Nos. 413P21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., Plaintiffs-Appellants, v. REPRESENTATIVE DESTIN HALL, et al., Defendants-Appellees.	From Wake County No. 21 CVS 015426
REBECCA HARPER, et al., Plaintiffs-Appellants, v. REPRESENTATIVE DESTIN HALL, et al., Defendants-Appellees.	From Wake County No. 21 CVS 500085

****

MOTION OF GOVERNOR ROY A. COOPER, III
AND ATTORNEY GENERAL JOSHUA H. STEIN
FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLANTS'
PETITIONS FOR DISCRETIONARY REVIEW

****

Governor Roy Cooper and Attorney General Joshua H. Stein respectfully seek leave under Appellate Rule 28(i) to file the attached amicus brief in support of Plaintiffs-Appellants' petitions for discretionary review before determination by the Court of Appeals.

INTERESTS OF AMICI CURIAE

In a democracy, the people should choose their representatives, not the other way around. To preserve the people's sovereignty, our state constitution mandates that all elections be free; that the freedoms of speech and association be secure; and that all people enjoy equal protection under the law. Partisan gerrymandering violates each of these rights and, as a result, fatally undermines popular sovereignty itself.

The Governor and Attorney General are elected statewide to serve the people of North Carolina. N.C. Const. art. III, §§ 2(1), 7(1). Given their roles and duties to the people of the State as a whole, they have strong interests in being heard on the constitutionality of partisan gerrymandering.

The Governor is the State's chief executive. *Id.* § 1. He bears primary responsibility for enforcing the state's laws. *Id.* § 5(4). He also plays a key role in the legislative process—proposing legislation and, when appropriate, vetoing bills. *Id.* art. II, § 22; *id.* art. III, § 5(2), (3). Partisan gerrymandering

affects the Governor's authority in each of these respects. He therefore has a strong interest in being heard on why that practice violates our state constitution, and why a decision from this Court is urgently needed.

The Attorney General is our State's chief legal officer. *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 52, 312 S.E.2d 241, 244 (1984). The Attorney General is charged with defending our State, its constitution, and the rights that our constitution guarantees to the sovereign people. *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987). In keeping with the Attorney General's constitutional role as the people's lawyer, section 1-260 of our General Statutes provides that whenever a statute "is alleged to be unconstitutional, the Attorney General of the State shall . . . be entitled to be heard." N.C. Gen. Stat. § 1-260. Because partisan gerrymandering undermines the sovereignty of the people and violates their rights, the Attorney General has a strong interest in being heard here as well.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

Amici's views will assist this Court in several ways. First, because the Governor and Attorney General are elected to represent all the people of our State, they are well situated to advocate for the interests of all voters. Second, by virtue of their constitutional roles and experiences in office, both

are well versed in the rights that our state constitution protects. Likewise, they intimately understand the threat that partisan gerrymandering poses to popular sovereignty and the people's constitutional rights.

ISSUE TO BE ADDRESSED

Amici seek to address whether this Court, in its discretion, should grant review before determination by the Court of Appeals. Amici submit that these cases involve legal and practical issues of the highest order, and that delay in this Court's adjudication would cause substantial harm to the functioning of our State's democracy. *Id.* § 7A-31(b)(1), (2), (3). For these reasons, and as explained in the attached brief, this Court should grant Plaintiffs-Appellants' petitions.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that the Court consider the attached amicus brief.

This 6th day of December, 2021.

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Nos. 413P21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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BRIEF OF AMICI CURIAE
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BRIEF OF AMICI CURIAE
GOVERNOR ROY A. COOPER, III AND
ATTORNEY GENERAL JOSHUA H. STEIN
IN SUPPORT OF PLAINTIFFS-APPELLANTS'
PETITIONS FOR DISCRETIONARY REVIEW [1]

****

[1] No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

INTRODUCTION

This case raises profound issues of constitutional law that go the heart of our State's ability to function as a democracy. Partisan gerrymandering, exacerbated by today's technology, allows legislative majorities to entrench themselves in power without regard to the popular will. It prevents the people from meaningfully exercising their sovereign authority to select their representatives, and to thereby ensure that the State's policies reflect the views of the people as a whole. And by facilitating illegitimate legislative supermajorities, it upends the balance of powers among the three branches that serves as the foundation for our system of government.

