NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendant-Appellees.	)	From Wake County No. COA19-384

****

PLAINTIFF-APPELLANT'S NEW BRIEF

****

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUE PRESENTED 2

INTRODUCTION 3

STATEMENT OF THE CASE 5

STATEMENT OF FACTS 8

ARGUMENT 11

I. THE NORTH CAROLINA GENERAL ASSEMBLY LACKED THE AUTHORITY TO PROPOSE CONSTITUTIONAL AMENDMENTS 11

II. THE QUESTION BEFORE THE COURT IS NARROW AND SUBJECT TO JUDICIAL RESTRAINT 15

A) The Legal Question Is Bounded by Time and *de facto* Authority Does Not Apply 16

B) The Question Before the Court Is Limited to Constitutional Amendment Not All Legislative Acts 18

C) The Ruling Is Confined to Situations Where Limiting Authority Will Not Cause Chaos and Confusion 19

III. THE QUESTION BEFORE THE COURT IS NOT A POLITICAL QUESTION BUT A JUSTICIABLE CONSTITUTIONAL QUESTION 21

A) Outdated, Overturned Jurisprudence Does Not Render the Question Non-Justiciable 21

B) The Judiciary Has an Essential Role in Protecting Our Constitution and Popular Sovereignty 23

IV. FEDERAL COURTS DID NOT SANCTION DEFENDANTS' ACTIONS 26

V. THE EFFECT OF THE WIDESPREAD RACIAL GERRYMANDER WAS NOT CURED BY POPULAR VOTE 27

CONCLUSION 31
CERTIFICATE OF COMPLIANCE..... 33
CERTIFICATE OF SERVICE..... 34

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Baker v. Carr,
369 U.S. 186 (1962) 22

Covington v. North Carolina ("Covington I"),
316 F.R.D. 117 (M.D.N.C. 2016), *aff'd,* 137 S. Ct.
2211 (2017) (per curiam) 8, 12

Covington v. North Carolina ("Covington II"),
270 F. Supp. 3d 881 (M.D.N.C. 2017) .....*passim*

Covington v. North Carolina ("Covington III"),
283 F. Supp. 3d 410 (M.D.N.C. 2018), *aff'd in part,*
rev'd in part, 138 S. Ct. 2548 (2018) 8, 9

Dawson v. Bomar,
322 F.2d 445 (6th Cir. 1963) 19

Greensboro v. Guilford Cty. Bd. of Elections,
251 F. Supp. 3d 935 (M.D.N.C. 2017) 24

Lochner v. New York,
198 U.S. 45 (1905) 11

Marbury v. Madison,
5 U.S. 137 (1803) 30

N.C. State Conference of the NAACP v. Bipartisan Bd.
of Elections & Ethics Enf't,
No. 1:16-CV-1274, 2018 WL 3748172 (M.D.N.C.
Aug. 7, 2018) 24

N.C. State Conference of NAACP v. McCrory,
831 F.3d 204 (4th Cir. 2016), *cert. denied*, —— U.S. –
——, 137 S. Ct. 1399, 198 L. Ed. 2d 220 (2017) 24, 26

Norton v. Shelby Cty.,
118 U.S. 425 (1886) 16

Poindexter v. Strach,
No. 5:18-CV-366, 324 F. Supp. 3d 625, 2018 WL
4016306 (E.D.N.C. Aug. 22, 2018) 24

Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections,
827 F.3d 333 (4th Cir. 2016) 24

Shaw v. Reno,
509 U.S. 630 (1993) 14

State Cases

Bacon v. Lee,
353 N.C. 696, 549 S.E.2d 840 (2001) 21

Bayard v. Singleton,
1 N.C. 5 (N.C. Super. L. & Eq. 1787) 21

Common Cause v. Lewis,
No. 18 CVS 014001, 2019 WL 4569584 (Wake Cty. Super. Ct. Sept. 3, 2019) 9

Cooper v. Berger,
370 N.C. 392, 809 S.E.2d 98 (2018) 21

Corum v. Univ. of N.C. Bd. of Governors,
330 N.C. 761, 413 S.E.2d 276 (1992) 23

Edwards v. Bd. of Educ. of Yancey Cty.,
235 N.C. 345, 70 S.E.2d 170 (1952) 15

Holmes v. Moore,
840 S.E.2d 244 (N.C. Ct. App. 2020) 24

Jenkins v. State Bd. of Elections of N.C.,
180 N.C. 169, 104 S.E. 346 (1920) 25

Kidd v. McCanless,
200 Tenn. 273, 292 S.W.2d 40 (1956), appeal dismissed, 352 U.S. 920 (1956) 19

Leandro v. State,
346 N.C. 336, 488 S.E.2d 249 (1997) 21

Leonard v. Maxwell,
216 N.C. 89, 3 S.E.2d 316 (1939) 21, 22

People ex rel. Duncan v. Beach,
294 N.C. 713, 242 S.E. 2d 796 (1978) 17

State ex rel. Martin v. Preston,
325 N.C. 438, 385 S.E.2d 473 (1989) 23

N.C. NAACP v. Moore,
817 S.E.2d 588, 2018 WL 4113895 (N.C. 2018) 29

N.C. NAACP v. Moore,
817 S.E.2d 591, 2018 WL 4123479 (N.C. 2018) 29

N.C. NAACP v. Moore,
849 S.E.2d 87 (N.C. Ct. App. 2020) .....*passim*

Smith v. Carolina Beach,
206 N.C. 834, 175 S.E. 313 (1934) 17

Starbuck v. Town of Havelock,
252 N.C. 176 (1960) 15

State v. Lewis,
107 N.C. 967, 12 S.E. 457 (1890) 17

Stephenson v. Bartlett,
355 N.C. 354 (2002) 22

Swaringen v. Poplin,
211 N.C. 700, 191 S.E. 746 (1937) 25

Van Amringe v. Taylor,
108 N.C. 196, 12 S.E. 1005 (1891). 15, 16

Woodard v. Carteret County,
270 N.C. 55 (1967) 22

Wrenn v. Kure Beach,
235 N.C. 291, 69 S.E. 2d 492 (1952) 17

State Statutes

N.C. Gen. Stat. § 1-1A, Rule 42(b)(4) 29

N.C. Gen. Stat. § 1-267.1 29

2018 N.C. Sess. Law 96 10

2018 N.C. Sess. Law 110 10

2018 N.C. Sess. Law 117 10

2018 N.C. Sess. Law 118 10

2018 N.C. Sess. Law 119 10

2018 N.C. Sess. Law 128 10

Constitutional Provisions

N.C. Const. art. I, § 2 11

N.C. Const. art. I, § 3 ..... 13, 18

N.C. Const. art. I, § 35 23

N.C. Const. art. XIII 10

N.C. Const. art. XIII, § 4 ..... *passim*

Other Authorities

Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257–60 (1997) 30

John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 201 (Oxford Commentaries on the State Constitutions of the United States) (2d ed. 2013). 28

