National Convention, *Platform of the Democratic Party* (2020), https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf 31

Kyle Keraga, *Drawing the First Line: A First Amendment Framework for Partisan Gerrymandering in the Wake of Rucho v. Common Cause*, 79 Md. L. Rev. 798 (2020) 30

More states to use redistricting reforms after 2020 census, The Associated Press (March 5, 2020), https://apnews.com/article/15945f8bd618d3c749e7c56d3a572d71 33

Redistricting Commissions: Congressional Plans, Nat'l Conf. St. Legislatures (Apr. 18, 2019), http://www.ncsl.org/research/redistricting/redistricting-commissions-congressionalplans.aspx 30

Republican National Convention, *Platform of the Republican Party* (2020), https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf............. 31

Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering, Campaign Legal Ctr. (Sept. 11, 2017), https://campaignlegal.org/press-releases/supermajority-americanswant-supreme-court-limit-partisan-gerrymandering/ 32

The Gerry-mander, a New Species of Monster, which Monster, which Appeared in Essex South District in Jan. 1812,
Bos. Gazette (Mar. 16, 1912) 32

No. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
Plaintiff-Appellee,	)	
v.	)	Wake County COA19-384
TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity,	)	
Defendants-Appellants.	)	

****

BRIEF OF DEMOCRACY NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF

****

INTRODUCTION[1]

Nothing is more contrary to democracy than partisan gerrymandering that results in political entrenchment, for then politicians keep themselves in power rather than being approved by a fairly-constituted electorate.

[1] No person or entity other than this amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

As Justice Elena Kagan has noted, partisan gerrymandering "enables politicians to entrench themselves in power against the people's will." *Gill v. Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring).

It is clear that "only the courts can do anything to remedy the problem, because gerrymanders benefit those who control the political branches." *Id.* "Courts have a critical role to play in curbing partisan gerrymandering," because the simple truth in partisan gerrymandering cases is that "politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Id.* at 1941.

In this case, the Superior Court appropriately determined that legislation proposing constitutional amendments meant to entrench one party in power was void due to the facts that the legislative body making the proposals was itself the result of partisan gerrymandering and, without that partisan gerrymandering, would have lacked the constitutionally-required threshold needed to propose constitutional amendments in the first place.

The Court of Appeals majority made major errors and should be reversed for the specific reasons discussed below, but the big picture of political entrenchment underlying this case should inform this Court's review of the Superior Court's judgment.

ARGUMENT

The 2017-18 Session of the General Assembly, which resulted from gerrymandered districts that were deemed unconstitutional, placed six amendments on the ballot for the November 2018 election. *N.C. State Conf. of the NAACP v. Moore*, No. COA19-384, slip op. at 1–2 (N.C. Ct. App. Sept. 15, 2020) [hereinafter Opinion]. The Court of Appeals incorrectly determined that the 2017-18 Session, though created through unconstitutional means, maintained the authority to propose the challenged amendments. *Id.*

The Court of Appeals should be reversed for multiple reasons. First, the Opinion is riddled with significant errors. The Court incorrectly interpreted the holding of *Covington v. North Carolina*, 267 F. Supp. 3d 664, 665 (M.D.N.C. 2017), and failed to address evidence indicating that the *Covington* federal panel, the plaintiffs, and the United States Supreme Court questioned the legitimacy of the 2017-18 Session. Second, the Court incorrectly stated the legality of partisan gerrymandering, misinterpreting *Rucho v. Common Cause*, 139 S. Ct. 2482 (2019), and failing to consider a contrary case in North Carolina. Third, the North Carolina Constitution, like other state constitutions, emphasizes the importance of free elections and equal protection of the laws, which are incompatible with partisan gerrymandering. Finally, the Opinion improperly condones partisan gerrymandering and subsequent political entrenchment.

I. The Court of Appeals Erred in Several Significant Respects.

The Court of Appeals erred in several respects with regard to its historical and legal statements throughout its opinion. The Opinion stated that in order to have a "proper understanding" of the issue before the Court, the issue of gerrymandering addressed in *Covington* must first be properly understood. Opinion, at 4. However, the Opinion incorrectly defined partisan gerrymandering, inappropriately stated that racial gerrymandering *may* be legal, and proceeded to incorrectly describe the findings of the *Covington* court. Perhaps most importantly, the Opinion erroneously concluded that the federal panel in *Covington*, the plaintiffs, and the United States Supreme Court found the 2017-18 Session to be legitimate, thereby disregarding stark evidence to the contrary.

A. The Opinion incorrectly describes the definitions and legality of gerrymandering and the districts at issue in this case.

First, the Opinion states that partisan gerrymandering "occurs when the majority party draws districts for the purpose of increasing a party's *political* advantage in the legislature." Opinion, at 5 (emphasis in original). This is an over-simplification. Partisan gerrymandering is described by the Supreme Court as "the drawing of legislative district lines to subordinate adherents of one political party and *entrench* a rival party in power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)

(emphasis added). The Opinion goes on to note that the Supreme Court declared partisan gerrymandering legal in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). Opinion, at 5. The Supreme Court in *Rucho* did not state that partisan gerrymandering is legal, but merely concluded that it was not actionable under the Federal Constitution. *Rucho*, 139 S. Ct. at 2506–07. In fact, the Supreme Court cautioned that its "conclusion does not condone excessive partisan gerrymandering" and that states "are actively addressing the issue," listing multiple states that have found partisan gerrymandering unconstitutional under their state constitutions. *Id.* at 2507. Such partisan gerrymandering may result in the political entrenchment of one party, allowing the party to cement its authority in the State and to become unresponsive to the individuals they represent. *See infra* Section IV, Part C.

