No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, vs. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendant-Appellees.	From Wake County

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DEFENDANT-APPELLEES' RESPONSE TO BRIEFS OF *AMICI CURIAE*

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DEFENDANT-APPELLEES' RESPONSE TO BRIEFS OF *AMICI CURIAE*

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Defendants Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, by and through undersigned counsel, hereby respond in opposition to the briefs of the following *Amici Curiae*: Governor Roy Cooper (the "Governor"); North Carolina Legislative Black Caucus (the "Black Caucus"); North Carolina Professors of Constitutional Law (the "Professors"); Democracy North Carolina ("Democracy NC"); the American Civil Liberties Union of North Carolina (the "ACLU"); and North Carolina Advocates for Justice ("NCAJ").

ARGUMENT

Amici Curiae offer no case law support for Plaintiff's novel position that, based on the Legislature's lack of authority, the challenged constitutional amendments were properly invalidated by the trial court. Instead, they argue that this Court should focus on the policy arguments supporting Plaintiff's position. For the reasons set forth below, *Amici Curiae's* policy arguments fail to aid the Court in its consideration of this appeal. Defendants address the main arguments advanced by the *Amici Curiae* below.

A. Plaintiff's Challenge is a Nonjusticiable Political Question.

The *Amici Curiae* dispute that the issues in this matter are nonjusticiable, arguing that the North Carolina Constitution does not commit to the General Assembly "the discretionary and unreviewable assessment of whether the constitutional obligation [a three-fifths vote in both houses] has been met." (Professors' Brief at 10) (*See also* ACLU's Brief at 11 ("the court below abdicated its duty to interpret the Constitution and say what the law is.")). Although the Professors, the Black Caucus, and Judge Young[1] cite *Baker v. Carr*, 369 U.S. 186 (1962), in support of what they argue should be found to be justiciable issues now

[1] The ACLU cites the Dissent's discussion regarding developments in redistricting jurisprudence and the application of the political question doctrine. *See* ACLU Brief at 15. Notably, the Dissent states that, under *Baker*, challenges to apportionment of state legislatures under the Equal Protection Clause and the Fourteenth Amendment are justiciable. *N. Carolina State Conference of Nat'l Ass'n for Advancement of Colored People v. Moore*, 849 S.E.2d 87, 104 (N.C. App. 2020) (Young, J., dissent). However, neither the Dissent nor the ACLU points to any case law holding that a challenge that questions whether a legislature has popular sovereignty to pass a law is justiciable.

before the Court, they ignore the *Baker* Court's discussion of the application of the political question doctrine to the validity of enactments. The Supreme Court relied on precedent for its position that "[t]he respect due to coequal and independent departments, and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, it complied with all requisite formalities." *Id.* at 214 (quotations omitted). The *Baker* Court acknowledged that a court could "delve into the legislative journals in order to preserve the enactment" to resolve such issues as the effective date of a statute, *id.* at 214-15, and also that a court shall not apply the political question doctrine "to promote only disorder", *id.* at 215. Thus, while a court might be able to review the legislative journal to confirm the Legislature satisfied the constitutional requirement that three-fifths of all members of each house voted to propose a constitutional amendment, *see, e.g., Frazier v. Bd. of Comm'rs of Guilford Cty.*, 194 N.C. 49, 138 S.E. 433, 436 (1927) (certificates and legislative journals are conclusive of compliance with [now] Article II, Section 23), whether the Legislature has the popular sovereignty necessary to propose constitutional amendments (or to pass other laws) is nonjusticiable.

B. Redistricting—as was Applied in North Carolina—is the Proper Remedy for Improperly Drawn Districts.

Like Plaintiff, the *Amici Curiae* want this Court to strike down the challenged constitutional amendments as a further remedy for racial gerrymandering that was found to be unconstitutional by the federal courts in the *Covington* case. (*See, e.g.,* Black Caucus's Brief at 4); (Governor's Brief at 20); (NCAJ's Brief at 9); (R at p 186).

However, neither Plaintiff nor any of the *Amici Curiae* points to a single case where a court struck down a law passed by a legislature elected under districts that were found unconstitutional. Rather, the Supreme Court has held that, once a state's legislative districts have been found to be unconstitutional, redrawing those districts prior to the next election is the proper remedy. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). *Amici Curiae* acknowledge that such a remedy was effected here. (*See, e.g.,* Democracy NC's Brief at 12; Governor's Brief at 20; (R at p 186)).