N.C. State Board of Elections, Official Election Results for Nov. 8, 2016, https://er.ncsbe.gov/ 10

NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendant-Appellees.	)	From Wake County No. COA19-384

****

PLAINTIFF-APPELLANT'S NEW BRIEF

****

ISSUE PRESENTED

Did the Court of Appeals err by reversing the Superior Court, which ruled that a General Assembly that was the product of a widespread, unconstitutional racial gerrymander, and thus did not represent the people of North Carolina, exceeded its authority when it acted to amend the state Constitution?

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff-Appellant, North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP"), requests that this Court reverse the Court of Appeals and uphold the Superior Court's ruling that N.C. Session Laws 2018-119 and 2018-128 and the related amendments to the North Carolina Constitution are void *ab initio*.

INTRODUCTION

As Judge Young wrote in dissent, "[t]his case presents a compelling issue of first impression":

> At issue is a narrow question, but one vital to our democracy: Can a legislature, which has been held to be unconstitutionally formed due to unlawful gerrymandering, act to amend the North Carolina Constitution?

N.C. NAACP v. Moore, 849 S.E.2d 87, 104 (N.C. Ct. App. 2020). Following Defendants' unprecedented, widespread racial gerrymander of the General Assembly, this Court is faced with a novel question regarding the limit of power accorded an unconstitutional legislature. But the question is narrow. At issue is only the General Assembly's authority to enact proposed amendments to our state Constitution.

The Court of Appeals did not set forth a united opinion explaining why a legislature, which operated "under a cloud of constitutional illegitimacy" and whose supermajority was gained through an ill-gotten racial gerrymander, could nonetheless take the extraordinary step of amending the Constitution. *See Covington v. North Carolina ("Covington II")*, 270 F. Supp. 3d 881, 891 (M.D.N.C.

2017). Instead, two separate opinions—each for different reasons—would greenlight any act of the legislature, no matter how illegally formed.

To reach their conclusions, the two majority opinions for the Court of Appeals overlooked the narrowness of the constitutional amendment question before them. In essence, the majority opinions concluded that because it would cause too much upheaval to invalidate every act of the racially gerrymandered General Assembly, courts cannot invalidate any act of the legislature. There is no legal or logical basis for that conclusion.

The two majority opinions both incorrectly assume that courts cannot differentiate among the types of actions taken by an unconstitutional legislature. But the strict requirements for amending the North Carolina Constitution are starkly different from other legislative powers. And the North Carolina judiciary has long stood as a safeguard to both North Carolina's democratic system of government and the sacrosanct nature of our Constitution. Where the Court of Appeals chose to abdicate its responsibility to protect those values because it did not want to draw a line between regular legislation and constitutional amendments, this Court has the opportunity to reaffirm the important role of our judiciary in ensuring that illegal acts do not go unchecked.

Moreover, it is the duty of this Court to tackle novel questions of unsettled State law. Judge James Wynn, writing for a federal court panel, explained the limit of power given to an unconstitutionally-formed North Carolina legislature poses just

such an unsettled question, and placed it squarely on our state courts to answer. *Covington II,* 270 F. Supp. 3d at 901.

The answer to this unsettled question is found in our longstanding constitutional principles that the people are sovereign, that our leaders have only the power given to them, and that constitutional amendment must be reached only after careful, reasoned, consensus. The Superior Court correctly honed in on the question before it, and rightly concluded that constitutional amendments should be treated differently than other ordinary legislative acts. This question is as specific as it is essential to our fundamental principles of democracy, as Judge Young recognized in dissent:

> Once it was determined that our General Assembly was acting in violation of the Constitution, without the proper support of the electorate, it lost the authority to alter that document. To hold otherwise would be to permit total usurpation of our democracy and our system of laws by the very body that has been admonished by our nation's highest court for having previously done so.

N.C. NAACP v. Moore, 849 S.E.2d at 106.

STATEMENT OF THE CASE

After requesting preliminary injunctive relief and filing a series of appeals to have its case heard on the merits before the election, Plaintiff, NC NAACP filed a motion for partial summary judgment in this matter in the Wake County Superior Court on November 1, 2018, asking the Court to invalidate the session laws proposing the constitutional amendments at issue in this case. After briefing and oral argument, the Wake County Superior Court granted NC NAACP's motion and

declared the Voter ID and Tax Cap Amendments void *ab initio*. Judge Collins found that the amendments were placed on the ballot by a North Carolina General Assembly that was the product of a widespread unconstitutional racial gerrymander, and that because this body did not represent the people of North Carolina, placing constitutional amendments on the ballot exceeded its authority. R. at 181. The Superior Court further found that voiding the two amendments and their corresponding session laws would not cause chaos and confusion. *Id.* at 195.

Defendants appealed to the North Carolina Court of Appeals. After briefing and oral argument, the Court of Appeals issued three separate opinions. Judge Dillion, writing for the Court, acknowledged that the legislature was the product of an unconstitutional racial gerrymander, but held that the General Assembly nevertheless had the authority of *de jure* officers, or failing that, *de facto* authority. *N.C. NAACP v. Moore,* 849 S.E.2d at 95. He concluded that the courts have no role in placing limits on any act taken by a legislative body that a federal court has declared to have lost its claim to popular sovereignty or else all actions taken by that unconstitutional legislature are subject to being struck down. *Id.* at 95-96. In addition, Judge Dillon concluded that there is no reason to treat constitutional enactments differently than any other act of the General Assembly. *Id.* at 96. Judge Stroud wrote separately, concurring in the outcome on different grounds. She concluded that no prior state appellate court had held that there are limits to the acts that can be taken by a racially gerrymandered legislature. *Id.* at 99. Judge Stroud reasoned that if the Superior Court's Order was upheld, it would necessarily

follow that the legislature was without any authority to act since elections were held under racially gerrymandered district maps drawn in 2011. *Id.* at 102. Notwithstanding the Superior Court's undisturbed conclusion, consistent with *Covington*, that the issue in this case is "an unsettled question of state law and a question of first impression for North Carolina courts" *id.* at 99 both Judge Dillon and Stroud faulted the trial court for not relying on prior North Carolina cases in rendering its decision. *Id.* at 95, 99.

