NO. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendants-Appellees.	From Wake County 18 CVS 9806 COA 19-384

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BRIEF OF GOVERNOR ROY COOPER AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT NORTH CAROLINA NAACP

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BRIEF OF GOVERNOR ROY COOPER AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT NORTH CAROLINA NAACP[1]

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ARGUMENT

The North Carolina Constitution, to recognize and establish "the great, general, and essential principles of liberty and free government," declares in no uncertain terms that "[a]ll political power is vested in and derived *from the people*; all government of right originates *from the people*, is founded *upon their*

[1] Pursuant to N.C. R. App. P. 28(i)(2), no one but the Governor or his counsel, directly or indirectly, wrote this brief or contributed money for its preparation.

will only, and is instituted solely for the good of the whole." N.C. CONST. art. I, preamble; *id.* § 2 (emphases added).

This constitutional language reflects the foundational principle of this State and Nation, that "governments are instituted among men, deriving their just powers *from the consent of the governed*. . . ." United States Declaration of Independence ¶ 2 (1776) (emphasis added).

When one branch of government acts outside of its constitutional authority, it therefore falls to the other coordinate branches to check that excess. Since taking office in 2017, the Governor, other elected officials, and a multitude of citizens have had to call on our federal and state courts repeatedly to rein in the overreach of a legislative supermajority created through illegal and unconstitutional racial gerrymandering. In this case, this Court is again asked to protect against efforts to entrench the political power and policy preferences of a temporary governing supermajority.

Political entrenchment is more than mere partisan or factional advantage—it is the manipulation of our system of laws with the intent that the party in power maintain that power, regardless of the will of the electorate. Entrenchment is an age-old evil that was recognized and guarded against at our nation's founding. *See, e.g.*, Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 499 & n.45 (1997)

(outlining various federal constitutional provisions guarding against legislative entrenchment).

In this case, the supermajority that proposed the constitutional amendments at issue in this case—the photo identification amendment of Session Law 2018-128 and the income tax cap of Session Law 2018-119—would not exist but for unconstitutional racial gerrymandering. Accordingly, these constitutional amendments represent a dangerous effort by the unconstitutional supermajority to entrench its policy preferences and power within the solemn text of the North Carolina Constitution.

The entrenchment challenged in this case is especially dangerous, given the substance of the constitutional amendments at issue. First, voter identification requirements disproportionately impact racial minorities. Through the voter-identification amendment, the unconstitutional supermajority entrenched its power by constitutionalizing a voting requirement that affects a group that is unlikely to vote for the members of the unconstitutional supermajority. As has long been observed, such entrenchment of policies that result in disenfranchisement are particularly problematic, since the right to vote is "regarded as a fundamental political right" that is a "preservative of all rights." *Yick v. Hopkins*, 118 U.S. 356, 370 (1886). Second, the tax cap amendment is regressive, meaning that individuals

with lower incomes (who are often those same individuals most affected by voter identification requirements) will bear a disproportionate share of the tax burden.

Absent this Court's intervention, these amendments and their harmful effects will be long lasting, as the former supermajority need only retain two-fifths of just one legislative house in order to block corrective constitutional amendments. *See* N.C. CONST. art. XIII, § 4. Such entrenchment within the solemn text of the North Carolina Constitution moves this State towards an unchecked, unaccountable government controlled by a singular faction, and frustrates separation of powers, the means by which popular sovereignty is preserved.

The Court of Appeals majority, while unable to agree on a rationale, upheld the two constitutional amendments at issue here, treating them as if they were garden-variety legislative enactments and abdicating the judiciary's crucial role of enforcing constitutional protections against the political branches. But the North Carolina Constitution distinguishes between *statutes*, which are enacted by a simple majority of the General Assembly subject to the Governor's veto (which can be overridden by three-fifths of all *then-present members* of each house), N.C. CONST. art. II, § 22(1), and constitutional *amendments*, which must be initiated by three-fifths of *all*

members of each house and are not subject to the Governor's veto. *See* N.C. CONST. art. II, § 22(2); *id.* art. XIII, § 4.