The Opinion then states that the Supreme Court held there are instances in which racial gerrymandering may be legal, specifically, if its "districting legislation is narrowly tailored to achieve a compelling interest." Opinion, at 6 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017)). This is wholly incorrect because racial gerrymandering is never legal. The Supreme Court in *Bethune-Hill* stated that determining if there is a compelling interest is the next step after a challenger "succeeds in establishing racial predominance;" however, if the legislature can demonstrate that the predominant use of race was narrowly tailored to

achieve a compelling state interest, then it has *not* engaged in racial gerrymandering. *Covington v. North Carolina*, 316 F.R.D. 117, 124 (M.D.N.C. 2016).

An example of a "compelling interest" the Opinion provides is "drawing districts to comply with Section 2 of the Voting Rights Act of 1965 . . . which prohibits districts that prevent a large group of minority voters living near each other from casting sufficient votes to elect a candidate of their choice." Opinion, at 6. This is erroneous, because the Supreme Court has yet to determine whether such compliance with the Voting Rights Act constitutes a compelling state interest. *Covington*, 316 F.R.D. at 166. The Court has assumed this to be the case without deciding the matter. *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 977 (1996) and *Shaw v. Hunt*, 517 U.S. 899, 911 (1996)).

The Opinion further states that a plan for developing district maps "which maximizes majority-minority districts is unconstitutional" if there is an alternative way to comply with the Voting Rights Act that creates fewer districts, "especially where minority voters in an area have the opportunity to elect a candidate of their choice through some compromise with other voters (where a group does not quite make up a majority of voters in the district)." Opinion, at 7. This is an oversimplification, because the Supreme Court has laid out necessary circumstances before a legislature can be justified in creating a majority-minority district that is in compliance with Section 2 of

the Voting Rights Act. *Thornburg v. Gingles*, 478 U.S. 30 (1986) (finding a redistricting plan that impaired the voting rights of black voters to violate the Voting Rights Act).

Before a legislature may create a majority-minority district, the pre-existing district must meet three preconditions. *Id.* at 50–51. First, the minority group must be "sufficiently large and geographically compact," thus creating a "majority in a single-member district." *Id.* at 50. Second, the minority group must constitute a "politically cohesive" unit, which may be demonstrated through evidence that a substantial amount of minority group members tend to vote for the same candidates. *Id.* at 51. Third, the votes from white individuals in the district must serve as a bloc that usually defeats the candidate of choice for the minority group, allowing the minority group to demonstrate an impedance on "its ability to elect its chosen representatives." *Id.*

The Opinion's reference to legislative districts drawn in 2011 is erroneous in multiple respects. The Opinion states that the Republican majority that followed the 2010 election drew new districts "with the predominant motivation of protecting and increasing their new-found *partisan* advantage." Opinion, at 9 (emphasis in original). The Opinion states that the majority "sought to engage in partisan gerrymandering" rather than racial gerrymandering. *Id.* The first problem with this statement is that the

Court cites *Rucho* for support, but *Rucho* involved congressional districts drawn in 2016 rather than the state legislative districts drawn in 2011. 139 S. Ct. 2484. The correct case that is relevant here concluded that race, rather than party alignment, was the predominant motivating factor in the formation of the 2011 districts. *Covington*, 316 F.R.D. at 124. The court in *Covington* determined that "the overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race." *Id.* at 135. The *Covington* opinion explicitly rejected the argument that the legislature was motivated by political aims, stating "there is no evidence in this record that political considerations played a primary role in the drawing of the challenged districts. Indeed, the evidence suggests the opposite." *Id.* at 139.

The Opinion goes on to state that "though it is not illegal to engage in partisan gerrymandering, *per se*, any new map would be illegal if it violated the VRA." Opinion, at 10. As previously noted, *Covington* found that partisanship was not a factor in the drawing of its districts, 316 F.R.D. at 124, and compliance with the Voting Rights Act has not been established by the Supreme Court as a "compelling interest," *id.* at 166. Moreover, the *Covington* court found that the defendants "failed to proffer evidence demonstrating they had a strong basis in evidence to fear [Voting Rights Act] Section 2 liability," *id.* at 159, and that the defendants never questioned

whether there was sufficient evidence to determine the existence of the third precondition of *Gingles*, *id.* at 168.

The Opinion then states that there was an increase in majority-minority districts, and that the "compelling purpose" of this increase was to "ensure that their maps would not run afoul of the VRA." Opinion, at 10. The Opinion states that *Covington* recognized this "compelling purpose," *id.*, but *Covington* actually determined that Representative Lewis incorrectly believed that "proportionality would likely insulate [the state] from lawsuits." 316 F.R.D. at 133 (internal quotations omitted). The Supreme Court in *Johnson v. DeGrandy*, 512 U.S. 997 (1994) stated that the presence of minority-majorities is "under no circumstances to be considered a 'safe harbor' from Section 2 litigation." *Covington*, 316 F.R.D. at 133 (citing *DeGrandy* 512 U.S. at 1017–21). The court in *Covington* definitively concluded that "proportionality is *not* required, *not* a safe harbor, and *not* to be pursued at the cost of fracturing effective coalitional districts." *Id.* at 133 (emphasis added).