Judge Young, dissenting, would have upheld the Superior Court's order limiting the unconstitutionally formed General Assembly's authority to initiate amendments to the North Carolina Constitution. Judge Young concluded that left unchecked, an unlawfully formed legislature could seek to amend the Constitution to make its own unlawful existence lawful. *Id.* at 104. In contrast to the majority opinions, Judge Young considered the significance of the *Covington* court's findings that the widespread racial gerrymander undermined representative democracy and that the legislature was acting "without the proper support of the electorate." *Id.* at 106. To hold that an unrepresentative General Assembly could nevertheless seek to alter the state's foundational document would "permit total usurpation of our democracy and system of laws." *Id.* On the other hand, disallowing a racially gerrymandered legislature from amending the Constitution would not cause chaos or confusion or inhibit the day-to-day affairs of the General Assembly. *Id.* at 104-105. Judge Young rejected the majority's conclusion that the choice before the Court is binary and concluded that courts can distinguish between the narrow ruling of

the Superior Court with regard to constitutional amendments without ruling that all acts of the legislature are void. *Id.* at 106.

STATEMENT OF FACTS

In June 2017, the United States Supreme Court issued a final ruling affirming that the North Carolina General Assembly was unlawfully constituted. *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). The *Covington* court found that, following the 2010 decennial census, legislative leaders manufactured a widespread racial gerrymander, illegally relying on race as the predominant factor motivating the drawing of districts in violation of the Equal Protection Clause of the United States Constitution. *Id.*

The scope of the racial gerrymander was unprecedented. Because the General Assembly leadership concentrated African-American voters into only 28 districts, surrounding districts were deprived of African-American voters and thus those districts were also unconstitutionally affected by the gerrymander. *See Covington II*, 270 F. Supp. 3d at 893.

The gerrymander "impact[ed] nearly 70% of the House and Senate districts, touch[ed] over 75% of the state's counties, and encompass[ed] 83% of the State's population—nearly 8 million people." *Id.* at 892. Almost two-thirds of all House and Senate districts were redrawn to create remedial maps. *See Covington I*, 316 F.R.D. at 128, 176*; Covington v. North Carolina* ("*Covington III*"), 283 F. Supp. 3d 410, 419–20 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018).

In remedying this unconstitutional racial gerrymander, a three-judge federal court panel determined that immediate elections under remedial districts were necessary to restore popular sovereignty to our State. *Covington II*, 270 F. Supp. 3d at 902. The court reluctantly concluded, however, that it would do more harm than good to order special elections so close to the regularly-scheduled 2017 election cycle. *Id* at 884. (declining to order special elections due to concerns that the "compressed and overlapping schedule such an election would entail is likely to confuse voters, raise barriers to participation, and depress turnout"). The court noted with disapproval that this new reality had been brought about by the legislature's own procedural maneuverings to delay the drawing of remedial district maps. *Id.* at 901. A state court later found troubling the discrepancy between when Legislative Defendants had prepared remedial district maps and contrary representations made to the *Covington* court that delayed the remedy. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *101-05 (Wake Cty. Super. Ct. Sept. 3, 2019). The *Covington* court subsequently found that some of the legislature's proposed remedial maps constituted another instance of intentional racial discrimination by the legislature and rejected them. *Covington III*, 283 F. Supp. 3d at 430.

In the same ruling, the *Covington* court noted that limits on an unconstitutionally-constituted legislature's authority in the period before new elections could be held remained an "unsettled question of state law." *Covington II*, 270 F. Supp. 3d at 901. The federal court concluded that this question was "more

appropriately directed to North Carolina courts, the final arbiters of state law." *Id.*

In the summer of 2018, Defendants knew that questions regarding potential limits to legislative authority remained unsettled and unaddressed by North Carolina courts. Defendants knew that their supermajority was obtained by illegal means. Defendants knew that their power to act under State law may be limited. Defendants knew that the constitution limited their ability to place amendments before the people if they could not summon a three-fifths supermajority. And Defendants knew that they did not represent the will of three-fifths of North Carolinians.[1]

Heedless of all this, in the final week of the last regular legislative session of the illegal supermajority, the leadership of the General Assembly hastily passed legislation to place six amendments to the North Carolina Constitution before the voters. 2018 N.C. Sess. Laws 96; 110; 117; 118; 128; and 119. The two amendments at issue in this case, the Tax Cap Amendment (Session Law 2018-119) and the Voter ID Amendment (Session Law 2018-128), passed the three-fifths threshold required by Article XIII by just one and two votes respectively. R. at 27-30. These

[1] In 2016, North Carolina was a 50-50 state. Voters in the state elected a Republican President with 49.8% of the vote, a Democratic Governor with 49% of the vote, a Democratic Attorney General with 50.2% of the vote and a Republican Insurance Commissioner with 50.4% of the vote. N.C. State Board of Elections, Official Election Results for Nov. 8, 2016, https://er.ncsbe.gov/. Likewise, the total vote percentage for the North Carolina House and Senate Democrats and Republicans in 2016 was almost even. *Id.* Yet, the racial gerrymander skewed the results, giving Republicans a majority of 35-15 in the Senate and 74-46 in the House.

two proposed amendments were placed on the November 2018 ballot and were ratified.

The November 2018 election also marked the first opportunity since 2012 for North Carolinians to elect members of the General Assembly under remedial maps that addressed the unlawful racial gerrymander. After the seating of those elected in November 2018, a single political party no longer holds a three-fifths supermajority in either the North Carolina House or Senate. Prior to that, North Carolinians were governed for six years by an unconstitutional body that did not reflect the will of the people.

