

SUPREME COURT OF NORTH CAROLINA

NORTH CAROLINA STATE)
CONFERENCE OF THE)
NATIONAL ASSOCIATION)
FOR THE ADVANCEMENT)
OF COLORED PEOPLE,)

Plaintiff-Appellee,)

v.)

From Wake County

TIM MOORE, in his official)
capacity, PHILIP BERGER, in)
his official capacity,)

Defendants-Appellants.)

**BRIEF OF *AMICUS CURIAE* NORTH CAROLINA
ADVOCATES FOR JUSTICE IN SUPPORT OF
PLAINTIFF-APPELLEE**

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¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

**STATEMENT OF IDENTITY OF AMICUS CURIAE AND ITS
INTEREST IN THE CASE**

Amicus curiae North Carolina Advocates for Justice (“NCAJ”) submits this brief in support of the position of the Plaintiff-Appellee, North Carolina State Conference of the National Association for the Advancement of Colored People (“NAACP”). Counsel hopes that its efforts will assist both the attorneys and this Court, by focusing on the historical context and the Court’s remedial powers in this instance.

NCAJ is a non-profit, nonpartisan association of legal professionals dedicated to protecting people’s rights through community, education, and advocacy. This case involves the protection and preservation of the most fundamental right in a democracy, the right of all citizens to have their voices heard and to participate in our democracy. The issue before this Court – whether the Legislature is entitled to reap the fruits of its unconscionable attempt to disenfranchise certain voters in this State – goes directly to the core of NCAJ’s mission to protect the rights of the People of this State from abuses by the powerful.

In this brief, NCAJ seeks to fulfill the “classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts

of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Comm'r. of Labor & Indus.*, 694 F.2d 203, 204 (8th Cir. 1982). This is an appropriate role for amicus curiae. As commentators have stressed, an amicus curiae is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603 (1984)).

SUMMARY OF ARGUMENT

The issue before this Court can be succinctly stated: can an illegally constituted General Assembly propose amendments to the North Carolina Constitution that are designed to entrench one party's political power – and control how they are presented on the ballot? Of course, it cannot. Yet here as evidenced by the long history of litigation in the case before the Court, it has. This Court has a duty to invalidate the General Assembly's unconstitutional abuse of power and to ensure that no further General Assembly feels emboldened to attempt a similar abuse of its perceived power.

The very purpose of the Declaration of Rights contained within the North Carolina Constitution is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State, and that the People of this State may seek remedy from the Court when an arm of the State violates these rights. *Corum v. University of North Carolina*, 330 N.C. 761, 782-83, 413 S.E.2d 276, 289-90, cert. denied, 506 U.S. 985, 113 S.Ct. 493, 121 L.Ed.2d 431 (1992); *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 338–39, 678 S.E.2d 351, 355 (2009). To fail to protect these rights now is to set a precedent that does nothing less than incentivize this type of unlawful and politically motivated foul play power grab.

ARGUMENT

I. THIS COURT HAS THE POWER AND THE AUTHORITY TO FORMULATE A REMEDY.

This case will answer the question of whether an illegally and unconstitutionally constituted General Assembly is able to keep the political gains reaped by its illegal conduct.² It has been established as a

² Under what circumstances could a person ever take something illegally, be immediately pursued in court for that, lose in court, and actually *keep* what they illegally took? Counsel can think of none.

matter of law that the North Carolina Republican-controlled General Assembly engaged in an expansive unconstitutional attack on the rights of Black North Carolinians to vote. *Covington v. North Carolina* (“*Covington I*”), 316 F.R.D. 117, 117 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 2211 (2017) (*per curiam*). Therefore, this Court’s choice in this case is binary: either (1) hold that an unconstitutionally constituted General Assembly cannot amend the North Carolina Constitution to entrench its own political power, or (2) condone and reward racial gerrymandering by holding that this Court cannot formulate a remedy that invalidates the ill-gotten amendments to the North Carolina Constitution.

It is critical that this Court set a precedent that unconstitutional conduct like that described in *Covington* has consequences. To understand the significance, consider a scenario twenty years from now in which North Carolina demographics have continued to evolve on their present course. There is a veto-proof Democratic majority in the North Carolina House and the North Carolina Senate. There is a Democratic Governor and a Democratic Attorney General. The political decision is made to amend the North Carolina Constitution in ways that herds the

once-majority-now-plurality of rural white voters into voting ghettos.

As here, the Constitutional Amendments pass and are approved by North Carolina voters. Associations of White people who live in rural areas file a lawsuit and the matter is litigated. The North Carolina Supreme Court will have set its own precedent by its decision in this case. “[T]he courts recognize that what is good for the goose is good for the gander...” *Racick v. Dominion Law Assocs.*, 270 F.R.D. 228, 233 (E.D.N.C. 2010). If voting rights are not subject to constitutional protection in North Carolina under the North Carolina Constitution, then any identifiable group can be targeted using analytics and a relatively simple computer algorithm. The political gains made by that targeting, before the plainly unconstitutional gerrymandering is corrected, may keep the exact people who broke the rules in power for a generation or more. Instead of a marketplace of ideas where the best plan wins, this result will ensure that political power stays with those – of either/any political party – who cheat.

II. THE HISTORICAL DISCRIMINATION AGAINST BLACK PEOPLE MADE THE AMENDMENTS ESPECIALLY HARMFUL TO BLACK NORTH CAROLINIANS.

