

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

Civil Action No.18 CVS 9806

NORTH CAROLINA STATE  
CONFERENCE OF THE NATIONAL  
ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE  
and CLEAN AIR CAROLINA,

Plaintiffs,

v.

TIM MOORE, in his official capacity, PHILIP  
BERGER, in his official capacity, THE  
NORTH CAROLINA BIPARTISAN STATE  
BOARD OF ELECTIONS AND ETHICS  
ENFORCEMENT, ANDREW PENRY, in his  
official capacity, JOSHUA MALCOLM, in  
his official capacity, KEN RAYMOND, in his  
official capacity, STELLA ANDERSON, in  
her official capacity, DAMON CIRCOSTA, in  
his official capacity, STACY EGGERS IV, in  
his official capacity, JAY HEMPHILL, in his  
official capacity, VALERIE JOHNSON, in her  
official capacity, JOHN LEWIS, in his official  
capacity,

Defendants.

FILED  
2018 SEP 19 A 10:41  
BY MM WAKE COUNTY CLERK

**SECOND AMENDED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

[Comp]

**INTRODUCTION**

The North Carolina General Assembly ("N.C.G.A.") is unconstitutionally constituted. Nevertheless, it has placed before the voters a set of amendments that would significantly alter the North Carolina Constitution. The current N.C.G.A is irredeemably tainted by an unconstitutional racial gerrymander that has rendered it a usurper legislature. This illegal body

may not be allowed to alter our state Constitution in ways designed to further entrench its power at the expense of popular sovereignty. Plaintiffs thus challenge four amendments proffered by the unconstitutional N.C.G.A. as the invalid acts of a usurper body.

Plaintiffs also assert that the four amendments are unconstitutionally vague, misleading, and incomplete. First, the language that the N.C.G.A. has written to present these amendments to the voters is intentionally misleading. Second, three out of the four amendments will require significant implementing legislation before their full effect can be known. As such, these proffered amendments are not fairly and accurately reflected on the ballot. They thus violate the state Constitution and should be declared void.

Central to the supreme law of North Carolina is the understanding that “[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.” N.C. Const. art. I, §35. To ensure this mandate “[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.” *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

The North Carolina judiciary has previously considered the question of whether ballot initiatives to amend the state Constitution have been properly put forth to the voters. In 1934, Governor J.C. Ehringhaus wrote to the N.C. Supreme Court asking for its help interpreting Article XIII § 4 of the N.C. Constitution—the section which allows the N.C.G.A. to submit proposed constitutional amendments to the people. Governor Ehringhaus noted that questions over the legality of a ballot initiative proposing a “change in the fundamental law of the State,” raise matters “of too great consequence to be controlled by the interpretation” of a single branch of government. The Governor noted that to proceed without judicial review “might bring into

question the validity of an election throughout the State of North Carolina and the adoption of important Constitutional revisions.” *In re Opinions of the Justices*, 207 N.C. 879, 181 S.E. 557 (1934). After the Supreme Court issued its opinion that the ballot initiative was not properly before the voters, it was abandoned. *See also Advisory Opinion in re Gen. Elections*, 255 N.C. 747, 750 (1961) (N.C. Supreme Court Advisory Opinion striking ballot initiative).

The judicial branch must again step in to promptly assess the validity of a sweeping ballot initiative set to be presented to the voters in November 2018. These four proposed amendments should be declared void and the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (“Board of Elections”) should be enjoined from including these amendments on the ballot or in the alternative these amendments to the N.C. Constitution should not go into effect.

#### **NATURE OF THE ACTION**

1) Plaintiffs, the North Carolina State Conference of the National Association for the Advancement of Colored People (“NC NAACP”) and Clean Air Carolina, hereby seek declaratory judgment under N.C. Gen. Stat. §§ 1-253, et seq., and North Carolina Rule of Civil Procedure 57; and a temporary restraining order, preliminary injunction, and permanent injunction under North Carolina Rule of Civil Procedure 65.

2) Plaintiffs seek a declaration that following the U.S. Supreme Court’s mandate in *Covington v. North Carolina*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority, and assumed usurper status.

3) Plaintiffs seek a declaration that a usurper legislature has no legal authority to place constitutional amendments on the ballot pursuant to Art I §§ 2, 3, 35 and Art XIII § 4.

4) Plaintiffs seek a declaration that the N.C.G.A.'s passage of Session Laws 2018-119, 128, 132, and 133, which each place a constitutional amendment on the ballot, violated the North Carolina Constitution, and ask that these laws be declared void *ab initio*.

5) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 3 and Art XIII § 4 by legislating to place vague and misleading language to describe the constitutional amendments contained in Session Laws 2018-119, 128, 132, and 133 on the 2018 general election ballots.

6) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 2, 3, 35 and Art XIII § 4 when it passed vague and incomplete proposed constitutional amendments in Session Laws 2018-119, 128, 132, and 133.

7) Plaintiffs seek a declaration that no proposal submitted to the voters by Session Laws 2018-119, 128, 132, and 133 can amend the N.C. Constitution.