ARGUMENT

I. THE NORTH CAROLINA GENERAL ASSEMBLY LACKED THE AUTHORITY TO PROPOSE CONSTITUTIONAL AMENDMENTS

The Court is presented with a case of first impression, but the solution to the question presented can be found in North Carolina law. "[A]ll 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, § 2.

For as long as our Constitution has included a provision for amendment, it has required a strict two-step process. Before an amendment can be placed before the people for ratification, both houses of the General Assembly must achieve a three-fifths consensus. N.C. Const. art. XIII, § 4. The process is difficult by design. Constitutional change should require a broad base of support because a constitution is meant to endure for generations and serve "people of fundamentally differing views." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

For years our Constitution has remained relatively stable, and its amendment has occurred only with complete adherence to that mandatory two-step process. Past constitutional amendments have generally reflected a broad consensus among the vast majority of North Carolina voters.

This case arises only because of the extreme and unprecedented actions of Defendants. The two different majority opinions of the Court of Appeals minimized the scope of the racial intent and projected harm which undergirded this legislative effort.[2] *N.C. NAACP v. Moore,* 849 S.E.2d at 95. Defendants conducted a widespread unconstitutional racial gerrymander that deliberately packed African-American voters into racially segregated voting districts in order to dilute their voice and diminish their power. *Covington II*, 270 F. Supp. 3d at 884. The gerrymander was one of the "largest . . . ever encountered by a federal court," and infected more than two-thirds of the legislative districts in our state. *Id*. The illegality of the gerrymander and Defendants' actions was confirmed by the United States Supreme Court. *See Covington I.*

On remand, the federal courts concluded that it would only further harm popular sovereignty to impose immediate elections. They acknowledged that the question of how much power the legislative body would have in the interim period was an "unsettled" one, and left it to the North Carolina Courts to decide. *See Covington II*, 270 F. Supp. 3d at 901 ("Given that this argument implicates an

[2] Amicus, the Legislative Black Caucus, explain in detail how Judge Dillon was mistaken in suggesting the racial gerrymander was benign.

unsettled question of state law, [this] argument is more appropriately directed to North Carolina courts, the final arbiters of state law.").

When the General Assembly hastily placed constitutional amendments on the ballot, in the waning days of its illegal formation, it violated our State Constitution. In its Declaration of Rights, the Constitution states that the people of North Carolina have "the *inherent, sole, and exclusive right of regulating the internal government . . . and of altering . . . their Constitution*." N.C. Const. art. I, § 3 (emphasis added); R. at 183-84. The Constitution then makes clear that its amendment requires that the state's duly elected officials draft, debate, and vote *by a three-fifths majority* in both houses to place an amendment proposal on the ballot. *Id*. (citing N.C. Const. art. XIII, § 4).

Here, there is no question that the General Assembly that placed the challenged amendments on the ballot was an illegally-constituted body and not representative of the people of North Carolina. As the *Covington II* court explained, the unconstitutionally gerrymandered maps that Defendants used to come to power unlawfully segregated voters by race, "strik[ing] at the heart of the substantive rights and privileges guaranteed by our Constitution." *Covington II*, 270 F. Supp. 3d at 890. "[U]njustifiably drawing districts based on race," the court went on, "encourages representatives 'to believe that their primary obligation is to represent only the members of [a particular racial] group, rather than their constituency as a whole'"—a message that is "altogether antithetical to our system of representative

democracy." *Id.* at 891 (alteration in original) (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

The result was that Defendants' unconstitutional racial gerrymander "interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable," *id.* at 897, and begat "legislators acting under a cloud of constitutional illegitimacy." *Id.* at 891.

The illegal racial gerrymander affected 117 districts in North Carolina, requiring that over two-thirds of the districts in both houses of the legislature be redrawn. The three-fifths supermajority votes that passed the challenged constitutional amendments did so by only one or two votes. R. at 184. As such, there was a very direct relationship between the sweeping racial gerrymander and the required supermajority. R. at 191. ("the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote").

Because of the centrality of popular sovereignty to lawful governance, North Carolina courts have long held that a body lacks *de jure* authority to engage in official acts after a finding that it obtained office through illegitimate means. The *Covington* court's ruling was unambiguous: the racial gerrymander interrupted the democratic mechanism by which the people confer their sovereignty on the General Assembly and hold the legislature accountable. *Covington II* at 897. Defendants' sweeping racial gerrymander disrupted the process by which "the voice of electors [is] expressed and ascertained in an orderly way, prescribed law," and could,

therefore, lay claim to being the "settled, well-regulated government." *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891). The resulting supermajority of the General Assembly that enacted the proposed constitutional amendments was in place "without the sanction of law" because the racial gerrymander interrupted the "order, certainty, integrity of character, dignity, direction, and authority of government to the expression of the popular will." *Id.*; *See also Starbuck v. Town of Havelock*, 252 N.C. 176 (1960) (discussing the limits of power of a municipal corporation created through an improper process); *Edwards v. Bd. of Educ. of Yancey Cty.*, 235 N.C. 345, 70 S.E.2d 170 (1952) (holding that school board members who were illegally holding dual offices were usurpers, and their acts totally invalid).

Thus, at the time Defendants took action to amend the Constitution, they did not "represent the people of North Carolina" and were therefore acting without the popular sovereignty and essential supermajority the constitutional amendment process requires. *Id.* The Superior Court thus correctly concluded that the amendments were unconstitutional and void *ab initio*. R. at 192.

II. THE QUESTION BEFORE THE COURT IS NARROW AND SUBJECT TO JUDICIAL RESTRAINT

As Judge Young recognized in dissent, the question before this court is a narrow one. *N.C. NAACP v. Moore*, 849 S.E.2d at 104. It is limited in time—applying only from June of 2017 when the United States Supreme Court reached its final merits ruling in *Covington v. North Carolina* until a new General Assembly was elected and seated under remedial districts at the beginning of 2019. And it is limited in reach—subject to a finding that voiding these two amendments would not

unleash "chaos and confusion" in our State. R. at 192. Here, the issue before the court is limited to constitutional amendment—not regular legislation. And the Superior Court correctly found that prohibiting an illegal body from constitutional amendment would not cause chaos and confusion.