The practice of legislators insulating themselves from popular will is not only wrong, it is unconstitutional. It subverts our state constitution's guarantee that "[a]ll elections shall be free." N.C. Const. art. I, § 2. It deprives the people of their right under the equal protection clause to "vote on equal terms." *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002). And it curbs the people's rights to free political expression and association. N.C. Const. art. I, §§ 12, 14. The time has come for this Court to

vindicate these powerful principles. And it should do so now, to ensure that the upcoming elections are held under maps that are constitutional.

BACKGROUND

In 2019, in *Common Cause v. Lewis*, a three-judge superior court correctly held that partisan gerrymandering violates the free elections, equal protection, speech, and association clauses of our state constitution. The court explained that this practice allows "carefully crafted maps, and not the will of the voters, [to] dictate . . . election outcomes." No. 18 CVS 014001, 2019 WL 4569584, ¶ 2 (Wake Cnty. Super. Ct. Sept. 3, 2019). That conclusion was hardly surprising. In the 2018 elections for the General Assembly, for instance, carefully crafted maps allowed a party that won fewer statewide votes in legislative races than the other major party to win a substantial majority of the seats in each chamber of the legislature. *See id.* ¶¶ 503-04.

To remedy that subversion of democracy, the superior court enjoined the use of districts that the legislative majority had enacted in 2017 to entrench one-party rule in the General Assembly. *Id.* ¶ 164. Not long thereafter, in *Harper v. Lewis*, the same court also enjoined use of the districts that the legislative majority had drawn in 2016 to ensure that one

party dominated the State's congressional delegation. *See* No. 19 CVS 012667 (Wake. Cnty. Super. Ct. Oct. 28, 2019).

In both of these cases, the legislative defendants chose not to appeal. They instead drew new districts that made it somewhat easier—for one election—for voters to elect candidates of their choice. As a result, neither *Common Cause* nor *Harper* provided this Court with the opportunity to hold definitively that partisan gerrymandering is unconstitutional. That outcome left the General Assembly free to enact new gerrymanders in the future.

The General Assembly has now done just that. Last month, it enacted new legislative and congressional districts that could entrench one party in power for at least the rest of this decade. *See* Act of Nov. 4, 2021, S.L. 2021-173 (senate districts); Act of Nov. 4, 2021, S.L. 2021-174 (congressional districts); Act of Nov. 4, 2021, S.L. 2021-175 (house districts).

To ensure that our State has free and fair elections, the Plaintiffs here challenged the new gerrymanders enacted by the General Assembly. Plaintiffs also asked a superior court to follow the decisions in *Common Cause* and *Harper* and enter a preliminary injunction that prevents elections from being held with districts that were unconstitutionally drawn.

The superior court, however, declined to do so. It instead held, among other things, that the challenges present nonjusticiable "political questions," because the state constitution purportedly grants the General Assembly plenary authority to enact districts free from any judicial review. *N.C. League of Conservation Voters v. Hall*, No. 21 CVS 015426, Order on Plaintiffs' Motion for Preliminary Injunction at 7 (Wake Cnty. Super. Ct. Dec. 3, 2021).

Plaintiffs have appealed that decision. They also petitioned this Court to hear the cases before the Court of Appeals resolves their appeals. For the reasons below, the Governor and the Attorney General respectfully request that this Court grant the petitions and set these cases for expedited review.[2]

REASONS THE PETITIONS SHOULD BE GRANTED

Section 7A-31(b) of the General Statutes allows this Court to certify a case for review "before determination of the cause by the Court of Appeals." N.C. Gen. Stat. § 7A-31(b). It may do so when the "subject matter of the appeal has significant public interest," when the case "involves legal principles of major significance to the jurisprudence of the State," or when

[2] The Attorney General has recused himself from representing the State Board of Elections, its members, or any of the other parties in this case.