The next sentence of the Opinion states that the maps in *Covington* were "ultimately approved ('pre-cleared') by the Department of Justice in 2011." Opinion, at 10. There are multiple problems with this statement. Section 5 of the Voting Rights Act requires federal approval for some states and localities to ensure proposed voting changes are not discriminatory. 52

U.S.C. § 10304(b). As Section 5 applies a retrogression standard, a district would not be able to pass preclearance under Section 5 if minority voters became worse off than they were under the previous district. *Covington*, 316 F.R.D. at 174 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)). However, the fact that some districts were precleared is of no moment in this context. Only part of North Carolina is covered by Section 5, and eleven of the districts challenged did "not include any county, in whole or in part, that was covered by Section 5 in 2011, and therefore those districts could not have been drawn to remedy a Section 5 violation." *Id.* at 174. In addition, the *Covington* court concluded that the defendants did not show a "strong basis in evidence for their conclusion that the race-based redistricting . . . was reasonably necessary to avoid a Section 5 violation." *Id.* at 176.

Even if the defendants had shown such a basis to avoid a Section 5 violation, the Supreme Court has "made quite clear" that such an avoidance of "preclearance objections cannot be a compelling interest justifying the use of racial classifications." *Id.* (citing *Miller v. Johnson*, 515 U.S. 900, 921–22 (1995)). The *Covington* court concluded that the defendants did not meet their burden "to comply with either Section 2 or Section 5." *Id.* The Opinion throughout pages nine and ten thus wholly misconstrues the conclusions of *Covington* and gives the legislature a pass for what has been plainly held to constitute purely race-based districting without adequate justification.

The Opinion then mischaracterizes the analysis of the Honorable James A. Wynn, Jr. in *Covington*. Opinion, at 11. The Opinion states that Judge Wynn "suggested that the maps might have been sustained had the Republican majority drawn fewer majority-minority districts." *Id.* This conclusion was drawn from Judge Wynn's statement: "Nor do we suggest that majority-black districts could not be drawn – lawfully and constitutionally – in some of the same locations as the [28] districts challenged in this case." *Covington*, 316 F.R.D. at 178. However, this conclusion is an incorrect portrayal of Judge Wynn's analysis in *Covington*. Judge Wynn followed this quoted text by further stating that "if during redistricting the General Assembly had followed traditional districting criteria, and, in doing so, drawn districts that incidentally contained majority-black populations, race would not have predominated in drawing those districts." *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 646 (1993)). Judge Wynn noted that natural political geography may have resulted in some of the same districts, but the legislature used a "mechanical approach" to its districting and did not address this matter. *Id.*

B. The Opinion ignores strong evidence that the federal panel in *Covington*, the plaintiffs, and the United States Supreme Court deemed the 2017-18 Session of the General Assembly to have lost legitimacy.

The first full paragraph on page fifteen of the Opinion includes multiple mistakes when further addressing *Covington*, as it states that the

Court, the plaintiffs, and the Supreme Court deemed the 2017-18 Session of the General Assembly to be legitimate.

First, the Opinion concludes that the "federal panel in Covington did not believe that the 2017-18 Session of our General Assembly lost legitimacy" because it "order[ed] the body it declared to be illegally gerrymandered to redraw the districts." Opinion, at 15. However, the three-judge panel was bound by long-standing principles of federalism to allow the legislature to address the matter first, stating that "it is the domain of the States, and not the federal courts, to conduct apportionment" *Covington*, 316 F.R.D. at 177 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993)). The *Covington* court further stated that, because of this, it must "provide the North Carolina General Assembly with a 'reasonable opportunity' to draw remedial districts in the first instance." *Id.* at 177 (quoting *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)). The federal panel's order to the legislature to redraw the districts does not provide evidence that the panel deemed the Session to maintain legitimacy. On the contrary, the panel's desire to truncate the legislature's term may signify the opposite. *Covington*, 316 F.R.D. at 176–77; *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017).

Furthermore, the *Covington* court did not give the legislature complete discretion in redrawing district maps. The court stated that it would review the newly drawn district plans and, if it found them to be "constitutionally

deficient, . . . would draw and impose its own remedial plan." *Covington v. North Carolina*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017). The court allowed for plaintiffs to review the newly drawn districts and lodge objections, appointed a Special Master to evaluate the newly drawn districts and to provide his own recommendations, and held hearings on the lodged objections. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 414 (2018).

The Opinion proceeds to infer that the plaintiffs also believed the 2017-18 Session of the General Assembly to be legitimate because they "sought an order directing the General Assembly . . . to draw new districts." Opinion, at 15. As previously noted, the General Assembly's redistricting was under the supervision of the *Covington* court in numerous ways. Additionally, the plaintiffs requested that the Court "order a *special election* using constitutionally adequate districts before the General Assembly reconvenes for its 2018 legislative session." *Covington*, 267 F. Supp. 3d at 666 (emphasis added). Although the plaintiffs' requested special election was denied, it should not be inferred that the plaintiffs deemed the 2017-18 Session "legitimate."

The Opinion's final conclusion regarding the 2017-18 Session's "legitimacy" is that the Supreme Court deemed the Session to have not lost legitimacy because it "vacated the lower court's order to shorten the terms of those elected in the 2017-18 Session." Opinion, at 15 (emphasis removed).