The Court of Appeals misapprehended the scope of the question and thus raised needless alarm at the consequence of the ruling. Judge Stroud mistakenly suggests that "the logical conclusion" of the Superior Court's decision "would be that North Carolina has not had a General Assembly with any authority to act since at least 2011 as North Carolina held elections based upon the 2011 districts addressed in Covington, some of which were determined to have been unconstitutionally racially gerrymandered." *N.C. NAACP v. Moore,* 849 S.E.2d at 99. But no such logical conclusion exists either as to the vast time period she suggests, or the breadth of legislative acts she points to.

A) The Legal Question Is Bounded by Time and *de facto* Authority Does Not Apply

North Carolina case law underscores the narrow time period at issue in this case.

When an officer or body acts under a public presumption of validity, its acts may be afforded retrospective *de facto* lawful authority. *See, e.g.*, *Van Amringe,* 108 N.C. at 198 (discussing the application of the *de facto* authority in North Carolina law); *see also Norton v. Shelby Cty.,* 118 U.S. 425, 441 (1886) (validity may be given to the acts of a "*de facto*" officer based on "considerations of policy and necessity, for

the protection of the public and individuals whose interests may be affected thereby").

However, "*de facto*" authority does not apply to this case. The trial court's order concerned only the actions of the General Assembly after the *Covington* case was fully decided and did not concern the past acts of the General Assembly prior to that time.

Judge Dillon's conclusion that the General Assembly was acting as a *de facto* officer relies on a line of cases that address only whether past acts of a subsequently-invalidated officer are lawful. *N.C. NAACP v. Moore,* 849 S.E.2d at 95 (citing *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E. 2d 796 (1978) (judge served in office *de facto* until 1977 when it was determined that his position as judge was legally infirm and he resigned, and his actions up until that invalidity determination were upheld); *State v. Lewis*, 107 N.C. 967, 12 S.E. 457 (1890) (upheld verdicts issued by a judge acting *de facto* in July of 1890 in another county's court prior to the time he was required to abdicate that position later that year); *Wrenn v. Kure Beach*, 235 N.C. 291, 69 S.E. 2d 492 (1952) (mayor and officers appointed in 1951 and acting *de facto* issued valid municipal bonds in 1951 as they were not deemed improperly elected until 1952); *Smith v. Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (1934) (bonds issued per ordinance passed in 1933 by *de facto* officers were valid as it was not until 1934 that the officers were declared elected under unconstitutional scheme)). Because the NC NAACP has not challenged any of the legislature's acts before the United States Supreme Court's judgment in

Covington, *de facto* authority does not apply. The scope of the Superior Court's ruling is limited to the period after the *Covington* court's finding that the General Assembly lost its popular sovereignty because of the massive racial gerrymander was finally upheld until the seating of the new General Assembly elected under a remedial districting plan.

B) The Question Before the Court Is Limited to Constitutional Amendment Not All Legislative Acts.

Despite concerns raised in the majority opinions, *N.C. NAACP v. Moore,* 849 S.E.2d. at 95-96, 102, the Superior Court's Order granting relief made no sweeping determination that the General Assembly lacked all authority to act. The matter before this Court is instead limited to the issue of constitutional amendment via Article XIII § 4, which dictates that the Constitution may only be amended by a proposal enacted by three-fifths of the people's duly and legally elected representatives before it can be put before the electorate for a statewide vote; and Article I § 3, which prescribes that the Constitution may only be changed by the people.

And indeed, constitutional amendment is different than regular legislation. Where regular legislation can be achieved by a simple majority of the General Assembly, constitutional amendment requires a strict two-step process: first, three-fifths of both the House and the Senate must vote to place constitutional amendments on the ballot, and then a simple majority of North Carolina voters must vote to approve it. N.C. Const. art. XIII, § 4. This process is not only difficult,

but it is difficult to undo.[3] Where regular legislation can be quickly overturned when political tides turn, constitutional amendment is much harder to correct—requiring another supermajority vote in both chambers and another majority vote by the North Carolina electorate. *Id.* And in fact, no constitutional amendment in North Carolina has ever been successfully repealed.

Thus, Judge Dillon's suggestion that "[]if there was a loss of popular sovereignty by our General Assembly, then *all* the laws passed by that body would be subject to attack ..." is incorrect. *N.C. NAACP v. Moore,* 849 S.E.2d at 96. And the reasoning from the Court of Appeals that the requirements to amend the constitution are not "unique and distinct from the requirements to enact other legislation" is simply wrong. *Id.* (quoting Superior Court Order).

C) The Ruling Is Confined to Situations Where Limiting Authority Will Not Cause Chaos and Confusion

Courts have allowed officers or bodies that lack either *de jure* or *de facto* authority to take actions that are necessary to avoid "chaos and confusion" and to allow the state to continue functioning. *See, e.g.*, *Dawson v. Bomar*, 322 F.2d 445, 447 (6th Cir. 1963); *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (1956), appeal dismissed, 352 U.S. 920 (1956). Avoiding chaos and confusion is a tool of judicial restraint, requiring courts to carefully weigh the consequences of any restrictions placed on elected bodies that have forfeited their claim to popular sovereignty. The principle requires judges to draw a line between the regular functioning of

[3] Amicus, the Legislative Black Caucus note that the permanence of constitutional amendment was a significant part of its appeal to Legislative Defendants. Br. for Amicus, Legislative Black Caucus at n.7.

government necessary to avoid chaos and confusion and actions that step over that line. Upholding the Superior Court does not require this Court to prejudge every action that may or may not cross that line. Amending the Constitution is the most extreme action the legislature can take, and is never required for the orderly functioning of state government.

The Superior Court correctly determined that its limited ruling invalidating the legislation proposing amendments would not cause chaos and confusion, as Judge Young agreed in his dissent. *N.C. NAACP v. Moore,* 849 S.E.2d at 105. Neither Defendants nor the majority opinions have disputed the Superior Court's factual finding on this point. *See* R. at 195. And indeed, there can be no doubt that in placing constitutional amendments on the ballot, the General Assembly was not acting to avoid chaos and confusion, but seeking to further entrench its illegally gained power on the eve of elections conducted under remedial district maps. It was seeking to lock-in its policy preferences for generations to come before new elections could "return to the people of North Carolina their sovereignty." *Covington II*, 270 F. Supp. 3d at 883.