"[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." *Id.*

The Governor and the Attorney General respectfully submit that all of these criteria are met here.

I. These Cases Have Significant Public Interest.

These cases concern nothing less than the democratic legitimacy of our State's government. They are cases of singular public interest.

A central purpose of our state constitution has always been to secure government by the people. The framers of our first constitution affirmed, in that charter's very first clause, that "[a]ll political power is vested in and derived from the people." N.C. Const. of 1776, Declaration of Rights, § I; *see* N.C. Const. art. I, § 2. In keeping with that guarantee, our General Assembly is meant to be a representative body, whose members speak for the people and serve "as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001).

Partisan gerrymandering, however, subverts the guarantee of popular sovereignty and violates multiple provisions of the state constitution. *See* N.C. Const. art. I, §§ 10, 14, 19. It allows legislators to control the result of elections by drawing districts to ensure that one party will almost always win

a majority of seats in the legislature. In a good year for the favored party, it also ensures that the favored party receives a disproportionately large supermajority of seats. Thus, when districts are gerrymandered, the power exercised by the General Assembly does not "derive[ ] from the people," but rather from incumbent legislators. N.C. Const. art. I, § 2.

When one party is entrenched in the General Assembly, the consequences for democratic governance are profound. The state constitution vests the "legislative power" in the General Assembly, which has the authority to enact laws on matters of critical importance, such as the education of our State's children, the provision of health care for those who cannot afford it, and the creation of a welcoming business climate. N.C. Const. art. II, § 1. When the people lose control over the General Assembly, however, they lose the ability to control the policies codified in our laws.

The effect of partisan gerrymandering reaches even beyond the General Assembly, moreover, because it distorts the functioning of all government. Partisan gerrymandering allows legislative supermajorities that do not reflect the will of the people to overcome our constitution's protections against the abuse of legislative authority. It does so in at least three ways.

First, the constitution allows the Governor to veto legislation enacted by the General Assembly, provided a supermajority of three-fifths of those present in each legislative chamber does not vote to override his veto. *Id.* art. II, § 22. The Governor's veto power allows him to check and moderate the General Assembly's use of its legislative power. This check is critical to stable democratic governance. In the *Federalist Papers*, for instance, James Madison and Alexander Hamilton argued that the veto is necessary to curb the propensity of the legislature "to intrude upon the rights, and to absorb the powers," of the other branches, drawing "all power into its impetuous vortex." *The Federalist* Nos. 48 & 73 (James Madison, Alexander Hamilton). The veto also allows the executive branch to protect itself, because without it, the governor and other executive officials "might gradually be stripped of [their] authorities by successive resolutions, or annihilated by a single vote." *Id.* No. 73 (Alexander Hamilton). Thus, the Governor's veto allows him to protect both the other branches from legislative overreach and to ensure that legislation truly meets the needs of all the people of North Carolina.

When this process works, and legislation incorporates the input of both the Governor and the General Assembly, the benefits for our State are considerable. Because the current legislature was elected from districts that

were fairer than those used in past years, and because the majority party therefore lacks a supermajority that can override the Governor's vetoes, the Governor has been able to work with the legislature to craft bipartisan legislation. Last month, for instance, after negotiations with legislators, the Governor signed a budget into law that includes important investments for our State, including funding for increasing teacher salaries and expanding high-speed internet access. *See* Current Operations Appropriations Act of 2021, S.L. 2021-180. And the prior month, also after negotiations with legislators, the Governor signed bipartisan legislation that requires the Utilities Commission to take steps that will require North Carolina to reduce its carbon emissions from electric generation by 70% by 2030 and to achieve carbon neutrality by 2050. *See* Act of Oct. 13, 2021, S.L. 2021-165. And before that, the Governor and the General Assembly also agreed to legislation that allowed students to safely return to in-person instruction at school while preserving local flexibility to respond to the ongoing Covid-19 pandemic. *See* Act of Mar. 11, 2021, S.L. 2021-4.