The Supreme Court vacated the order not due to a finding of legislative legitimacy, which was never mentioned throughout the entirety of its opinion, but because the Court did not believe the district court weighed all equitable considerations in its analysis. *Covington*, 137 S. Ct. at 625–26. Thus, it cannot be inferred that the federal panel in *Covington*, the plaintiffs, or the Supreme Court found the 2017-18 Session of the General Assembly to have not lost legitimacy due to the district maps in place.[2]

II. The Opinion Incorrectly Characterizes the Legality of Partisan Gerrymandering.

The Opinion makes two significant errors regarding the constitutionality of partisan gerrymandering. First, the Opinion incorrectly states that the Supreme Court has held partisan gerrymandering to be legal. *Compare* Opinion at 4-5 (stating that "The United States Supreme Court recently declared that *partisan gerrymandering is legal*") *with Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (asserting that even though

[2] The level of error is not limited to the majority opinion; there is error in the concurrence, too. The *Covington* court rejected the casual attitude the legislators took, and the Court of Appeals now takes in its opinion and concurrence, stating that the defendants' referral to the constitutional violation as a "rational disagreement" was "patently wrong." *Covington*, 270 F. Supp. 3d at 892. The *Covington* court emphasized that "[t]here is no 'rational disagreement' as to whether the districting plans at issue in this case violated the Constitution. This Court *unanimously* held that the challenged districts violate the Constitution. The Supreme Court affirmed that conclusion *without argument and without dissent*." *Id.* The court continued, stating that the harms of the gerrymandering not only affect those within the lines of the unconstitutional districts, but "adversely affect *all* North Carolina citizens." *Id.* at 893.

partisan gerrymandering "present[s] political question beyond the reach of the federal courts," the Court's ruling "does not condone excessive partisan gerrymandering" nor does it prevent states from outlawing partisan gerrymandering). Next, the Opinion fails to address a unanimous decision by a three-judge panel concluding that the most recent instance of partisan gerrymandering violates the state constitution. *Common Cause v. Lewis*, No. 18CVS014001, 2019 N.C. Super. LEXIS 56, at *413 (N.C. Super. Ct. Sept. 3, 2019) (holding unanimously that partisan gerrymandering is justiciable and violates the North Carolina constitution's free elections clause, equal protection clause, and freedom of speech and assembly).

By mischaracterizing the legality of partisan gerrymandering at the federal and state level, the Opinion bases its support for the legitimacy of the General Assembly's amendments legislation on incorrect statements of law. In doing so, the Opinion condones the use of partisan gerrymandering to add a constitutional amendment that will entrench the gerrymandered majority's political advantage. *See infra* Section IV, Part C.

A. The Supreme Court did not declare partisan gerrymandering is legal.

Since 2004, the Supreme Court has ruled repeatedly that state issues of partisan gerrymandering are non-justiciable. However, the Supreme Court has never declared that partisan gerrymandering is legal, as the Opinion

contends. Opinion at 4-5. This characterization is an oversimplification, ignoring years of Supreme Court jurisprudence regarding partisan gerrymandering stretching decades before *Rucho v. Common Cause*.

The Supreme Court has never declared partisan gerrymandering to be legal. Instead, the Court has repeatedly focused on whether partisan gerrymandering is justiciable or a non-justiciable political question. Since 2000, the Court has accepted three cases questioning the constitutionality of partisan gerrymandering. In each case, the Court focused on the question of justiciability instead of evaluating the constitutionality of partisan gerrymandering.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), Pennsylvania voters challenged a 2002 plan that gave Republicans an expected thirteen congressional seats out of the nineteen available, despite them losing the popular vote. *See also Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002). In that case, the plaintiffs proposed countering partisan gerrymandering with a "discriminatory effect" test whereby a court determines if the totality of the circumstances confirms that the map can make the plaintiffs unable to transform a majority of votes into a majority of seats. *Vieth*, 541 U.S. at 286-87. The Court discussed at length how to apply the then-existing standard, under which a political gerrymandering claim could succeed only if the plaintiffs showed "both intentional discrimination

against an identifiable political group and an actual discriminatory effect on that group." *Id.* at 281 (quoting *Davis v. Bandemer*, 478 U.S. 109, 127 (1986)). The Court focused on how confusing it was for lower courts to apply that standard, noting that the decision was divided, and that even the plurality that formulated the *Bandemer* standard acknowledged it was "of necessity a difficult inquiry." *Bandemer*, 478 U.S. at 143. In evaluating the decisions of lower courts under the *Bandemer* standard, the Court found that "its application has almost invariably produced the same result . . . as would have obtained if the question were nonjusticiable . . . ." *Vieth*, 541 U.S. at 279. The Court emphasized that during the eighteen years guided by the *Bandemer* standard, in only one case did the plaintiff obtain relief, and even there the relief was merely preliminary. *Id.* at 279-80.

In *Vieth*, the Court reversed *Bandemer* not because the Court found partisan gerrymandering to be constitutional, but rather because "no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged." *Id.* at 281. But while the plurality opinion voted to hold equal protection and elections clause challenges to partisan gerrymandering non-justiciable, Justice Kennedy's concurrence made clear that future justiciability was possible. *Id.* at 313. Evaluating the difficulties of implementing judicial solutions to cases of partisan gerrymandering, Justice Kennedy stated:

> On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an ***unconstitutional manner*** will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards. . . . [i]f a subsidiary standard could show how an otherwise permissible classification, as applied, burdens representational rights, we could conclude that appellants' evidence states a provable claim . . . .

Id. at 312-13 (Kennedy, J., concurring) (emphasis added).

Justice Kennedy left open the possibility that in the future courts will have the technological capacity to evaluate partisan gerrymandering cases. In doing so, his concurrence made clear that the Court's main concern there was not whether partisan gerrymandering is constitutional, but rather the need for evaluating partisan gerrymandering cases with a consistent standard. Because current Supreme Court precedent rests on *Vieth*, the Opinion's contention that the Supreme Court "recently declared that *partisan gerrymandering is legal*" is a plain mischaracterization of the key issue underlying this line of jurisprudence. *See* Opinion, at 4-5. The issue is not whether partisan gerrymandering is constitutional, but rather whether it is justiciable.