As Judge Young noted in dissent, the only relief requested is to "hold void only those actions taken by the legislature which sought to amend our Constitution," which "strike at the heart of our democracy." *N.C. NAACP v. Moore,* 849 S.E.2d at 105. The relief requested is narrow and does not require "an extreme overreach." As Judge Young points out, the attempt by the other judges to ignore the reality of the narrow relief requested and to expand the case into a larger

strawman "ignores the reality of the court's order, and substitutes fear-mongering rhetoric for reasoned argument." *Id.* at 106.

III. THE QUESTION BEFORE THE COURT IS NOT A POLITICAL QUESTION BUT A JUSTICIABLE CONSTITUTIONAL QUESTION

The political question doctrine applies to those controversies that "revolve around *policy choices* and *value determinations*," not to the interpretation of the Constitution itself. *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (emphasis added) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). Here, the question relates to whether an illegally obtained supermajority of the General Assembly that lacks the requisite claim to popular sovereignty can propose constitutional amendments. It is not a debate over the substance of the amendments themselves. The question is justiciable and can—indeed must—be decided by the North Carolina Supreme Court which has long provided a check on the powers of the legislature, and has long acted as a defender of the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. 5, 3 (N.C. Super. L. & Eq. 1787); *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) (explaining that when "a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.").

A) Outdated, Overturned Jurisprudence Does Not Render the Question Non-Justiciable

Judge Dillon relied on *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939) to conclude that the NC NAACP's case has effectively already been decided by this Court. *N.C. NAACP v. Moore,* 849 S.E.2d at 94. A brief examination of *Leonard*

makes clear it cannot bear the weight Judge Dillion gives it. In that case, a plaintiff sought a declaration that the General Assembly was not properly apportioned as part of his effort to evade a retail sales tax of $3.13 that had been levied upon him. *Leonard,* 3 S.E.2d at 324. The vast majority of the Court's opinion focused on the question as to whether the sales tax was arbitrary and discriminatory, and therefore unconstitutional. *Id.* at 319-24. In closing, however, the Court rejected the apportionment aspect of the plaintiff's claim as a non-justiciable political question. *Id*. at 324.

At the time *Leonard* was decided, the question of apportionment itself was considered a non-justiciable issue, which the plaintiff in that case conceded in his brief. Consistent with then prevailing precedent, the North Carolina Supreme Court of the 1930s determined that both the question of apportionment—and the related consequences of malapportionment—were non-justiciable political questions.

Jurisprudence on the justiciability of apportionment has not remained static since 1939. As Judge Young noted in dissent, where questions of apportionment gerrymandering were once considered "out of reach of the judiciary," "that is no longer the case." *N.C. NAACP v. Moore,* 849 S.E.2d at 104. Such cases are now routinely considered justiciable. *See, e.g., Baker v. Carr*, 369 U.S. 186, 197–98 (1962) (holding that courts have a role in adjudging whether the composition of a legislature is legal); *Woodard v. Carteret County*, 270 N.C. 55, 62 (1967) (holding that an equal protection challenge to the apportionment of a board of county commissioners was justiciable); *Stephenson v. Bartlett*, 355 N.C. 354, 386 (2002)

(affirming the trial court's decision that the 2001 state legislative redistricting plans violated the North Carolina Constitution). The related question—how much power can be accorded an unconstitutionally apportioned body—is justiciable also, and remains an unsettled question of state law.

B) The Judiciary Has an Essential Role in Protecting Our Constitution and Popular Sovereignty.

This Court should reject Judge Dillon's conclusion that the question presented is not one courts can answer. *N.C. NAACP v. Moore,* 849 S.E.2d at 95-96. It is well established in North Carolina that the judiciary has an essential role in protecting the integrity of our state Constitution: "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Thus, the proper meaning, construction, and application of the state constitutional provisions regulating the amendment process can only be answered with finality by the state Supreme Court. *See Stephenson*, 355 N.C. 354 at 362 ("'issues concerning the proper construction and application of ... the Constitution of North Carolina can ... be answered with finality [only] by this Court'") (omissions and alteration in original) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)). This judicial role is enshrined in the constitutional provision that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

In recent years, North Carolina has repeatedly found itself in the midst of legal disputes centered around these fundamental concepts. Over the past decade, the General Assembly has embarked on a campaign of voter disenfranchisement and wide-ranging attempts to entrench illegally-gained power. To do so, it has pushed against the bounds of our state and federal constitutions in rapid succession. In response, the courts have been called on to check abuses, to protect our citizens' right to vote, to safeguard full and fair representation, and to ensure that the fundamental principles of representative democracy and a government that is derived from the will of the people is not lost.[4]

Just last year, a three-judge panel of the Wake County Superior Court in this case ruled on issues of when and how our state Constitution can be amended, a ruling the Court of Appeals and this Court did not disturb. R. at 61. Defendants also argued in that instance that the question regarding misleading, vague, and

[4] Indeed, over the past decade the General Assembly has enacted, and continues to enact, voting- and election-related legislation that has been struck down by state and federal courts as unconstitutional or violative of law. *See, e.g.*, *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 214–15 (4th Cir. 2016), *cert. denied*, —— U.S. ——, 137 S. Ct. 1399, 198 L. Ed. 2d 220 (2017) (mem.); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 352 (4th Cir. 2016); Order, *Poindexter v. Strach*, No. 5:18-CV-366, 324 F. Supp. 3d 625, 2018 WL 4016306 (E.D.N.C. Aug. 22, 2018), ECF No. 22 (holding that statute retroactively removing candidates from the ballot who were qualified and previously had been approved to appear on the ballot likely violated the candidates' rights under the First and Fourteenth Amendments); *N.C. State Conference of the NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16-CV-1274, 2018 WL 3748172, at *12–13 (M.D.N.C. Aug. 7, 2018) (holding that state statute authorizing individual voters to challenge registrations of other voters on change-of-residency grounds violated National Voter Registration Act); *Greensboro v. Guilford Cty. Bd. of Elections*, 251 F. Supp. 3d 935, 951 (M.D.N.C. 2017); *Holmes v. Moore*, 840 S.E.2d 244, 250 (N.C. Ct. App. 2020) (enjoined because plaintiffs were likely to prove that the law's voter ID requirements were motivated by discriminatory intent against minority voters.).

incomplete constitutional amendment ballot questions was a political one—a position rightly rejected by the three-judge panel. *Id*.