But this collaborative process breaks down when gerrymandering allows one party to achieve a supermajority that does not reflect the will of the people. This observation does not rest on speculation. During the first

two years of the Governor's first term, gerrymandering produced illegitimate legislative supermajorities that could override the Governor's vetoes. And those supermajorities repeatedly overrode his veto to try to effectively undo the Governor's election by stripping away his executive authority.

To provide just two examples, after the Governor's election, the General Assembly enacted multiple statutes that took away the Governor's power to execute the State's election laws by restructuring the State Board of Elections. *See* Act of Dec. 16, 2016, S.L. 2016-125, secs. 1-19, 2017 N.C. Sess. Laws 15, 15-28; Act of April 25, 2017, S.L. 2017-6, 2017 N.C. Sess. Laws 84, 84-98. After a year of litigation, this Court ultimately invalidated the latest iteration of this legislation because it violated separation of powers by preventing the Governor from fulfilling his responsibility to execute the State's laws. *See Cooper v. Berger*, 370 N.C. 392, 422, 809 S.E.2d 98, 116 (2018).

The General Assembly also sought to interfere with the ability of the courts to administer justice. In an apparent attempt to prevent the Governor from filling judicial vacancies, the General Assembly enacted a statute that would have gradually eliminated three of the fifteen judgeships on the Court of Appeals, whenever a seat on that court became vacant. *See* Act of April 26, 2017, S.L. 2017-7, sec. 1, 2017 N.C. Sess. Laws 98, 98-99. While a challenge

to that law was pending in this Court, the legislature relented and repealed this statute. *See* Act of Feb. 27, 2019, S.L. 2019-2; Joint Motion to Withdraw Appeal, *State ex rel. Cooper v. Berger*, No. 315PA18 (N.C. Mar. 11, 2019). But it did so only after a judge on the Court of Appeals (of the legislative majority's *favored* party) avoided the statute by resigning early. This early resignation let the Governor fill the judge's vacancy before the General Assembly could override the Governor's veto of the legislation that shrunk the size of the Court of Appeals. *See* Anne Blythe & Mark Binker, *Cooper appoints Democrat to fill NC appeals court seat after GOP judge makes surprise early retirement*, The News & Observer, April 24, 2017. Thus, that early resignation—and the prospect of this Court's review of the unconstitutional legislation—preserved the Court of Appeals in its current form.

In sum, fair districts help create better legislation that satisfies the needs of all North Carolinians. Gerrymandered districts, in contrast, enable legislation that weakens the separation of powers and accumulates power in an unrepresentative legislature that is not accountable to the people.

Second, the supermajorities created by gerrymandering weaken another protection against the abuse of legislative authority. The General Assembly has the power to propose amendments to the state constitution for

approval by the people. But it can only exercise that solemn responsibility when three-fifths of each legislative chamber agree to change the State's foundational charter. *See* N.C. Const. art. XIII, § 4.

In 2018, after the courts restrained legislative attempts to take away the Governor's powers, a supermajority of the General Assembly elected from gerrymandered districts proposed constitutional amendments that would have stripped away vast swaths of gubernatorial power. One amendment, for example, would have let the General Assembly transfer all power to execute state law away from the Governor to new boards and commissions under the control of legislative appointees. *See* Act of June 28, 2018, S.L. 2018-117, 2018 N.C. Sess. Laws 756, 756-57. Another would have required the Governor to fill judicial vacancies only with candidates that had first been recommended by the General Assembly. *See* Act of June 28, 2018, S.L. 2018-118, 2018 N.C. Sess. Laws 757, 757-60. To hide the radical nature of these amendments, the General Assembly drafted misleading ballot language that failed to disclose to voters what these amendments would have really accomplished.