C. Constitutional Requirements for Amendment were Satisfied, and Voter Ratification is an Appropriate Check on Constitutional Amendments.

Pursuant to the express language of the Constitution, there are two steps required to amend the Constitution: 1) a vote of three-fifths of all of the members of each house of the General Assembly is required to propose a constitutional amendment to voters and, 2) thereafter, ratification of the amendment requires a majority vote of the people. N.C. Const. Art. XIII, Sec. 4.[2] Although several of the *Amici Curiae* highlight the close, party-line vote to propose the challenged amendments, (*see* Black Caucus Brief at 10; Professor's Brief at 8; Governor's Brief at 21), there is no dispute that sufficient votes were cast by members of the General Assembly to meet the three-fifths threshold. Nonetheless, some of the *Amici Curiae* argue that the required three-fifths majority would not have existed but for unconstitutional gerrymandering and that, therefore, the first step in the amendment

[2] The Constitution also allows for amendment of the Constitution by a Convention of the People called by "the concurrence of two-thirds of all the members of each house of the General Assembly." N.C. Const. Art. XIII, Sec. 1, 3.

process was not satisfied. (*See, e.g.* Governor's Brief at 20, Black Caucus's Brief at 21; ACLU's Brief at 5; Professors' Brief at 8.) For example, the ACLU argues that the Constitution requires "approval of three-fifths supermajorities of duly-elected representatives in both houses of the legislature" and that "the amendments at issue were enacted in violation of these constitutional requirements, as they were enacted by an unrepresentative legislative body." (ACLU Brief at 5.)[3] However, there is no evidence offered by Plaintiff or the *Amici Curiae* that the members of the legislature who voted in favor of the challenged amendments were not, in fact, duly elected. To the contrary, Plaintiff understood that the legislators serving in the districts that had to be redrawn were elected and sought to "truncate the terms" of those legislators. *Covington v. North Carolina*, 270 F. Supp.3d 881, 884 (M.D.N.C. 2017). And, the Middle District of North Carolina, which concluded that there was unconstitutional racial gerrymandering, acknowledged that the legislators had indeed been elected. *See, e.g., id.* at 884 ("We recognize that legislatures elected under the unconstitutional districting plans have governed the people of North Carolina for more than four years and will continue to do so for more than two years after this Court held that the districting plans amount to unconstitutional racial gerrymanders.") (emphasis in original); *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018),

[3] The ACLU went on to argue that the majority of the Court of Appeals "presumed, without constitutional analysis, that the 2018 legislature possessed the authority to place constitutional amendments before the voters." (ACLU Brief at 10.) In fact, the majority concluded that members of the General Assembly were *de jure* officers or, "at worst," *de facto* officers with "the authority to exercise all the power that may be exercised by a *de jure* officer under the *de facto* doctrine consistently applied by our Supreme Court." *NAACP v. Moore*, 849 S.E.2d at 95.

aff'd in part, rev'd in part, 138 S. Ct. 2548 (2018) (districts enacted in plan to remedy violations to which no substantive challenges were raised "are entitled to the presumption of constitutionality afforded an enactment of a duly elected legislature.").[4]

Amici Curiae, without offering legal support, would have this Court conclude that the three-fifths vote in favor of the challenged amendments should be ignored because the supermajority vote might not have been achieved without what was determined to be unconstitutional racial gerrymandering. However, as will be discussed in more detail below, such an argument cannot be limited to the passage of the two challenged constitutional amendments. There are other laws that, for example, required only a simple majority to pass, but it is entirely speculative whether or not those laws would have passed but for the makeup of the General Assembly as it was after federal courts found unconstitutional racial gerrymandering.