In Chief Justice Sarah Parker's forward to the leading treatise on our state's constitution, she recognizes that the North Carolina Constitution is "our foundational document" which "establishes our state's tripartite system of government in accordance with the fundamental principle of separation of powers." John V. Orth & Paul Martin Newby, THE NORTH CAROLINA STATE CONSTITUTION xix (2d ed. 2013). In the same treatise, Justice Newby notes that constitutional litigation requires "returning to the fundamental principles recognized in" the North Carolina Constitution. *Id.* at xxii. This Court and the United States Supreme Court have similarly recognized the singular importance of constitutions. *See State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("The will of the people as expressed in the Constitution is the supreme law of the land."); *In re Trusteeship of Kenan*, 261 N.C. 1, 7, 134 S.E.2d 85, 90 (1964) ("It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people. Its provisions must be observed by all." (citation omitted)); *Smith v. O'Grady*, 312 U.S. 329, 331 (1941) (stating that the federal constitution "is the supreme law of the land").

The fact that our Constitution does not provide the protection of a gubernatorial check on proposed amendments makes judicial review of the amendment process essential in preventing the type of entrenchments presented in this case. Indeed, the North Carolina Constitution "should be interpreted so as to carry out the general principles of the government and not defeat them." *Jenkins v. State Bd. of Elections of N.C.*, 180 N.C. 169, 169, 104 S.E. 346, 349 (1920). Without a judicial check on attempts to impose entrenchment directly into our Constitution, the power of a supermajority legislature elected only as a result of an unconstitutional gerrymander—whether racial or extreme partisan—could become absolute, which corrupts absolutely.

I. Immediately after Governor Cooper was elected in November 2016, and continuously thereafter, the unconstitutional supermajority attempted to entrench its power and political views through legislation.

The legislative actions which spawned this litigation are yet another chapter in the continuing saga of the efforts by the General Assembly's unconstitutionally obtained supermajority to entrench its power and policy views since it came to power and cemented its supermajority status by engineering one of the most widespread racial gerrymanders ever confronted by federal courts. Since before Governor Cooper took office—and continuing at least until new representatives were seated following the November 2018

elections—the unconstitutional supermajority took repeated actions which were clearly designed to ensure its retention of political power and keep its preferred policies enforced, no matter what the majority of the electorate actually desired.

A. The supermajority attempted to disenfranchise voters likely to support its opposition and restrict the Governor's power over implementation of legislation.

Even before it was apparent that its partisan would lose control of the Governor's mansion, the General Assembly's unconstitutionally obtained supermajority began its work to ensure its power and policy preferences would remain unchecked in the event of a change in voter sentiment. For example, beginning in 2013, the General Assembly's Republican supermajority enacted a voter identification law that a federal court found targeted and burdened African-American voters—voters who disproportionately oppose candidates of the supermajority's party—with "almost surgical precision." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). And in 2014, the General Assembly's supermajority stripped the Governor of authority to make appointments to several executive commissions to ensure its policy preferences—rather than those of the Governor—dictated the implementation of legislation. This Court struck down that effort to entrench the

supermajority's policy preferences. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 258 (2016).

B. The supermajority attempted to embed political appointees of the outgoing Governor as career employees in the new Governor's administration.

When it was apparent that control of the Governor's Mansion would change hands, the unconstitutional supermajority enhanced its efforts to entrench its political power and policy preferences. In particular, certain provisions in Session Law 2016-126 reduced the number of state government positions that the Governor could deem "exempt" from the North Carolina Human Resources Act (reducing the number of "political" appointees appointed at the discretion of the Governor). More importantly, that act provided that employees in any positions the outgoing Governor converted from exempt to "non-exempt" would be deemed career State employees protected from removal by the incoming Governor. *See, e.g.*, *Cooper v. Berger and Moore*, Wake County Case No. 16 CVS 15636, 2017 WL 1433245, at *3 Order on Cross-Mot. for Summ. J. (N.C. Super. Mar. 17, 2017) (summarizing the challenged act). A three-judge trial court panel held the challenged provisions unconstitutional. Those provisions were repealed soon after the trial court's order. *See* Session Law 2017-6, § 1 (veto override on Apr. 25, 2017).

C. The supermajority sought to control the leadership of the North Carolina Industrial Commission and extend terms of office of appointees of the outgoing Governor.