Voters ultimately approved neither of these amendments. But they were only defeated after a superior court ordered the legislature to rewrite

the ballot descriptions, because it found that the descriptions drafted by the legislative supermajority were materially misleading. *See Cooper v. Berger*, No. 18 CVS 9805, Order on Injunctive Relief (Wake Cnty. Super. Ct. Aug. 21, 2018). The amendments were also only defeated after a bipartisan group of *all five* of the State's living former governors campaigned against the amendments, educating the public about the danger to separation of powers that the amendments posed. *See* Travis Fain, *Five former NC Governors campaigning against constitutional amendments*, WRAL, Aug. 13, 2018.

Using the power of gerrymandered districts, therefore, the General Assembly sought to mislead voters into approving constitutional amendments that would have stripped away core executive powers from the Governor. These interbranch conflicts came at a considerable cost to our State's people. Gerrymandering diverted the attention of the General Assembly away from working with the Governor to enact legislation that meets the needs of all North Carolinians.

Third, supermajorities created by partisan gerrymandering have the potential to undermine another important check on legislative power. The constitution gives a majority of the House of Representatives the power to impeach executive and judicial officials, but it provides that those officials

may be convicted and removed from office only if two-thirds of the Senate agree to do so. *See* N.C. Const. art. IV, § 4.

Gerrymandering creates the possibility that a supermajority in the Senate that does not reflect the will of the people could remove executive and judicial officials chosen by the people in statewide elections. Fortunately, the legislature has not exercised this power in recent years. But members of the legislative majority have routinely threatened to impeach judges who issue decisions that they disagree with, and the majority party actually initiated an impeachment investigation of a Council of State member over a policy disagreement. *See, e.g.*, Lynn Bonner, *NC GOP leader raises possibility of impeaching justices over amendment ruling*, The News & Observer, Sept. 5, 2018; Craig Jarvis, *GOP lawmakers press impeachment probe of Secretary of State Elaine Marshall*, The News & Observer, June 29, 2017. The risk that these threats could eventually materialize would increase if gerrymandered districts created legislative supermajorities that were not subject to popular control.

Thus, partisan gerrymandering not only produces an unrepresentative General Assembly whose legislation does not reflect voters' concerns. It also undermines the checks and balances that the state constitution created to

protect against abuses of legislative authority. Review of the decision below is therefore needed to ensure stable democratic governance in our State.

II. These Cases Involve Legal Principles of Major Significance.

These cases are also worthy of this Court's immediate review because they "involve[] legal principles of major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31(b)(2). Today, no issue in state constitutional law is more important than whether state courts will enforce the protections in state charters that curb partisan gerrymandering.

Two years ago, the U.S. Supreme Court heard a challenge under the federal constitution to the same North Carolina congressional districts that the superior court in *Harper* later invalidated under our state constitution. *Rucho v. Common Cause*, 139 S. Ct. 2491, 2491-92 (2019). The Supreme Court, though sharply divided, held that the federal constitution allows legislatures to adopt "highly partisan" districting plans that entrench one party in power at the expense of the other. *Id.* at 2491. At the same time, the Court also affirmed that "state constitutions can provide standards and guidance for state courts to apply" to stop partisan gerrymandering. *Id.* at 2507.

Even before the Supreme Court ruled, state courts had already acted to restrict partisan gerrymandering. In 2018, for instance, the Pennsylvania

Supreme Court held in *League of Women Voters v. Commonwealth* that its state constitution forbids partisan gerrymandering. 178 A.3d 737, 821 (Pa.), *cert. denied*, 139 S. Ct. 445 (2018). And in our State, the *Common Cause* and *Harper* courts later held that our state constitution also forbids partisan gerrymandering. 2019 WL 4569584, ¶ 2; No. 19 CVS 012667, at 5-11.