In *Gill v. Whitford*, 138 S. Ct. 1916, 1932-33 (2018), plaintiffs challenging legislative redistricting in Wisconsin proposed a new method of

analyzing partisan gerrymandering cases relying on a calculation called "the efficiency gap." Plaintiffs came up with this calculation in response to Justice Kennedy's *Vieth* concurrence, attempting to address his concerns with justiciability by coming up with a proper judicial standard. *See* Andrew Chin, Gregory Herschlag & Jonathan Mattingly, *The Signature of Gerrymandering in Rucho v. Common Cause*, 70 S.C. L. Rev. 1241, 1244 (2019). The Court held that the plaintiffs lacked standing because the injury to a voter is district-specific, the remedy for which is the affected voters changing the boundaries of their own districts. *Gill*, 138 S. Ct. at 1930. The Court did not reach the question of justiciability, but rested its decision "on the understanding that we lack jurisdiction to decide this case . . . ." *Id.* at 1931.

Despite *Gill* not reaching the issue of justiciability, the Court's unanimous opinion indicated on multiple occasions that partisan gerrymandering may violate the constitution. In discussing standing, the Court noted that partisan gerrymandering "dilutes individual votes" and may "inflict other kinds of constitutional harms" such as the First Amendment right of association. *Id.* at 1937-38. In its conclusion, the Court stated that "[c]ourts have a critical role to play in curbing partisan gerrymandering," emphasizing this practice incentivizes "conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Id.* at 1941. While *Gill* turned on standing and failed to reach justiciability or the

constitutionality of partisan gerrymandering, the unanimous decision makes multiple clear references to the possibility that partisan gerrymandering is federally unconstitutional. This plainly undercuts the Opinion's contention that the Supreme Court "recently declared that *partisan gerrymandering is legal*." Opinion, at 4-5.

To support this conclusion, the Opinion relies on *Rucho*, where the Supreme Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. at 2506-07. As the Supreme Court jurisprudence discussed above supports, relying on *Rucho* to state that the Supreme Court "recently declared that *partisan gerrymandering is legal*" plainly mischaracterizes the main issue underlying this line of cases. In *Rucho*, in the same paragraph the Opinion relies on to assert that the Supreme Court "recently declared that *partisan gerrymandering is legal*," the Court couched its analysis in the underlying issues of justiciability. While the Court determined that partisan gerrymandering is a "political question beyond the competence of the federal courts," the Court's support for that conclusion was that there are no "legal standards discernable in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500. So while the Court in *Rucho* did recognize that "a jurisdiction may engage in constitutional political gerrymandering,"

id. at 2497, the Court did not broadly declare that partisan gerrymandering is legal as the Opinion asserts.

In fact, the Court made its disdain for partisan gerrymandering clear, further undercutting the Opinion's contention. The majority reasoned that while partisan gerrymandering cannot be solved by the federal judiciary, "such gerrymandering is 'incompatible with democratic principles." *Id.* at 2506 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)). The majority even discusses the history of partisan gerrymandering, and our country's widespread frustration with this practice, going back to the first congressional elections. *Id.* at 2494. In doing so, the Court emphasized that the question before the Court was not whether partisan gerrymandering is constitutional, but rather "whether there is an 'appropriate role for the Federal Judiciary' in remedying the problem of partisan gerrymandering . . . ." *Id.* Based on the Court's own characterization of the issue in *Rucho*, the Opinion's contention that the Court "recently declared that *partisan gerrymandering is legal*" has no basis.

B. Partisan gerrymandering violates the North Carolina Constitution.

The Opinion also fails to acknowledge a unanimous decision by a three-judge panel on North Carolina's Superior Court that has already ruled that partisan gerrymandering like that at issue here violates North Carolina's

constitution. *See Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56. The *Lewis* decision held that Republicans engaged in partisan gerrymandering when they drew the 2017 redistricting plans to maximize their political power, *id.* at *7, concluding that this practice violated the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Assembly, *id.* at *352-53. That a unanimous panel of three North Carolina Superior Court judges found this partisan gerrymandering to be unconstitutional directly undercuts the Opinion's contention that partisan gerrymandering is legal.

The *Lewis* decision detailed at length how the General Assembly drew district maps with the intent of favoring voters aligned with a political party for the purpose of retaining power. *Id.* at *6. The court analyzed the plan district by district, focusing on the geography and demography of each division. *Id.* at *109-223. The court found that the Republican Party drew the district maps to ensure that the districts, not the voters, would dictate control of the General Assembly. *Id.* at *7. The defendants offered no meaningful defense of these plans. *Id.* at *238.

The *Lewis* court found the redistricting plan was unconstitutional because it engaged in partisan gerrymandering to entrench one party's political power. *See id.* at *352-53. The court found that the plaintiffs had standing and that their claims were justiciable under the North Carolina

Constitution. *Id.* at *292-98; 331-41. The court emphasized that the North Carolina Constitution provides protections independent from, and sometimes greater than, those provided by the Federal Constitution. *See id.* at *307-09, 318-20. After evaluating these state constitutional protections, the court held that the 2017 plan violated North Carolina's independent, more expansive constitutional rights. *See id.* at *352-53.

First, the court found that the redistricting plan violated North Carolina's broadened Free Elections clause, as it interferes with voters' ability to freely choose their representatives. *See id.* at *304. By ensuring that Democrats could not achieve a majority in the General Assembly, the plans undermine this right, ensuring that elections are predetermined instead of chosen by the voters. Second, the court found that the redistricting plan violated North Carolina's Equal Protection Clause. *Id.* at *307. Generally, partisan gerrymandering "runs afoul of the State's obligation to provide all persons with equal protection of law because, by seeking to diminish the electoral power of supporters of a disfavored party, a partisan gerrymander treats individuals who support candidates of one party less favorably than individuals who support candidates of another party." *Id.* Because North Carolina's Equal Protection Clause provides greater protection for voting rights than its federal counterpart, see *Stephenson v. Bartlett*, 355 N.C. 354, 377-81 & n.6, 562 S.E.2d 377, 395 & n.6 (2002), and

the evidence shows that the 2017 redistricting plan substantially deprived democratic voters of equal voting power, this plan violated North Carolina's Equal Protection Clause. *Lewis*, 2019 N.C. Super. LEXIS 56, at *317.