Amici curiae argue that the alleged failure to secure the requisite three-fifths vote of both houses cannot be cured by a vote of the people approving the amendments, (*see, e.g.*, Governor's Brief at 20; ACLU Brief at 13), but they offer nothing to show that Defendants failed to follow the appropriate process for

[4] Democracy North Carolina argues that the federal court's order to the Legislature to redraw the districts or failure to order a special election should not be viewed as evidence that those courts believed the Legislature was legitimate. (*See* Democracy NC Brief at 12-14.) However, as set forth above, both Plaintiff and the Middle District acknowledged that the legislators were elected and making laws to govern North Carolina.

amendment. Moreover, as noted by Judge Stroud, "this is a specific type of legislative action that must be and was approved by a majority of the voters in North Carolina in a statewide election. The popular vote provides an additional layer of protection." *N. Carolina State Conference of Nat'l Ass'n for Advancement of Colored People v. Moore*, 849 S.E.2d 87, 102 (N.C. Ct. App. 2020).

And, while *Amici Curiae* may question voters' ability to make what *Amici Curiae* think are appropriate decisions, (*see, e.g.*, ACLU Brief at 13-14), the Supreme Court has recognized that "[i]t is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of this sensitivity on decent and rational grounds," and that "the courts may not disempower the voters from choosing which path to follow." *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 572 U.S. 291, 313 (2014) (holding that no authority in United States Constitution would allow the judiciary to set aside an amendment to the Michigan Constitution passed by voters that prohibits affirmative action in public education, employment, and contracting).

Six constitutional amendments were proposed to the voters on the 2018 ballot. (R pp 141-142.) Although Plaintiff (and the Governor) challenged only four of the six amendments, Plaintiff's usurper argument (that the General Assembly lacked the authority to pass session laws proposing constitutional amendments) would apply equally to each of the six. At the November 2018 election, the voters ratified only four of the six proposed amendments. (R 179, 186.) While *Amici Curiae* speculate that, except for the General Assembly's supermajority obtained through districts that

were found to be unconstitutional,[5] these amendments would not have reached the people, they seem to ignore that the voters weighed the amendments and decided what they would add to their Constitution. The voters did not agree with some of the proposals (specifically, those related to the filling of judicial vacancies and the makeup of the State Board of Elections). Therefore, while *Amici Curiae* argue that there needs to be a "judicial check on attempts to impose entrenchment directly into our Constitution," (*see* Governor's Brief at 6), our Constitution already contains the check of the vote of the people, *see* N.C. Const. art. XIII, § 4 (proposed amendments must be submitted "to the qualified voters of the State for their ratification or rejection."). Ratification by a majority of voters cannot be ignored; as recently determined by the Fourth Circuit Court of Appeals, "[t]here is no question that the voters of North Carolina constitutionally mandated that the legislature enact a voter-ID law." *N. Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 306 (4th Cir. 2020).

D. So-Called Political Entrenchment is Not a Ground for Reversing the Court of Appeals.

The popular vote of the sovereign people of North Carolina also undercuts *Amici Curiae's* arguments that the proposed amendments were part of the Republican party's policy of entrenchment. The *Amici Curiae* have focused on what they allege are partisan efforts to entrench political power in the North Carolina

[5] Notably, the vote on the proposed constitutional amendments was a statewide vote such that districts—no matter how drawn—are not relevant to the voters' rejection or ratification of the proposals.

General Assembly. (*See, e.g.,* Democracy NC Brief at 35;[6] Governor's Brief at 3; Black Caucus's Brief at 4.) However, none of the *Amici Curiae* appears to recognize that it was *the people* of North Carolina who lowered the cap on the tax rate and established the use of photo identification when voting. The General Assembly proposed a bipartisan elections board and a new structure for judicial vacancy appointments, but the people of North Carolina did not want those specific amendments; therefore, those ideals are not "entrenched" in our Constitution. The will of North Carolina voters has been expressed—not squelched—by their vote. Those (in the minority) who opposed the amendments now prefer to characterize the amendments ratified by voters as political entrenchment rather than as valid amendments. (*See, e.g.*, Governor's Brief at 3)[7] ("these constitutional amendments represent a dangerous

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[6] Democracy NC largely focuses its brief on an analysis of political gerrymandering and the decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), but the legality of political gerrymandering is not before this Court. Democracy NC also criticizes the Court of Appeals majority for "major errors" (many of which are later revealed to be, at worst, oversimplifications). (Democracy NC at 2, 6, 16.) Defendants note that Democracy NC's brief contains errors of its own. For example, Democracy NC states that

> 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 proposal 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.