Certain portions of Session Law 2016-125 used appointments to, and chairmanship of, the Industrial Commission to entrench the supermajority's policy preferences. Specifically, that act granted "a single appointee named by an outgoing Governor and confirmed by an outgoing General Assembly . . . an extended term on the Industrial Commission . . . ." *State ex rel. Cooper v. Berger et al.*, Wake County Case No. 17 CVS 6465, Order and J. at 8 ¶ 26 (Dec. 3, 2018). Session Law 2016-125 also prevented the Governor from appointing the chair and vice-chair of the Industrial Commission "for the entirety of his first term," unconstitutionally prevented the Governor from faithfully executing our State's workers' compensation laws, and "directly conflict[ed] with the electorate's selection of Governor Cooper and the policies he was elected to pursue." *Id.* at 15 ¶¶ 57, 59, 60. These provisions were permanently enjoined by the Wake County Superior Court. Eventually, the General Assembly repealed the offending provisions and its appeal from the trial court order was withdrawn. *See State v. Berger*, COA No. 19-512, Joint Mot. to Withdraw Appeal (Sept. 3, 2019) https://www.ncappellatecourts.org/show-file.php?document_id=253193.

D. The supermajority—for the first time—required Senate confirmation of the Governor's cabinet secretaries.

Part III of Session Law 2016-126 established statutory authority for the North Carolina Senate to confirm the Governor's appointments for his cabinet secretaries. This intrusion was upheld by the trial court and this Court, which reasoned that "the Governor has unfettered power to nominate any eligible individual to serve in his Cabinet, has significant supervisory power over his Cabinet members, and has the power to remove Cabinet members at will." *Cooper v. Berger*, 371 N.C. 799, 817, 822 S.E.2d 286, 300 (2018).

E. Ignoring this Court's opinion in *McCrory*, the supermajority refused to restructure boards and commissions unconstitutionally controlled by the General Assembly.

This Court's landmark *McCrory* opinion held that the Governor must have sufficient control over executive branch boards and commissions implementing executive policy. The Governor challenged the structure of six specific boards and commissions as violating the teachings of *McCrory* and a three-judge trial court panel agreed, holding their structures unconstitutional. *State ex rel. Cooper v. Berger et al.*, Wake County Case No. 17 CVS 6465, Order Granting Pl.'s Mot. for Partial Summ. J. (Counts 7-12) (Aug. 31, 2018). Following that holding, the General Assembly refused to restructure those boards and commissions, forcing the Governor to reconstitute them by

executive order. After the 2018 elections, the General Assembly took legislative action and provided a constitutional structure for the boards and commissions at issue. *See* Session Law 2019-32 (June 21, 2019).

F. Apparently frustrated by judicial enforcement of the North Carolina Constitution, the supermajority attempted to intimidate the courts by reducing the size of the Court of Appeals.

Through Session Law 2017-7, the General Assembly attempted to shrink the North Carolina Court of Appeals from 15 to 12 judges by cutting short the terms of office for three judicial seats for the sole purpose of preventing the Governor from making judicial vacancy appointments. A majority of a three-judge trial court panel upheld the challenged act as constitutional and the Governor appealed. During the pendency of the appeal before this Court, the General Assembly—after the 2018 elections—enacted Session Law 2019-2, which repealed the challenged provision. *See Cooper v. Berger*, No. 315PA18, Joint Mot. to Withdraw Appeal (Mar. 11, 2019), https://www.ncappellatecourts.org/show-file.php?document_id=243683.

G. Recognizing elections as the source of its power, the supermajority repeatedly attempted to control the composition and policies of the Board of Elections.

For more than two years—and despite losing four times in the courts—the unconstitutional supermajority tried to dismantle the elections oversight structure that had served North Carolina for more than 100 years. The

unconstitutional supermajority did so in order to tilt our State's elections policies in their favor and to entrench their political views and power. The unconstitutional supermajority first attempted, through Session Law 2016-125 (Dec. 19, 2016), to exercise direct control over the State Board's implementation of election laws. A three-judge trial court panel unanimously found that unconstitutional. *Cooper v. Berger and Moore*, 2017 WL 1433245 at *8 ¶ 23.

Undeterred, the unconstitutional supermajority again tried to restructure the State Board of Elections, enacting Session Law 2017-6 (Apr. 25, 2017), which this Court held unconstitutional:

> [W]e conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, "leave[ ] the Governor with little control over the views and priorities" of the Bipartisan State Board [of Elections], by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs, limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.
>
> . . . .
>
> [T]he manner in which the membership of the Bipartisan State Board is structured and operates under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that

> the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution.

Cooper, 370 N.C. at 416, 418, 809 S.E.2d at 112–14 (citations and footnotes omitted).