Lastly, the court evaluated these plans under North Carolina's guarantees of free speech and assembly, which function independently and provide more protection than their federal counterparts. *Id.* at *317-18. The court reasoned that when it comes to partisan gerrymandering, "it is especially important that North Carolina courts give independent force to North Carolina's constitutional protections." *Id.* at *319. Because the Supreme Court in *Rucho* found that federal courts have no power to adjudicate claims of partisan gerrymandering, this ruling "does not mean that partisan gerrymandering complies with the constitution; it means that federal courts have no power to decide *whether* the practice complies with the constitution." *Id.* at *320. Without any other remedy, the three-judge panel reasoned that because the 2017 redistricting plan burdens core means of political expression protected by North Carolina's Freedom of Speech and Freedom of Assembly Clauses, it should be subject to strict scrutiny. *Id.* Under this rigorous standard, the court held that this plan violates both clauses, engaging in insidious viewpoint discrimination. *Id.* at *321-22.

By making these findings and conclusions, and dismissing all defenses as lacking in merit, this panel of North Carolina Superior Court judges

unanimously ruled that the 2017 partisan gerrymandering plan violates the State Constitution. *Id.* at *343, 352-53. This clear, explicit ruling squarely undermines the Opinion's blanket assertion that the Supreme Court "recently declared that *partisan gerrymandering is legal.*" This Court should take this opportunity to make clear that partisan gerrymandering violates the North Carolina Constitution and, due to the Court of Appeals' fundamental misunderstanding of law, this Court should reverse.

In making these conclusions, the panel emphasized that "[i]f unconstitutional partisan gerrymandering is not checked and balanced by judicial oversight, legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade." *Id.* at *333; *see also infra* Section IV Part C. Based on this dire consequence and the Court of Appeals' fundamental misunderstanding of law, this Court should reverse.

III. Multiple States Have Emphasized The Importance Of Free And Equal Elections Under Their State Constitutions.

Other state supreme courts have emphasized that the rights to vote and to a free election are fundamental to every citizen, including the Missouri Supreme Court and the Pennsylvania Supreme Court, based on state constitutional provisions similar to North Carolina's.

In 2006, the Missouri legislature passed a statute requiring voters to provide a form of photographic identification in order to cast their ballots. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (en banc). The law required voters to present identification issued by either the state of Missouri or the federal government and contained the voter's name and photograph. *Id.* at 205. The voter's name on the identification had to match that of the individual's voter registration records and the identification could not have expired. *Id.*

Concluding that the statute was unconstitutional, the Missouri Supreme Court stated that the "rights to vote and to equal protection of the laws . . . are at the core of Missouri's constitution and, hence, receive state constitutional protections even more extensive than those provided by the federal constitution." *Id.* at 204. The court noted that the only forms of identification that would satisfy the requirements of the statute are a Missouri driver's or non-driver's license or a United States passport, both of which cost money to obtain. *Id.* at 205–06. Additionally, individuals may face other "practical costs" such as travel to and from the government agencies and having this availability during the agencies' operating hours. *Id.* at 208. The court noted that anywhere from 169,000–240,000 registered voters did not have the required forms of identification, *id.* at 206, and the plaintiffs noted that for "many of Missouri's qualified voters, including the poor, elderly

and disabled, these hurdles to obtaining the proper photo ID are not significant." *Id.* at 209. The Missouri Supreme Court concluded that the statute interfered with the fundamental right to vote and thus violated the Missouri Constitution. *Id.* at 221–22.

Equally instructive is the Pennsylvania decision of *League of Women Voters of Pa. v. Pennsylvania*, 178 A.3d 737 (Pa. 2018). Like the Missouri Supreme Court, the Pennsylvania Supreme Court concluded that the Pennsylvania Congressional Redistricting Act of 2011 was unconstitutional because it "clearly, plainly, and palpably" violated the Pennsylvania constitution's Free and Equal Elections Clause. *Id.* at 801–02. The petitioners had argued that the districts drawn under the 2011 plan discriminated against Democratic voters in the state, "depriv[ing them] of an 'equal' election." *Id.* at 790.

The Pennsylvania Supreme Court stated that the "broadest interpretation" should be provided to the constitution's Free and Equal Election Clause, *id.* at 814, and that the "plain and expansive sweep of the words 'free and equal'" indicate the "framer's intent that all aspects of the electoral process, *to the greatest degree possible*, be kept open and unrestricted to the voters." *Id.* at 804 (emphasis added). The court determined that the plan did not "primarily consider . . . traditional redistricting criteria." *Id.* at 818–19. Although this alone would not be enough

to be unconstitutional, evidence established that the deviation from traditional redistricting criteria effectively provided Republican candidates with a substantial political advantage. *Id.* at 820. The court concluded that the districting plan created an "unfair partisan advantage" and thus violated the Pennsylvania constitution's Free and Equal Elections Clause by "undermin[ing] voters' ability to exercise their right to vote in free and 'equal' elections." *Id.* at 821 (further stating that "[a]n election corrupted by extensive, sophisticated gerrymandering and partisan dilution of votes is not 'free and equal'").