(Democracy NC Brief at 2.) In fact, the Superior Court makes no reference to partisan gerrymandering.

[7] In support of his Motion for Leave to File *Amicus Curiae* Brief, the Governor states that he "accepts his responsibility to oppose political entrenchment," and that he

effort by the unconstitutional supermajority to entrench its policy preferences and power within the solemn text of the North Carolina Constitution,"); (Black Caucus's Brief at 11 ("using their unlawfully obtained constitutional amendments as cover, Defendants continued their efforts to entrench their political power,") (NCAJ's Brief at 3 (arguing that the challenged amendments were "designed to entrench one party's political power."); (Democracy NC's Brief at 36 ("this amendment serves as an example of political entrenchment."). *Amici Curiae* cannot argue that ratification of an amendment by a majority of voters violates any specific provisions of the federal or state constitutions or infringes upon a justiciable right of those who did not vote in favor of the amendments. For all their purported arguments about political

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"seeks permission to participate as *amicus curiae* so that he may articulate the dangers of political entrenchment." (Governor's Motion for Leave at 2). Notably, however, the Governor did ***not*** join in the NAACP's challenge to the Legislature's ability to propose constitutional amendments when he was a plaintiff to litigation challenging the language of several proposed amendments. The Governor filed an action challenging proposed constitutional amendments (specifically, Session Laws 2018-117 and 2018-118, which were later replaced by Session Laws 2018-132 and 2018-133) on the very same day the NAACP initiated its action challenging Session Laws 2018-117, 2018-118, 2018-119, and 2018-128 (and later 2018-132 and 2018-133). The cases were consolidated for purposes of consideration of the arguments and entry of various orders, (*see* R 85), and were simultaneously reviewed in our appellate courts, but the Governor—then a party to the litigation rather than merely a friend of the court—did not officially challenge the session laws at issue in this action (Session Laws 2018-119 and 2018-128) nor did he adopt the NAACP's claim that the General Assembly is a usurper legislative body whose actions are invalid, (*see* R p 89). Only after the constitutional amendments challenged by the Governor had been rejected by the voters (*see* R 179), and after the trial court departed from the earlier guidance of the three-judge panel rejecting the usurper argument, (*see* R p 89), has the Governor jumped in to be a friend of the court. The Governor lacks a constitutional role in the amendment process (*i.e.*, he cannot veto a proposed constitutional amendment) and now again (as an *amicus*) seeks aid of the Court to veto or void amendments that, in his opinion, are not good government.

entrenchment and protecting the rights of the people, it is the *Amici Curiae*, elected and unelected political opponents of the leadership of the General Assembly, who ask this Court to overturn the direct vote and voice of the people of North Carolina.

E. Constitutional History and Recitations of Other Constitutional Litigation Have Little Relevance When the Current Constitutional Requirements Have Been Met.

The Professors lay out the history of the process for amending the State Constitution that culminates in the establishment of the requirement of a three-fifths majority in both houses of the Legislature to propose a constitutional amendment for majority vote by North Carolina citizens. (Professors' Brief at 3-5). As set forth above, despite the *Amici Curiae's* unsupported arguments to the contrary, both of the constitutional requirements (three-fifths vote of both houses and majority vote of qualified voters) were met with regards to the challenged amendments.

The *Amici Curiae* also recount more recent history, specifically, the history of constitutional challenges to legislation passed by the General Assembly. (*See, e.g.,* Governor's Brief at 6-7; Black Caucus's Brief at 9; ACLU Brief at 4). This history is incomplete, however, because *Amici Curiae* ignore recent cases[8] in which constitutional challenges to legislation were unsuccessful. *See, e.g., North Carolina Democratic Party v. Berger*, No. 1:17-CV-01113-CCE-JEP, Trial Findings and Conclusions, Docket #105 (M.D.N.C. June 25, 2018) (entering final judgment for Defendants and finding that session law cancelling judicial primaries is not

[8] The Governor does reference *Cooper v. Berger*, 371 N.C. 799, 822 S.E.2d 286 (2018), in which this Court upheld senatorial advice and consent over department secretaries. (Governor's Brief at 10.)