Moreover, our courts play an important role in ensuring that popular sovereignty remains unbroken. As our Supreme Court has noted, "[o]ur government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot." *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937). As such, 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, 104 S.E. 346, 349 (1920).

This question poses a question essential to the underpinnings of our democracy. As Judge Young notes in dissent, "if an unlawfully-formed legislature could indeed amend the Constitution, it could do so to grant itself the veneer of legitimacy. It could seek, by offering amendments for public approval, to ratify and make lawful its own unlawful existence." *N.C. NAACP v. Moore,* 849 S.E.2d at 104. And that is, in part, exactly what it attempted. Judge Young explains in a footnote that "[o]ne of the amendments proposed by the General Assembly was a Voter ID law, designed to prevent citizens from unlawfully voting in our elections. And yet, this amendment was proposed by a General Assembly which was, itself, unlawfully formed." *Id.* at 105, fn. 19. The legislature then was using its illegally gotten power, acquired through racial discrimination, to enshrine another barrier to voting, one that had been found to be discriminatory in intent just a couple of years before, and

further entrench itself. *NC NAACP v. McCrory*, 831 F. 3d 204 (4th Cir. 2016), cert. denied sub nom. 137 S. Ct. 1399 (2017).

There is no end to where the legislature might stop. And Defendants, in briefing and argument before the courts, have never suggested a limit. Nor did the majority opinions for the Court of Appeals suggest one. It is the role of this Court to place a check on legislative power and to ensure our Constitution remains sacrosanct.

IV. FEDERAL COURTS DID NOT SANCTION DEFENDANTS' ACTIONS

The concurring opinion of Judge Stroud rests in large part on the misplaced assumption that *Covington* foreclosed the Superior Court's order because the federal courts did not explicitly limit the General Assembly's authority beyond requiring the legislature to draw remedial districts. *N.C. NAACP v. Moore,* 849 S.E.2d. at 103; *see also id* at 94. (Judge Dillon stating same). But *Covington* declined to rule on the question of whether the unlawfully constituted General Assembly had a limit on its authority specifically because it was an "unsettled question of state law" that needed to be addressed by state courts. *Covington II,* 270 F. Supp. 3d at 901. It was for this reason that the N.C. NAACP brought its claim in superior court.

As Judge Young mentions in dissent, "[t]he decision not to order a special election was one intended to prevent disruption to ordinary legislative activity; it does not follow that extraordinary legislative activity, such as constitutional amendments, would likewise be protected from scrutiny." *N.C. NAACP v. Moore,* 849 S.E.2d at 105. The *Covington* court was faced with a difficult situation and did

what it could to craft an effective remedy for the racial gerrymander without risking further barriers to participation in elections. The plain language of the court's opinion, however, makes clear that it did not pass on the question before the court today, but placed the issue squarely before the State courts to decide.

V. THE EFFECT OF THE WIDESPREAD RACIAL GERRYMANDER WAS NOT CURED BY POPULAR VOTE

Judge Stroud suggests that "since passing a constitutional amendment requires a majority of the voters of North Carolina in a statewide election unaffected by illegal districts, NC NAACP's argument is actually weaker for a constitutional amendment than for other ordinary legislation without these additional protections." *Id.* at 104. But such reasoning misunderstands our State Constitution.

Our Constitution has a two-step process for amendment. N.C. Const. art. XIII, § 4. And, as Judge Young notes in dissent:

> The people of this State cannot, by popular vote, approve an unlawful act of the General Assembly. The very provision of our Constitution which mandates review by the voting populace requires, before such a vote can take place, action by "three-fifths of all the members of each house" of the General Assembly. In other words, the popular vote as to whether to approve an amendment to the Constitution is predicated upon a preceding lawful action by the General Assembly.

N.C. NAACP v. Moore, 849 S.E.2d at 106.

This strict two-step process has governed constitutional amendment in our State for almost two centuries. In their authoritative treatise on the North Carolina Constitution, Justice Paul Newby and Professor John Orth refer to the "awesome power" of constitutional amendment, and note that the requirement

that a three-fifths supermajority of both houses of the General Assembly must agree to any amendment is one that has been in place for as long as there has been a mechanism for constitutional amendment[5]—an unbroken history that makes clear that the founders of our democracy intended amending the constitution to be a demanding, representative, and considered action, and therefore, necessarily difficult.[6]

Under the reasoning of Judge Stroud, there could be no judicial recourse if voters approved a proposed constitutional amendment that was unlawfully printed on official ballots without any prior authorization of a supermajority of both chambers of the General Assembly. If there was no judicial resolution of a case challenging the unlawful placement of the proposed amendment question on the ballot before election day, and the voters approved the rogue amendment by a simple majority, there could be no remedy.

Though different in degree than Defendants' actions here, the fallacy of relying on the results of the plebiscite to determine the outcome of the case is remarkably similar. Judge Dillon mischaracterizes Plaintiff's case as having been "commenced" to seek "an order to void two of the four amendments ratified by the people during the November 2018 election." *Id.* at 89. Instead, NC NAACP

---

[5] John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 201 (Oxford Commentaries on the State Constitutions of the United States) (2d ed. 2013).

[6] This intent has been adhered to and reinforced over our history. For example, the supermajority requirement to call a constitutional convention was debated and set in 1835 and is even more stringent, requiring a two-thirds majority of legislators to call for a convention.

commenced this action seeking an order to remove the proposed amendments from the ballot months before the election and shortly after enactment. The fact that the NC NAACP's claims were not fully heard by a court until after the election was not due to lack of effort.[7]

Defendants themselves, in arguing against pre-election injunctive relief on the NC NAACP's claims, acknowledged that a ruling that the amendments were unlawfully proposed by the General Assembly could result in invalidating those amendments, even after ratification by the voters. In arguing against preliminary injunctive relief before the election, Defendants argued: "Should Plaintiffs prevail on their challenge before the November election, then any votes cast for the challenged amendment simply would not count. And, if this lawsuit is not resolved before the November election and the Proposed Amendments are adopted by North Carolina voters, the Proposed Amendments could be deemed invalid." (Defs.' Mem.