Notably, instead of declaring the whole of Session Law 2017-6 to be unconstitutional, this Court in *Cooper* expressly declined to reach issues regarding the constitutionality of the legislative appointment of the Executive Director of the State Board and the structuring of county boards of elections. *See id.* at 418–21, 809 S.E.2d at 114–16. That is, out of respect for, and deference to, the legislative power of a coordinate branch, this Court allowed the legislature another opportunity to craft a constitutional statute. The unconstitutional supermajority disregarded that opportunity.

Instead of repealing Session Law 2017-6 and creating a constitutional structure for the State Board of Elections, the unconstitutional supermajority retained the un-amended, un-repealed portions of Session Law 2017-6 and enacted Part VIII of Session Law 2018-2 (Mar. 16, 2018) to create yet another iteration of a legislatively influenced Board of Elections. The same three-judge panel—which had duly considered the supermajority's two previous attempts to restructure the State Board—heard argument on 26 July 2018 and on 16 October 2018 found "the challenged Acts in their entirety are unconstitutional" and permanently enjoined "Part VIII of Session Law 2018-2 in its entirety, and

sections 3 through 22 of Session Law 2017-6 in their entirety." *Cooper v. Berger et al.*, Wake County Case No. 18 CVS 3348, Order at 22 ¶ 83 (N.C. Super. Oct. 16, 2018).

II. When the supermajority's unconstitutional acts were rebuffed by the judiciary, it resorted to constitutional amendments.

Rather than accepting the well-considered opinions of trial and appellate courts—and perhaps recognizing that its statutory attempts at entrenchment would continue to run afoul of the North Carolina Constitution—the legislative supermajority doubled down, proposing a constitutional amendment to establish a State Board of Elections entirely composed of legislative nominees. In other words, having its legislative acts declared unconstitutional caused the supermajority to resort to the nuclear option of amending our state's Constitution—since the courts cannot declare a (validly adopted) constitutional provision unconstitutional. *See Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.").

Even then, the unconstitutional supermajority tried to rig the vote by offering a misleading description of the amendment. As a result, that amendment was enjoined as unconstitutional by a three-judge trial court panel that "conclude[d] beyond a reasonable doubt that this portion of the ballot

language in the Board Appointments Proposed Amendment does not sufficiently inform the voters and is not stated in such manner as to enable them intelligently to express their opinion upon it." *Cooper v. Berger et al. and NC NAACP v. Moore et al.*, Wake County Case Nos. 18 CVS 9805 & 9806, Order on Inj. Relief at 25 ¶ 55 (Aug. 21, 2018).

The unconstitutional supermajority then proposed a second amendment creating a State Board of Elections entirely composed of legislative nominees. *See* Session Law 2018-133. This second amendment was opposed publicly by all of the living former governors of North Carolina and rejected by the voters of North Carolina at the November 2018 election. *See* N.C. State. Bd. of Elections, 11/06/2018 Official General Election Results – Statewide, https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=REF&contest=0.

The two amendments presently before this Court are part of the same strategy of the unconstitutional supermajority to "constitutionalize" its policies and thus protect them from the will of the electorate.

III. Affirming the Court of Appeals would abdicate the judiciary's vital role in our three-part government.

The majority of the Court of Appeals panel below concluded that the trial court erred in declaring the two constitutional amendments enacted by the unconstitutionally gerrymandered legislature void *ab initio*. Contrary to Judge Dillon's opinion, this Court has *never* "expressly addressed and rejected the

argument accepted by the superior court." *N.C. State Conf. of the NAACP v. Moore*, ___ N.C. App. ___, ___, 849 S.E.2d 87, 94 (2020) (opinion of Dillon, J.). Neither *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939) (considering a challenge to a statute concerning taxation), nor *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (considering a challenge to a redistricting plan alone), nor *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (considering a challenge to a redistricting plan and contemplating how to order new redistricting plans be drawn on remand) considered the issue of first impression before this Court—whether an unconstitutionally gerrymandered legislature may act to enshrine its policy preferences in the North Carolina Constitution.