Similar to the political entrenchment that would have resulted from the unconstitutional Missouri and Pennsylvania statutes, permitting a session of the General Assembly that resulted from unconstitutional gerrymandering to place amendments on the ballot would permit the interests of those in office to be placed over those of the State's voters.

Similar to the equal right to vote protected under the Missouri Constitution and the Equal Elections Clause of the Pennsylvania Constitution, the North Carolina Constitution states under its Declaration of Rights that "*all* elections shall be *free*." N.C. Const. art. 1, § 10 (emphasis added).[3] This Court has deemed "fair, honest elections" to be a compelling

[3] The North Carolina Constitution's Free Elections Clause was based on the 1689 English Bill of Rights' provision that "election of members of parliament ought to be

interest of the State. *Lewis*, 2019 N.C. Super. LEXIS 56, at *336 (N.C. Super. Ct. Sept. 3, 2019). North Carolina's Constitution further states that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. 1, § 19. Partisan gerrymandering contradicts the equal protection clause, because the voting power of some individuals is inherently lessened due to their political party. *Common Clause*, 2019 N.C. Super. LEXIS 56, at *346. This Court has held that the constitution's "Equal Protection Clause protects 'the fundamental right of each North Carolinian to *substantially equal voting power*.'" *Id.* at *347 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 379, 562 S.E.2d 377, 394 (2002)) (emphasis in original). The Superior Court below thus correctly determined the amendments put on the November 2018 ballot to be void, because they were, as contended by the plaintiffs, "approved by a General Assembly that did not represent the people of North Carolina." *N.C. State Conf. of NAACP v. Moore*, No. 18CVS9806, 2019 WL 2331258, at *6 (N.C. Super. Ct. Feb. 22, 2019).

---

free." *Common Cause*, 2019 N.C. Super. LEXIS 56, at *340 (citing Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)). This English provision was created after the king attempted to "manipulate parliamentary elections, including by changing the electorate in different areas to achieve 'electoral advantage.'" *Common Cause*, 2019 N.C. Super. LEXIS 56, at *340 (citing J.R. Jones, *The Revolution of 1688 in England* 148 (1972)).

IV. Partisan Gerrymandering is an Unpopular Practice that Results in Political Entrenchment.

Few "political questions" garner as little debate as partisan gerrymandering. While both major parties have engaged in the practice, neither explicitly supports partisan gerrymandering. This has held throughout United States history, as the public has displayed strong, bipartisan opposition to this practice. *See generally* Kyle Keraga, *Drawing the First Line: A First Amendment Framework for Partisan Gerrymandering in the Wake of Rucho v. Common Cause*, 79 Md. L. Rev. 798 (2020). In recent decades, at least seventeen states have combated partisan gerrymandering with ballot initiatives or legislation. *See Redistricting Commissions: Congressional Plans*, Nat'l Conf. St. Legislatures (Apr. 18, 2019), http://www.ncsl.org/research/redistricting/redistricting-commissions-congressionalplans.aspx. This consistent, bipartisan opposition to partisan gerrymandering is based on widespread fear of the resulting political entrenchment (the use of political office to make a temporary political advantage permanent), a fear that can be traced back to the Federalist Papers. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 815 (2015).

A. **Political parties and the public reject partisan gerrymandering.**

Though both major political parties have engaged in gerrymandering, Opinion, at 7-8, both parties and the public as a whole have historically advocated against gerrymandering. When it comes to the "political question" of partisan gerrymandering, the consensus answer is remarkably bipartisan. For example, in 2020 neither the Republican Party nor the Democratic Party supported gerrymandering. *See* Democratic National Convention, *Platform of the Democratic Party (*2020) https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf.; *see also* Republican National Convention, *Platform of the Republican Party* (2020) https://prod-cdn-static.gop.com/docs/Resolution_Platform_2020.pdf. The Democratic Party platform even mentions eliminating the practice. Democratic National Convention, *supra* at 56. President Barack Obama advocated for bipartisan districting commissions in his last State of the Union address, and President Ronald Reagan called for "an end to the antidemocratic and un-American practice of gerrymandering congressional districts," calling the practice "a national scandal." *See* Alan S. Lowenthal, T*he Ills of Gerrymandering and Independent Redistricting Commissions as the Solution*, 56 Harv. J. on Legis. 1, 2 (2019). Bipartisan antipathy towards partisan gerrymandering is as old

as the practice itself, going back to the Federalist Papers and the days where the Federalist and Anti-Federalist political factions prevailed. *See id* at 9.

Partisan gerrymanders are also widely seen as illegitimate by a supermajority of voters. Seventy-three percent of American voters support removing partisanship from the districting process, even if it would cost their party an election. *See Supermajority of Americans Want Supreme Court to Limit Partisan Gerrymandering*, Campaign Legal Ctr. (Sept. 11, 2017), https://campaignlegal.org/press-releases/supermajority-americanswant-supreme-court-limit-partisan-gerrymandering/. This overwhelming public sentiment is consistent across American history. Condemnation of partisan gerrymandering dates back to 1812, when the *Boston Gazette* published its iconic "Gerry-mander" cartoon, highlighting Governor Elbridge Gerry's seemingly incoherent redistricting proposal. *The Gerry-mander, a New Species of Monster, which Monster, which Appeared in Essex South District in Jan. 1812,* Bos. Gazette (Mar. 16, 1812). Partisan gerrymandering and calls to end it continued through the 19th and 20th Centuries, addressed by legislation like the Voting Rights Act of 1965 and court decisions like *Baker v. Carr*. Alan S. Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions as the Solution*, 56 Harv. J. on Legis. 1, 10-11 (2019). This sentiment has carried through our country to the current day, driven by popular discontent with this disenfranchising, unconstitutional,

and undemocratic practice. *See generally id.* Indeed, no candidate promises, "Elect me, and I will work to make sure my seat is safe for years to come."