---

[7] Alongside Plaintiff's complaint, filed on August 6, 2018, Plaintiff filed a Motion for Temporary Restraining Order and sought preliminary injunctive relief to prevent the Board of Elections from placing the two amendments on the November 2018 ballot. After arguments before Judge Ridgeway on August 7, 2018, the case was transferred to a three judge panel of the Superior Court; See N.C. Gen. Stat. § 1-267.1; N.C. Gen. Stat. § 1-1A, Rule 42(b)(4). The panel heard arguments on August 15, 2018. On August 21, 2018, the majority of the panel issued an order granting in part and denying in part the NC NAACP's request for relief, (R.at 84) and declining to enjoin the Board from placing amendment proposals authorized by the Voter ID and Tax Cap Amendments on the November 2018 ballot. As noted above, this denial, came after arguments from Defendants that there was no harm in placing amendments on the ballot, because the vote could simply be discounted later.

Immediately following the order from the three judge panel, the NC NAACP filed a notice of appeal. NC NAACP then filed a Motion to Bypass the Court of Appeals, Motion for Temporary Stay, and Petition for Supersedeas with this Court which was ultimately denied. *N.C. NAACP v. Moore*, 817 S.E.2d 591 (Mem), 2018 WL 4123479 (N.C. 2018); *N.C. NAACP v. Moore*, 817 S.E.2d 591 (Mem), 2018 WL 4123760 (N.C. 2018); *N.C. NAACP v. Moore*, 817 S.E.2d 588 (Mem), 2018 WL 4113895 (N.C. 2018).

in Opp. to Mots. for TRO and Prelim. Inj. (Aug. 13, 2018) (*N.C. NAACP v. Moore*, Pet. for Writ of Supersedes, Docket No. 261P18, at App. 188 (Sept. 1, 2018)).

> Permitting the use of an unrepresentative, unconstitutionally-elected supermajority to meet the critical first step in the constitutional amendment process would undermine the heightened safeguards the Constitution requires for its amendment. Judge Stroud's suggestion that popular ratification of a proposed constitutional amendment is, by itself, sufficient to meet the constitutional requirements for amendment would essentially write out of the Constitution the critical three-fifths threshold requirement to propose such an Amendment.[8]

At the time it proposed these amendments, the North Carolina General Assembly could not reach the three-fifths supermajority required to amend our constitution without resorting to votes from members whose legislative districts that were tainted by an unconstitutional racial gerrymander. Later ratification of the proposed amendment by a simple majority of the popular vote could not save this fundamental constitutional deficiency.

As Justice Marshall noted in *Marbury v. Madison*, "[t]he constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." 5 U.S. 137, 177 (1803). Similarly, the North Carolina Constitution

---

[8] The three-fifths threshold requirement also offers an important protection to our State's minority groups. There are many examples outside of the constitutional amendment context of where "direct democracy" and a simple majority vote has been employed to disadvantage minority groups. *See* Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 Am. J. Pol. Sci. 245, 257–60 (1997).

has always been a "superior paramount law." This Court should not allow Defendants to turn it into just an "ordinary legislative act." *Id*.

Judge Young concluded in dissent:

> Only a legislature formed by the will of the people, representing our population in truth and fact, may commence those actions necessary to amend or alter the central document of this State's laws. For an unlawfully-formed legislature, crafted from unconstitutional gerrymandering, to attempt to do so is an affront to the principles of democracy which elevate our State and our nation.

N.C. NAACP v. Moore, 849 S.E.2d at 105.

There can be no more important role for this Court than safeguarding both representational democracy, and the sanctity of our State Constitution. This Court should address the narrow question before it, and declare that a legislature that forms a supermajority only by way of a widespread, illegal racial gerrymander cannot alter our Constitution.

CONCLUSION

NC NAACP respectfully requests this Court reverse the Opinion of the Court of Appeals and declare that a legislature that that is the product of a widespread, illegal racial gerrymander does not have authority to amend the constitution, and order the Income Tax and Voter ID constitutional amendments void *ab initio.*

Respectfully submitted this 2nd day of December, 2020.

/s/ Kimberley Hunter

Kimberley Hunter
N.C. Bar No. 41333
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220

Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org

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.

David Neal
N.C. Bar No. 27992
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
dneal@selcnc.org

Irving Joyner
N.C. Bar No. 7830
P.O. Box 374
Cary, NC 27512
Telephone: (919) 319-8353
Facsimile: (919) 530-6339

Daryl V. Atkinson
N.C. Bar No. 39030
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
Telephone: (919) 323-3889

Attorneys for Plaintiff- Appellant NC NAACP

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a 12-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of services, this certificate of compliance, and appendixes) as reported by the word processing software.

S/ Kimberley Hunter
Kimberley Hunter
N.C. Bar No. 41333

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the foregoing Plaintiff-Appellant New Brief upon the parties via e-mail to the attorneys named below:

D. Martin Warf
Nelson Mullins
Glenlake One, Suite 200
4140 Parklake Avenue
Raleigh, Nc 27612
Phone: (919) 329-3881
martin.warf@nelsonmullins.com

Attorney for Defendants

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
Phone: 336-373-8850
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com

Attorneys 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, North Carolina 28246
Phone: (704) 377-2536
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsbradshaw.com

Attorneys for the North Carolina Legislative Black Caucus

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

Attorneys for North Carolina Professors of Constitutional Law

Jaclyn Maffetore
Leah J. Kang
Kristi L. Graunke
ACLU of North Carolina Legal Foundation
P. O. Box 28004
Raleigh, NC 27611-8004
Tel: 919-834-3466
jmaffetore@acluofnc.org
lkang@acluofnc.org
kgraunke@acluofnc.org

Attorneys for ACLU of North Carlina

John J. Korzen
Wake Forest University School of Law
PO Box 7206
Winston-Salem, NC 27109-7206
(336) 758-5832
korzenjj@wfu.edu

Attorneys for Democracy North Carolina

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

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

Attorneys for NCAJ

This the 2nd day of December, 2020.

/s/ Kimberley Hunter

_____

Kimberley Hunter
N.C. Bar No. 41333