Proposing a constitutional amendment is not an ordinary legislative act. Instead, it is an extraordinary action requiring approval by a legislative supermajority of both houses and the people themselves. The framers of our state Constitution recognized the special significance of constitutional amendments. Amendments may not be proposed to the people by a simple legislative majority. N.C. CONST. art. XIII, § 4 (the General Assembly may initiate a constitutional amendment "only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection"). It necessarily follows that a

subsequent, constitutionally composed, legislature wishing to repair the damage caused by the unconstitutional supermajority's *years* running rampant faces this same structural reality.[2] The subsequent (and more representative) legislature may, where necessary, repeal or amend legislation to correct statutory law enacted by the unconstitutional supermajority and quickly restore the people's policy preferences. In most cases, this can be accomplished by a simple majority. Repealing constitutional amendments brought about by an unconstitutional supermajority's havoc, however, is a tall order—requiring "three-fifths of all the members of each house." *Id.*[3] The practical effect of the result reached by the Court of Appeals majority is that the unconstitutional supermajority's policy preferences will remain the law of the land so long as the former supermajority maintains more than two-fifths of just one legislative

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[2] Indeed, the history of amendments to the North Carolina Constitution since 1971 suggests that specific repeals of constitutional amendments occur rarely, if ever. *See* Amendments to North Carolina Constitution of 1971, https://sites.ncleg.gov/library/wp-content/uploads/sites/5/2020/01/NCConstAmendsince1971.pdf (noting that the specific repeal of the literacy requirement in N.C. CONST. art. VI, § 4 was rejected by the voters). This history compiled by the North Carolina Legislative Library does not indicate any specific repeals of constitutional language, but instead reflects slight modifications or wholesale additions of new language. *Id.* In short, once adopted, amendments to the Constitution are usually there to stay.

[3] Our Constitution sets forth a second procedure for amendments via a Convention of the People, but this process cannot be initiated without "the concurrence of two-thirds of all the members of each house of the General Assembly," N.C. CONST. art. XIII, § 1, meaning that any future legislature wishing to correct these amendments via Convention of the People would need an even *larger* majority than it would to do so by legislative initiation, *id.* art. XIII, § 4.

body sufficient to block future attempts to propose constitutional amendments to the people. The constitutional violation in this case must be remedied by this Court, as there is no basis to challenge (valid) constitutional amendments as violating the North Carolina Constitution. *See Leandro*, 346 N.C. at 352, 488 S.E.2d at 258 (noting that the constitution cannot violate itself).

That this Court has declined to unwind the routine acts of government officials and bodies that only had de facto authority,[4] does not resolve the present issue of first impression. Alterations to our state's fundamental document are simply different, both as a constitutional and practical matter. Our Constitution plainly provides that "[a]ll political power is vested in and derived *from the people*; all government of right originates *from the people*, is founded *upon their will only*, and is instituted solely for the good of the whole." N.C. CONST. art. I, preamble; *id.* § 2 (emphases added). These amendments brought about by the unconstitutional legislature *do not* represent the will of

[4] Specifically, Judge Dillon's opinion cites to distinguishable instances where this Court declined to unwind acts of government officials or town councils whose authority was in some way defective. *See N.C. State Conf. of the NAACP*, ___ N.C. App. at ___, 849 S.E.2d at 95 (citing *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978) (considering a judge who served past the statutory mandatory retirement age and stating in dicta that the judge's "judicial acts while in office are valid"); *Wrenn v. Kure Beach*, 235 N.C. 292, 295, 69 S.E.2d 492, 494 (1952) (upholding acts of town council who was elected under unconstitutionally void scheme); *Smith v. Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (1934) (same); *State v. Lewis*, 107 N.C. 967, 972, 12 S.E. 457, 458 (1890) (sustaining a criminal conviction where the judge presiding was constitutionally ineligible for office)).

the people and cannot be easily corrected by subsequent acts of the people through their duly elected representatives—as more routine governmental acts could.

Holding that the judiciary is powerless to remedy such acts to alter our Constitution will lead to dangerous consequences. The opinions of both Judge Dillon and Judge Stroud below note that the 2011 legislative maps were not North Carolina's first rodeo with gerrymandering. *N.C. State Conf. of the NAACP*, ___ N.C. App. at ___, 849 S.E.2d at 91; *id.* at ___, 849 S.E.2d at 103 (opinion of Stroud, J.). Without meaningful bipartisan redistricting reform, the 2011 maps are unfortunately unlikely to be our last. Affirming the Court of Appeals will be an invitation to any future unconstitutional supermajorities to make the most of their tenure by weaponizing constitutional amendments—thereby entrenching their power and policy preferences that do not reflect the will of the people.