unconstitutional); *Cooper v. Berger*, No. 315PA18-2, 2020 WL 7414675 (N.C. Dec. 18, 2020) (holding that block grant funds are within State treasury and subject to General Assembly's appropriations authority). Regardless, whether unrelated legislation was determined to be constitutional or not on a direct facial or as-applied challenge to the text of the law is irrelevant to Plaintiff's collateral attack on the General Assembly's purported usurper status—the basis for the invalidation of the amendments at issue here. In Plaintiff's challenge in federal court to the voter identification law passed after the adoption of the voter identification amendment, the Fourth Circuit Court of Appeals made clear that

> the district court *must* afford the state legislature a "presumption" of good faith. *Abbott*, 138 S. Ct. at 2324. For "a finding of past discrimination" neither shifts the "allocation of the burden of proof" nor removes the "presumption of legislative good faith." *Id.; see also City of Mobile v. Bolden*, 446 U.S. 55, 74, 100 S.Ct. 1519, 64 L.Ed.2d 47 (1980) ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."); *McCrory*, 831 F.3d at 241 (finding that we cannot "freeze North Carolina election law in place" as it existed before the [prior voter identification law]).

N. Carolina State Conference of the NAACP v. Raymond, 981 F.3d 295, 303 (4th Cir. 2020) (reversing Middle District's injunction of voter identification law on the grounds of abuse of discretion).[9] Plaintiff and the *Amici Curiae* cannot rely on prior

[9] Both the Governor and the Professors reference the Middle District's injunction without mentioning that it was overturned by the Fourth Circuit. (Governor's Brief at 27 n.7; Professor's Brief at 13 n.12.) Defendants acknowledge that the Fourth Circuit's opinion was issued on December 2, 2020, the same day the *Amici Curiae* filed their briefs, and that the Governor and the Professors may not yet have been aware of the opinion.

laws found to be unconstitutional as the basis for finding the challenged amendments unconstitutional. While the amendments were passed by

> supermajorities elected under racially gerrymandered maps[,] . . . this sheds little light on the motivations of those . . . legislators. At most the racially gerrymandered maps tell us about the motivations of the mapmakers and the legislators to whom they answered. They do not dictate a later General Assembly's intent in passing different legislation.

Id. at n.4.

F. Attacks on the Substance of the Amendments Are Irrelevant.

Much of the focus of the *Amici Curiae* is on the substance of the constitutional amendments. (*See, e.g.,* Democracy NC's Brief at 35) ("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."); (Governor's Brief at 27) ("the voter identification amendment will disproportionately impact racial minorities . . . . And the tax cap amendment is regressive, meaning that individuals with lower incomes will bear a disproportionate share of the tax burden."); (Black Caucus's Brief at 4) ("invalidating amendments that disproportionately affect—and in the case of Voter ID, disenfranchise—African Americans is an appropriate response. . . ."); (NCAJ's Brief at 10-11) (characterizing the amendments as "part of the illegal effort to thwart the will of the people by diminishing the voting power of Black people in North Carolina."). Any arguments about the substance of the amendments and what effect they could have are irrelevant; Plaintiff's theory (as adopted by the trial court) purports to rely on the Legislature's lack of authority to propose the amendments rather than the substance of the amendments. Thus, both

Amici Curiae's opposition to the constitutional amendments and their disagreement with the policies implemented through those amendments are irrelevant to a determination of whether or not the General Assembly could pass legislation proposing the amendments.

It is the legislative branch, and not the judicial branch, that determines what is good policy for this State. *See, e.g.*, *State v. Warren*, 252 N.C. 690, 696, 114 S.E.2d 660, 666 (1960) ("the wisdom of [the Legislature's] enactments is not the concern of the courts. As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts[.]"). And for constitutional amendments, it is the people themselves who ultimately decide the wisdom of such a policy. *Amici Curiae's* policy arguments lay bare their purpose in participating as *amici*—an attempt to do through this Court what they could not do at the ballot box.