The most critical right of citizenship in a democracy is the right to self-determination. The heart and soul of democratic rule is the right to vote. *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)). The North Carolina Republican-controlled General Assembly made a willful, conscious, intentional decision to engage in racial gerrymandering. These violations primarily focused on herding Black North Carolinians into voting ghettos. The purpose was to effectively undermine the Constitutional rights of Black North Carolinians.

The history of racial injustice in North Carolina is well-documented. Despite the plain meaning of the constitutional mandates, political leaders within North Carolina have not fully and eagerly protected this right for African Americans and have regularly engaged in “patterns and practices” which sought to deny or abridge that right. Irving Joyner, *African American Political Participation in North Carolina: An Illusion or Political Progress?*, 6 Wake Forest J.L. & Pol’y 85, 99 (2016). Black people were the only population systematically enslaved. They are the only population for whom North Carolina fought

a war to keep as chattel. Once those inhumane efforts failed, Black people are the only population that was then left to fend for themselves for decades in the post-Civil War era.

Predictably, in the era of Reconstruction, Black people in North Carolina struggled against systemic racism and were given virtually no structure for education, no economic foundation, and were treated in all respects as if they were the product of a lesser God. See Irving Joyner, *African American Political Participation in North Carolina: An Illusion or Political Progress?*, 6 Wake Forest J.L. & Pol'y 85, 99 (2016). As they battled for basic rights, such as equal education and equal access in society, the mass incarceration of young Blacks, especially young Black men, destroyed much of the economic foundation for the Black community. “While it may not excuse criminal offending, the destructive effects of mass incarceration and excessive punishment are visited disproportionately upon individuals and communities of color and reinforce that the project of the civil rights revolution remains unfinished. Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 Wake

Forest J.L. & Pol'y 1 (2016).

Against that backdrop, the theft of Black people's voting power by the North Carolina Republican-controlled General Assembly was particularly damaging. After years of litigation, the United States Supreme Court affirmed the Fourth Circuit decision affirming that the North Carolina General Assembly was unlawfully constituted. *Covington I*, 316 F.R.D. at 117. The question now facing this Court is whether the perpetrators of reprehensible misconduct that deprived Black people of their Constitutional rights have the power to alter the North Carolina Constitution in order to effectuate what was and is an illegal power grab.

The North Carolina Constitution – and the rights and duties expressed therein – is the most sacred covenant between our State and its Citizens. It is basic Constitutional law that for every Constitutional violation there must be a legal and equitable remedy. *Corum*, 330 N.C. at 782-83, 413 S.E.2d at 289-90; *Craig ex rel. Craig*, 363 N.C. at 338–39, 678 S.E.2d at 355. The only remedy here is the holding that an illegally formulated, self-declared General Assembly cannot alter the North

Carolina Constitution to reward itself with additional political power at the expense of the persons the illegally constituted General Assembly victimized.

It is the law of this case that North Carolina's General Assembly that had illegally usurped the Constitutional rights of Black people was not a legally constituted body. *Covington*, 581 U.S. —, 137 S. Ct. 2211 (2017). As such, this illegally constituted body had no legal authority to alter the North Carolina Constitution. *Covington*, 581 U.S. —, 137 S. Ct. 2211 (2017). To rule otherwise would allow a political party to use its illegally obtained supermajority status to entrench itself as a permanent majority.

The trial court applied basic Constitutional law in its ruling. An illegally constituted General Assembly is a renegade assembly that has no authority to act to change foundational documents. Any attempts by an illegally constituted General Assembly that relate to preservation and maintenance of the illegally obtained power is as the trial court recognized void ab initio. R. at 192. This rule applies to unconstitutional amendments that were part of the illegal effort to thwart the will of the

people by diminishing the voting power of Black people in North Carolina. It is the other side of the same coin.

The systematic violation of Constitutional rights cannot be condoned; and instead, those violations must have significant consequences. The first consequence is that unconstitutional abuses of power must be held invalid. The Republican Supermajority was immediately lost in the first election involving more nearly Constitutionally valid districts. The 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. The trial Court correctly relied upon the mandate that to be constitutionally valid and legitimate, the General Assembly had to be the result of constitutional, not unconstitutional, elections. In the absence of legitimacy, the specific General Assembly is without authority to alter fundamental rules of governance. "All political power is vested in and derived from the people; all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. The process by which the subject

Amendments were made was not founded upon the will of the people of this State, and thus this Court must reverse the Court of Appeals and invalidate these Amendments.

CONCLUSION

The trial court was correct in its ruling. It is a matter of the law of the case that the North Carolina General Assembly was unconstitutionally constituted due to its widespread and pervasive violations of the North Carolina Constitution. *Covington*, 581 U.S. ———, 137 S. Ct. 2211 (2017). Because the North Carolina General Assembly was not a legitimate General Assembly, it lacked the legal status or authority to amend the North Carolina Constitution. Any Constitutional Amendments offered by the illegally constituted General Assembly are void *ab initio*. It is critical that the status quo of the North Carolina Constitution be returned and that the illegally constituted General Assembly not reap the rewards of its unconstitutional actions.

The trial court correctly interpreted the North Carolina Constitution and determined the only appropriate remedy for its violation. This Court should affirm the trial court's decision in its entirety.

Respectfully submitted this 2nd day of December, 2020

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WORD COUNT CERTIFICATION

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indices, table of authorities, certificates of service, and this certificate of compliance) as reported by the word processing software.

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CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the foregoing *BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE* upon the parties via e-mail and by U.S. mail to the attorneys named below:

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