Judge Stroud's opinion expresses appropriate concern about the breadth of any holding invalidating legislative acts. *Id.* at ___, 849 S.E.2d at 101–103. These concerns recognize, as this Court has before, that the judiciary must police itself to avoid interfering with the other branches. *See, e.g.*, *In re Alamance Cty. Court Facilities*, 329 N.C. 84, 100, 405 S.E.2d 125, 133 (1991). The issue here, however, requires judicial intervention because no other

protection is feasible. Indeed, the supermajority's strategy appears intended to protect its policy choices from any judicial check, as a constitutional provision cannot be declared unconstitutional. As outlined above, so long as the former supermajority retains two-fifths of one at least one legislative body, the constitutional impact of these amendments will likely last for decades. Rather than accepting unconstitutional racial gerrymandering as an unavoidable reality—and allowing the state's foundational document to reflect as much—this Court can and should act.

IV. Voter approval of the two amendments at issue did not cure their fatal flaw.

Voter approval of the two proposed constitutional amendments at issue in this case did not cure their fatal flaw. The amendments fail the constitutional requirement that they be initiated by "three-fifths of *all the members* of each house," N.C. CONST. art. XIII, § 4 (emphasis added), because the three-fifths majorities necessary to propose such amendments would not have existed but for the unconstitutional gerrymandering of the General Assembly. This much is confirmed by subsequent elections under different maps. *Compare* General Assembly composition post-2016 election (House: 74 Republicans and 46 Democrats; Senate: 35 Republicans and 15 Democrats), *with* composition post-2018 election (House: 65 Republicans and 55 Democrats; Senate: 29 Republicans and 21 Democrats), *and* composition post-2020 election

(press reports reflect House: 69 Republicans and 51 Democrats; Senate: 28 Republicans and 22 Democrats). While the consequences of racial gerrymandering might not always track along party lines, in this case they do. Legislation enabling proposal of the voter identification amendment was passed strictly along party lines. *See* N.C. General Assembly, Senate Roll Call Vote Transcript For Roll Call #792, 2017–2018 Session, https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/792; N.C. General Assembly, House Roll Call Vote Transcript For Roll Call #1260, https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/H/1260.[5]

Both the Judge Dillon and Judge Stroud opinions below minimize the role played by the General Assembly in amending our Constitution, reasoning that the people themselves control the process of amending the North Carolina Constitution—thereby implying that the unconstitutional supermajority's involvement in the process was harmless. *N.C. State Conf. of the NAACP*, ___ N.C. App. at ___, 840 S.E.2d at 96 (opinion of Dillon, J.); *id.* at ___, 840 S.E.2d at 104 (opinion of Stroud, J.). To the contrary, the General Assembly serves

[5] Similarly, the legislation placing the income tax amendment on the ballot was passed largely along party lines. *See* N.C. General Assembly, Senate Roll Call Vote Transcript For Roll Call #20, https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/20 (two Democrats and one Republican voting against party lines); N.C. General Assembly, House Roll Call Vote Transcript For Roll Call #1286, https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/H/1286 (one Republican voting against party lines).

critical roles as both gatekeeper and architect for any constitutional amendments, which should be thoroughly considered, carefully drafted, and painstakingly revised to avoid inserting flaws in the foundation of North Carolina government and the rule of law.[6] When, as here, the gatekeeper and architect functions have devolved to a legislature that has unconstitutionally attempted to entrench itself, those functions are irreparably broken. Moreover, the harm caused by this constitutional violation is compounded where a majority of voters cannot correct the constitutional defect and a minority of more than two-fifths of one legislative body can block any corrective efforts.

The legislature alone is not the State of North Carolina. *Cf.* THE FEDERALIST No. 71 (Alexander Hamilton) ("The representatives of the people,

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[6] Notably, North Carolina's constitutional history includes many proposed constitutional amendments which, though they may have promoted good government, never reached the people because the General Assembly did not propose the amendments to the people. For example:

- The 1929 General Assembly rejected the Governor's short ballot constitutional amendment to reduce the number of elected executive officers. Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2061 (1999). So did the 1931 General Assembly. *Id.* at 2062.

- The 1957 constitutional study commission authorized at the request of the Governor proposed rewriting the Constitution, "but the General Assembly did not approve submission of the proposal to the voters." *Id.* at 2065.