G. Arguments That There Will Be No Chaos and Confusion Are Unconvincing.

Some of the *Amici Curiae*, like Plaintiff, try to deflect Defendants' arguments that the trial court's Order would lead to chaos and confusion. For example, the Professors argue that the trial court "avoided any boundless, sweeping principle," by limiting its decision to constitutional amendments that must be proposed with a three-fifths majority of both houses. (Professors' Brief at 11); (*see also* Black Caucus's Brief at 16 ("there would be nothing chaotic or confusing about a ruling that would have the effect of temporarily limiting the General Assembly's power to propose constitutional amendments until the racial gerrymander is undone.")). As these *Amici Curiae* seem to recognize, (*see, e.g.,* Professors' Brief at 12 ("it would have been

judicial abuse to reach out and address these other amendments which the present plaintiffs chose not to challenge.")), the trial court's Order is limited only because the Plaintiff's express claims are limited to two constitutional amendments. However, there is no way to contain Plaintiff's theory. As acknowledged by Judge Stroud,

> there is no law to support [the argument that the General Assembly's lack of legal authority is limited to the two constitutional amendments at issue] and no logical way to limit the effect of the electoral defects noted in *Covington* to one, and only one, type of legislative action, and more specifically to just these two particular amendments which plaintiff opposes.

N. Carolina State Conference of Nat'l Ass'n for Advancement of Colored People v. Moore, 849 S.E.2d 87, 102 (N.C. Ct. App. 2020). These *Amici Curiae* appear to discount the effect of a decision by this Court affirming the trial court's premise and creating precedent.[10]

> Neither this Court nor the trial court can limit the effect of its ruling to these two amendments. Just saying the ruling is limited does not make it so. Now that the order has been appealed, its effect cannot be contained to this one case, and the precedential effect of this Court upholding the trial court's order would lead to the "chaos and confusion" the trial court was attempting to avoid.

Id.

According to the Governor, the "right of the people of North Carolina to choose their own government was significantly and repeatedly abridged during each of the

[10] At the other extreme, the ACLU recognizes that an appellate decision will have precedential value and warns that the Court of Appeals' Opinion "would all but foreclosure the ability of civil rights litigants to advance novel theories for the protection of individual rights under the State Constitution." (ACLU Brief at 17.) No one has advocated that Plaintiff's novel argument violates Rule 11 of the North Carolina Rules of Civil Procedure, despite it not being supported by any courts so far.

three election cycles for which North Carolina citizens elected their representatives through districts found to be unconstitutional racial gerrymanders." (Governor's Brief at 25-26.) The Governor seems to take the position that because these three General Assemblies were unconstitutional, there is no prejudice or confusion about a sanction that strikes merely two constitutional amendments out of hundreds of laws passed during a six-year period. However, deciding which laws or amendments to strike under the theory that the state legislature is a usurper body requires a balancing test that the courts in *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939) and *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963) refused to undertake. Those Courts recognized that it is the legislative branch—and not the judicial branch—whose role is to balance the relative benefits and harms of legislation on society. If this Court affirms the trial court's premise that courts can (a) find that the Legislature lacked popular sovereignty and (b) weigh the sanctity of the legislators' votes cast, what other laws could be brought before the courts for review? Certainly, the other two constitutional amendments passed by the people and proposed by the same Legislature are ripe for challenge by those who disagreed or disapproved of the policy preferences contained in those amendments.

At oral argument before the trial court, counsel for Plaintiff offered no real way to distinguish the two constitutional amendments Plaintiff has challenged from the two constitutional amendments that were ratified but have not been challenged:

> The Court: Then what about those other two [amendments] that you are not challenging?

> Ms. Hunter: The other two are not within the interest areas of our clients, and so are not before you. . . . I don't think those four Constitutional amendments, one which involved a right to hunt and fish, which essentially already existed in North Carolina law – I don't think that would really change – cause chaos and confusion. And nor would the victims' rights amendment. So I think these four Constitutional amendments are very limited in scope. North Carolina was getting along just – just fine without them before. And I don't think there would be dramatic chaos, as mentioned by these other courts.

(T. p 44).

Can the line setting which laws are valid and which laws are invalid be drawn at the four constitutional amendments passed by North Carolinians in 2018? There are other laws that were passed by a three-fifths majority to which the arguments made by Plaintiff and *Amici Curiae* (*e.g.,* that the three-fifths majority would not have been reached but for the racial gerrymander) could apply, but *Amici Curiae* would attempt to draw a line between "ordinary legislation" and constitutional amendments. (*See, e.g.,* Black Caucus Brief at 15.) The line between what is ordinary and what is extraordinary is not clear, however.