The time has now come for this Court to confirm definitively that our state constitution forbids highly partisan districting plans that entrench one party in power without regard to the popular will.

Below, the superior court wrongly disregarded the multiple provisions in our state constitution that prohibit partisan gerrymandering. The superior court also wrongly held that challenges to partisan gerrymandering present nonjusticiable political questions. This second holding was particularly flawed, because a core purpose of judicial review in this State has always been to prevent the legislature from entrenching itself in office. More than two centuries ago, our state courts held that judicial review was necessary precisely to ensure that current members of the General Assembly would never be able to make "themselves the Legislators of the State for life." *Bayard v. Singleton*, 1 N.C. 5, 7 (1787).

The need for the judiciary to safeguard against this danger is particularly important in our State. When our state courts disregard the provisions in our constitution that prevent legislators from improperly entrenching themselves and their political party in office, our system of government provides no other way for the people to undo the resulting harms. For example, unlike in many other states, the people of our State lack the ability to propose constitutional amendments or other ballot initiatives to prohibit partisan gerrymandering. Only the General Assembly can initiate the process for amending the constitution. *See* N.C. Const. art. XIII. Therefore, the people's sole resort is with this Court—the statewide elected judicial officials in whom they entrust the solemn obligation to protect their constitutional rights.

In sum, confirming that the *Common Cause* and *Harper* courts correctly held that our constitution prohibits partisan gerrymandering is a matter of great importance for our state's jurisprudence. If this Court does not act, voters will have no way to ensure that the General Assembly genuinely represents the will of the people.

III. Delay Would Cause Substantial Harm.

As a final matter, these cases also merit this Court's immediate review because "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." N.C. Gen. Stat. § 7A-31(b)(3).

Any delay in definitively resolving these cases would result in substantial harm. In its filings below, the State Board of Elections indicated that, if the current districts enacted by the General Assembly were invalidated and primaries were delayed, a new plan that remedies the districts' constitutional infirmities may be needed as early as the week of February 14, 2022 for primaries to be held in time for the upcoming fall's election.

These cases therefore must be resolved expeditiously. Allowing the cases to proceed in the Court of Appeals could significantly delay their resolution. That delay could, in turn, result in elections being carried out under maps that entrench one party in power, violate the constitutional rights of North Carolinians, and bring about the many harms to the governance of our State described above.

This Court's immediate review would be consistent with its prior practice. In *Stephenson v. Bartlett*, for example, plaintiffs filed a lawsuit in

November 2001 alleging that legislative districts violated the state constitution's whole county provision. 355 N.C. at 358, 562 S.E.2d at 381. When the plaintiffs petitioned this Court for "for expedited direct review by this Court," so that remedial maps could be in place in time for the 2002 elections, the Court granted the request. *Id.* at 360, 562 S.E.2d at 382. This Court should follow its established practice of allowing immediate review of redistricting cases to allow elections to occur under constitutional maps.[3]

CONCLUSION

The Governor and the Attorney General respectfully request that this Court grant Plaintiffs' petitions and immediately hear this case.

This 6th day of December, 2021.

JOSHUA H. STEIN
Attorney General

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[3] This Court has also recently granted bypass petitions in other cases that have required expedited consideration. *E.g.*, *Cooper*, 370 N.C. at 401, 809 S.E.2d at 103 (granting bypass petition to review validity of laws that altered composition of State Board of Elections). During the litigation that immediately followed the 2011 redistricting cycle, granting such petitions was unnecessary because a statute allowed for direct appeals to this Court in redistricting cases. *See Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (describing right of appeal under section 120-2.5). This statutory right of appeal was repealed in 2016, in the same session law in which the General Assembly first tried to take away the Governor's power to enforce the State's election laws. *See* Session Law 2016-125, sec. 22(f), 2017 N.C. Sess. Laws at 37.

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