- Certain amendments proposed by the 1968 Study Commission were rejected in the General Assembly. *See id.* at 2068 ("The General Assembly, however, did not ratify Commission proposals concerning gubernatorial succession, veto power, or the short ballot . . . .").

in a popular assembly, seem sometimes to fancy that that they are the people themselves, and betray strong impatience and disgust at the least sign of opposition from any other quarter. . . ."). Instead, the State consists of the people and their three co-equal and coordinate branches of government. When the legislature oversteps its authority, it is incumbent upon both the Governor and the judiciary, when required, to protect and enforce constitutional guarantees. The trial court correctly recognized this and acted to restore this wrong. It is imperative that this Court do the same.

V. The widespread and serious racial gerrymanders in North Carolina resulted in a General Assembly not representative of the people in violation of the people's fundamental right to sovereignty. Such an unrepresentative General Assembly cannot be permitted to entrench its policies in the North Carolina Constitution.

Because voting is the mechanism through which people confer power in a government, "the Supreme Court has long recognized that the 'right to vote freely for the candidate of one's choice is of the essence of a democratic society.' " *Covington v. North Carolina*, 270 F. Supp. 3d 881, 890 (M.D.N.C. 2017) *("Covington II")* (quoting *Reynolds v. Sims,* 377 U.S. 533, 555 (1964)). "Accordingly, because the right to vote is 'preservative of all rights,' any infringement on that right . . . strikes at the heart of the substantive rights and privileges guaranteed by our Constitution." *Id.* (quoting *Reynolds*, 377 U.S. at 562–63).

In a comprehensive review of the racial gerrymanders that gave the General Assembly the supermajority needed to pass the constitutional amendments at issue here, the federal three-judge panel in *Covington II* held:

> Taken together, the effects of the racial gerrymanders identified by the Court—and affirmed by the Supreme Court—are widespread, serious, and longstanding. Beyond the immediate harms inflicted on Plaintiffs and other voters who were unjustifiably placed within and without districts based on the color of their skin, Plaintiffs—along with millions of North Carolinians of all races—have lived and continue to live under laws adopted by a state legislature elected from unconstitutionally drawn districts.

Id. at 894.

The *Covington II* court also found that "[t]he widespread scope of the constitutional violation at issue—unjustifiably relying on race to draw lines for legislative districts encompassing the vast majority of the state's voters—also means that the districting plans intrude on popular sovereignty." *Id.* at 897. This "strikes at the heart of the substantive rights and privileges guaranteed by our Constitution," because "the districting plans interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." *Id.* at 890, 897. As such, the court held that

> [t]he harms attendant to unjustified race-based districting do not end with the enactment of an unconstitutional districting scheme. Quite the opposite, these harms begin with the enactment of unconstitutional maps; are inflicted

> again and again with the use of those maps in each subsequent election cycle; and, by putting into office legislators acting under a cloud of constitutional illegitimacy, continue unabated until new elections are held under constitutionally adequate districting plans.

Id. at 891.

In addition to the serious and widespread abridgement of North Carolinians' popular sovereignty, the *Covington* panel emphasized the particular harms associated with the racial nature of the gerrymandering. First, race-based districting "sends a 'pernicious . . . message' to elected representatives that they should represent the interests only of the racial group from which they obtained support, not their constituency as a whole." *Covington v. North Carolina*, No. 1:15CV399, 2017 WL 44840, at *3 (M.D.N.C. Jan. 4, 2017) (quoting *Shaw v. Reno,* 509 U.S. 630, 648 (1993)). This message is "'altogether antithetical to our system of representative democracy,' raising the specter that the electorate will be 'balkanize[d] . . . into competing racial factions' and threatening 'to carry us further from the goal of a political system in which race no longer matters[.]'" *Covington II,* 270 F. Supp. 3d at 891 (quoting *Shaw,* 509 U.S. at 648, 657) (citations omitted).

Here, the "inherent, sole, and exclusive" right of the people of North Carolina to choose their own government was significantly and repeatedly abridged during each of the three election cycles for which North Carolina

citizens elected their representatives through districts found to be unconstitutional racial gerrymanders. *See id.* at 894 ("[R]egarding duration, as Plaintiffs rightly emphasize, these harms have persisted for over six years, tainting three separate election cycles and six statewide elections."). The gerrymanders underlying this case are "among the largest racial gerrymanders ever encountered by a federal court." *Id.* at 884. Additionally, the impact of the unconstitutional racial gerrymanders is "not limited to the eight million voters in districts with lines drawn based on an unjustified consideration of race." *Id.* at 893. "Rather, the districting plans adversely affect *all* North Carolina citizens to the extent their representatives are elected under a districting plan that is tainted by unjustified, race-based classifications." *Id.* (emphasis in original).