If Plaintiff and the *Amici Curiae* suggest that the standard for whether the General Assembly had the authority to enact a law rests on whether the law is really necessary, is it a question of law or fact whether North Carolina "was getting along just fine" without the challenged law? If the necessity of a law (as judged by the judicial branch) is deemed to be the proper standard, it seems irrelevant whether the

law was passed by a supermajority or a simple majority. For example, the budget passed in 2018 (S.L. 2018-5) was passed over the Governor's veto, meaning three-fifths of the members of the General Assembly had to vote in favor of an override.[11] *See* N.C. Const. Art. II, Sec. 22(1). Like the challenged amendments, this override passed by a slim margin and on party lines; in the House, there were 73 votes (all of the Republicans present and two of the Democrats present) for override, and, in the Senate, there were 34 votes (all of the Republicans present and none of the Democrats present) for override. https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/H/S99; https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/S99.[12] Is the state budget a necessary act; does it depend on whose priorities are represented therein?

While some of the *Amici Curiae* argue that the trial court's order is narrow and applies only to the challenged constitutional amendments and not to "ordinary legislation," at least one recognizes the import of the order. According to the NCAJ, "[t]he Trial Court correctly noted that for ***any power*** to be exercised by a particular North Carolina General Assembly, that General Assembly must be constituted in accordance with the principles of the North Carolina Constitution."[13] (NC Advocates

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[11] The Governor and the Professors argue that constitutional amendments are not ordinary legislative acts in part because of the requirement of approval by a legislative supermajority. (Governor's Brief at 17; Professors' Brief at 1.) The same is true of a veto override.

[12] The tax cap amendment passed with 73 votes in the House and 34 votes in the Senate.
https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/H/1286;
https://www.ncleg.gov/Legislation/Votes/RollCallVoteTranscript/2017/S/775.

[13] Defendants note that the determination of racial gerrymandering was made under the federal Constitution.

for Justice Brief at 11) (emphasis added). Under this reading, each and every act of the General Assembly for approximately six years could be invalidated. Thus, it appears that the confusion foreshadowed by Defendants is real; there is confusion as to the effect of a final ruling in this case even between the *Amici Curiae* and no way to parse (and no precedent for parsing) which laws are valid and which laws are void.

CONCLUSION

For the foregoing reasons, *Amici Curiae*'s arguments either mirror what Plaintiff has already argued to this Court or offer no persuasive support for Plaintiff's position. The Court of Appeals' Opinion should be affirmed.

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Respectfully submitted, this the 20th day of January, 2021.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

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.

Noah H. Huffstetler, III
N.C. State Bar No. 7170
noah.huffstetler@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612

Counsel for Defendant-Appellants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the forgoing Defendant-Appellees' Response to Briefs of *Amici Curiae* upon the parties via e-mail to the attorneys named below:

Kimberley Hunter
David Neal
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
khunter@selcnc.org
dneal@selcnc.org

Counsel for Plaintiff-Appellant NC NAACP

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
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
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com

Counsel for Roy Cooper, Governor of the State of North Carolina

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsonbradshaw.com

Counsel for North Carolina Legislative Black Caucus

Colin A. Shive
Robert F. Orr
150 Fayetteville Street, Suite 1800
Raleigh, NC 27601
cshive@tharringtonsmith.com
orr@rforrlaw.com

Counsel for North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation
PO Box 28004
Raleigh, NC 27611-8004
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org

Counsel for ACLU of North Carolina

John J. Korzen
Wake Forest University School of Law
PO Box 7206
Winston Salem, NC 27109-7206
korzenjj@wfu.edu

Counsel for Democracy North Carolina

Douglas B. Abrams
Noah B. Abrahms
Abrams & Abrams
1526 Glenwood Avenue
Raleigh, NC 27608
dabrams@abramslawfirm.com
nabrams@abramslawfirm.com

Matthew E. Lee
Whitfield Bryson LLP
900 W. Morgan Street
Raleigh, NC 27603
matt@whitfieldbryson.com

Counsel for NCAJ

This the 20th day of January, 2021.

/s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 329-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612