B. **Other states have begun to outlaw partisan gerrymandering.**

To address partisan gerrymandering, advocates have turned to the states, banning partisan gerrymandering by referendum or legislation. For example, in 2020, citizens in the states of Virginia, Arkansas, Nevada, Oklahoma, and Oregon voted on citizen initiatives proposing redistricting reforms. *See More states to use redistricting reforms after 2020 census*, The Associated Press (March 5, 2020) https://apnews.com/article/15945f8bd618d3c749e7c56d3a572d71. Before the most recent elections, seventeen different states had already approved independent redistricting reforms. *Id.* As a whole this demonstrates the ample, and growing, nationwide sentiment against partisan gerrymandering.

For example, in 2018 voters approved constitutional amendments to create commissions responsible for creating and approving district maps for congressional and state legislative districts. *See* Colo. Const., art. V, §§ 44, 46; Mich. Const., art. IV, § 6. In Missouri, voters approved the creation of a new position to draw state legislative district lines. Mo. Const., art. III, § 3. In recent years Florida, Iowa, and Delaware have all prohibited partisan favoritism in redistricting. Fla. Const. art. III, § 20(a); Iowa Code § 42.4(5)

(2016); Del. Code Ann. Tit. xxix, § 804 (2017). Due to *Rucho*, however, citizens living in states without legislatures willing to let the voters consider gerrymandering reforms or to create bipartisan redistricting commissions must rely on their state courts have to ensure their vote counts.

C. Partisan gerrymandering allows political entrenchment.

Political entrenchment occurs when political actors take advantage of their political power to attempt to make that power permanent. *See Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 787, 815 (2015). This concept runs directly contrary to the Elections Clause, which was meant to "act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Id.* Entrenchment runs counter to the North Carolina Constitution as well, which calls for "[f]requent elections" and provides "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. II § 9. To these ends, North Carolina requires elections for legislators every two years. N.C. Const. art. II, § 8. However, when a political party successfully entrenches itself in power, these frequent elections can fail to serve their vital purpose, becoming "unresponsive and insensitive" to the people they represent. *See Jeness v. Fortson*, 403 U.S. 431, 438 (1971).

One of the most common ways for political actors to entrench themselves is to prevent their opponents' supporters from casting ballots. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 Yale L. J. 400, 414 (2015). Provisions that restrict the right to vote, such as voter ID laws and cuts to voter registration, serve this purpose. In a state as politically competitive as North Carolina, the consequences of political entrenchment can be significantly magnified.

The North Carolina General Assembly's recent attempts to make voting more difficult serve the cause of political entrenchment. When the General Assembly passed the voter identification law struck by the Fourth Circuit, it used a "breakdown by race of DMV-issued ID ownership." *NAACP v. McCrory*, 831 F. 3d 204, 230 (4th Cir. 2016). The Fourth Circuit noted that "data revealed that African Americans . . . disproportionately lacked DMV-issued ID." *Id.* at 230. Because a large portion of African Americans vote for Democratic candidates, see *id.* at 225-26, this action by an opposing party in control of the legislature serves as an example of political entrenchment.

Similarly, the Voter ID Amendment at issue "would have an irreparable impact on the right to vote of African Americans in North Carolina." R p 188 ¶ 33. Because "African American race is a better predictor for voting Democratic than party registration," there is little doubt this amendment will disproportionately disqualify Democratic voters. *See NAACP*

v. McCrory, 831 F.3d at 225. Just like the previous attempted voter ID law, this amendment serves as an example of political entrenchment because it is an action by the party in control of the General Assembly that will disproportionately disqualify voters of the opposing party.

By condoning this political entrenchment, the Opinion permits the party in power to "entrench themselves or place their interests over those of the electorate." *Ariz. State Legis.*, 578 U.S. at 815. The Opinion risks "freez[ing] the political status quo," resulting in legislatures becoming "unresponsive and insensitive" to the people they are supposed to represent. *See Jeness*, 403 U.S. at 438. By taking this risk, the Opinion fails to recognize constitutional safeguards that prevent one party from entrenching itself in power. Therefore, the Opinion should be reversed.

CONCLUSION

The Court should reverse the Court of Appeals, thereby reinstating the judgment of the Superior Court.

Respectfully submitted, this the 2nd day of December 2020.

/s/ John J. Korzen
John J. Korzen[4]
Appellate Advocacy Clinic
Wake Forest University School of Law
PO Box 7206
Winston-Salem, NC 27109-7206
(336) 758-5832
N.C. Bar No. 18283
korzenjj@wfu.edu

Counsel for Democracy North Carolina

[4] Counsel thanks third-year law students Meredith Behrens and Aaron Walck for all their work on this brief.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief was served upon the persons indicated below via electronic mail to the email addresses shown below:

Kimberley Hunter
David L. Neal
SOUTHERN ENVIRONMENTAL LAW CENTER
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
khunter@selcnc.org
dneal@selcnc.org

Irving Joyner
240 Nelson Street
Durham, NC 27707
ijoyner@nccu.edu

Daryl Atkinson
FORWARD JUSTICE
400 W. Main Street, Suite 203
Durham, NC 27701
daryl@forwardjustice.org
Counsel for Plaintiffs

D. Martin Warf
Noah H. Huffstetler, III
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com
noah.huffstelter@nelsonmullins.com
Counsel for Defendants

This the 2nd day of December 2020.

/s/ John J. Korzen