Because the racial gerrymanders abridged the popular sovereignty of *all* North Carolinians, the General Assemblies elected thereunder were unrepresentative, lacking power "derived from the people" to amend our Constitution. As a result, this Court should reverse the Court of Appeals and hold that the constitutional amendments in this case are void and of no effect.

It bears emphasis that the racial nature of these gerrymanders present additional harms that further delegitimize the two constitutional amendments challenged by Plaintiff-Appellant North Carolina NAACP. Permitting these

amendments to take effect will entrench the power and policy preferences of an unconstitutional supermajority into the North Carolina Constitution. Specifically, the voter identification amendment will disproportionately impact racial minorities, who—based on the experience with such laws nationwide—more frequently lack identification, regularly suffer discriminatory enforcement, and tend to turn out in lower numbers when such laws are operative.[7] And the tax cap amendment is regressive, meaning that individuals with lower incomes will bear a disproportionate share of the tax burden.

Finally, Judge Dillon's declaration that "[t]he United States Supreme Court recently declared that partisan gerrymandering is legal," *N.C. State Conf. of the NAACP*, ___ N.C. App. at ___, 849 S.E.2d 87, 90 (2020) (opinion of Dillon, J.). (emphasis in original) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019)), is wrong as a matter of law. In *Rucho*, the United States Supreme Court held that the issue of partisan gerrymandering presented in that case was a political question under the federal constitution, not that partisan gerrymandering was "legal." This Court's political question

[7] Indeed, a judge in the Middle District of North Carolina preliminarily enjoined portions of the statute enacted by the General Assembly to give effect to the voter identification amendment. *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 53–54 (M.D.N.C. 2019), *appealed on separate grounds* No. 19-2274 (4th Cir). So too did the Court of Appeals. *See Holmes v. Moore*, ___ N.C. App. ___, 840 S.E.2d 244 (2020).

jurisprudence, applying the North Carolina Constitution, is an entirely different matter. The question of partisan gerrymandering is likely to come before this Court in due course. This Court should specifically reject the Court of Appeals' unprompted exposition on that issue.

In any event, the recent prevalence of severe partisan gerrymandering only highlights the importance of this case. Legislators should not be allowed to slice and dice the electorate block-by-block to ensure a fleeting supermajority and then push through constitutional amendments that further entrench them in power.

* * *

Fundamentally, any General Assembly—whether conservative or progressive, Republican or Democratic—that uses unconstitutionally obtained legislative power over redistricting to select its own voters should not be permitted to amend the State's Constitution. Enforcing the constitutional guarantee of popular sovereignty in this narrow circumstance will protect against future attempts of any faction to use the machinery of governmental power to entrench itself against the will of the electorate. More importantly, holding that an unconstitutional supermajority cannot initiate constitutional amendments will promote and safeguard the popular, representative sovereignty guaranteed to the people in the North Carolina Constitution.

CONCLUSION

For all of the foregoing reasons, Governor Cooper respectfully requests that this Court reverse the decision of the Court of Appeals.

This the 2nd day of December, 2020.

Electronically Submitted
Daniel F. E. Smith
N.C. State Bar No. 41601
dsmith@brookspierce.com
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
Telephone: 336-373-8850
Facsimile: 336-378-1001

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com
Eric M. David
N.C. State Bar No. 38118
edavid@brookspierce.com
Kasi W. Robinson
N.C. State Bar No. 52439
krobinson@brookspierce.com

Attorneys for Amicus Roy Cooper, Governor of the State of North Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel has this day served the foregoing document in the above-captioned action on all parties to this cause by email, addressed to the following:

Noah H. Huffstetler, III
noah.huffstetler@nelsonmullins.com
D. Martin Warf
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

Irving Joyner
ijoyner@nccu.edu
P.O. Box 374
Cary, NC 27512

David Neal
dneal@selcnc.org
Kimberley Hunter
khunter@selcnc.org
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516

Daryl Atkinson
daryl@forwardjustice.org
Leah Kang
lkang@forwardjustice.org
400 W. Main Street, Suite 203
Durham NC 27701

This the 2nd day of December, 2020.

/s/ Daniel F. E. Smith
Daniel F. E. Smith