### **THE PARTIES**

#### **Plaintiffs**

8) Plaintiff NC NAACP is a nonpartisan nonprofit civil rights organization founded in 1938, with its principal place of business located in Raleigh, North Carolina. With more than 90 active branches and over 20,000 individual members throughout the state of North Carolina, the NC NAACP is the largest NAACP conference in the South and second largest conference in the country. The NC NAACP's fundamental mission is the advancement and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination.

9) Plaintiff NC NAACP has standing to challenge the proposed amendments on behalf of its members in that its members would otherwise have standing to sue in their own rights; the interests it seeks to protect are germane to its purpose, which includes the core mission of protecting and expanding voting rights; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

10) Plaintiff NC NAACP has standing to challenge the proposed voter ID amendment on behalf of its members and on its own behalf. Since its founding, the enduring priority of the NC NAACP has been to protect and expand hard-won voting rights, including by opposing voter ID laws and other barriers to the ballot, and to advocate for a more open and democratic voting system.

11) Members of the NC NAACP, who include African-American and Latino voters in North Carolina, will be directly harmed by the proposed voter ID constitutional amendment. Members will be effectively denied the right to vote or otherwise deprived of meaningful access to the political process as a result of the proposed voter ID requirement. The proposed voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members.

12) The NC NAACP was the lead plaintiff in *NC NAACP v. McCrory*, which successfully challenged racially discriminatory restrictions on voting—including a voter ID requirement—enacted by the N.C.G.A. in 2013. In ruling for plaintiffs, the U.S. Court of Appeals for the Fourth Circuit found that this photo identification provision and other challenged provisions were passed with racially discriminatory intent and unlawfully targeted African-American voters “with almost surgical precision.” 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub nom.* 137 S. Ct. 1399 (2017) (striking down provisions in 2013 N.C. Sess. Laws 381).

The proposed voter ID amendment harms the NC NAACP because it circumvents the NC NAACP's hard-fought legal victory against a racially discriminatory voter ID requirement and would again require voters to present photo identification in order to access the ballot, which would have an irreparable impact on the right to vote of African Americans in North Carolina.

13) The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election. Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

14) Plaintiff NC NAACP has standing to challenge the judicial vacancies amendment on behalf of its members and on its own behalf because it frequently litigates in court in order to vindicate the civil and political rights of its members. It thus has a strong and abiding interest in a fair and independent judiciary and will be harmed by the proposed constitutional amendment that would further politicize the judiciary and erode separation of powers principles that are themselves a form of protection for the rights of racial minorities. The proposed constitutional amendment also harms the NC NAACP because giving the General Assembly sole control over filling judicial vacancies endangers the NC NAACP's efforts to advocate for diversity in the North Carolina judiciary. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed

amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election. Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

15) Plaintiff NC NAACP has standing to challenge the Board of Elections amendment on behalf of its members and on its own behalf because the NC NAACP and its members regularly advocate before, participate in, and monitor activities governed by the Board of Elections. The NC NAACP and its members will be harmed by the amendment because the amendment's proposal to change the Board of Elections from a nine-member body to an eight-member body and to give the General Assembly power to choose those members will invite deadlock from an evenly-divided Board of Elections and make the Board of Elections more partisan, less independent, and less able to conduct their mission in an impartial way. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election.



Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

16) Plaintiff NC NAACP has standing to challenge the income tax cap amendment on behalf of its members and on its own behalf because the proposed constitutional amendment harms the NC NAACP, its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy. Because the amendment is misleading, NC NAACP will be forced to divert significant resources away from its core activities to educate voters about it before the 2018 election. Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

17) Plaintiff Clean Air Carolina is a not-for-profit corporation founded in 2002. Clean Air Carolina has approximately 3,400 members in North Carolina. Its mission is to ensure cleaner air quality for all North Carolinians through education and advocacy and by working with its partners to reduce sources of pollution, including Greenhouse Gases ("GHGs"). Its



primary goal is to improve health by achieving the cleanest air possible. Clean Air Carolina is based in Charlotte, North Carolina and works on regional and statewide issues.

18) Plaintiff Clean Air Carolina has standing to challenge the proposed amendments on behalf of its members in that its members would otherwise have standing to sue in their own rights; the interests it seeks to protect are germane to its purpose, which includes the core mission of improving health by achieving the cleanest air possible; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

19) Plaintiff Clean Air Carolina has standing to challenge the income tax cap amendment on behalf of its members and on its own behalf because the proposed constitutional amendment harms Clean Air Carolina, its members, and the communities it serves, and its ability to advocate for its priority issues. Clean Air Carolina advocates for increased state spending on measures that will improve air quality and mitigate against global climate change. Clean Air Carolina has encouraged its members to support the Governor's proposed 2018 budget which included increased spending for environmental protection. Clean Air Carolina's "Particle Falls" educational exhibits have received state funding, passed through the N. C. Department of Transportation and donated by the N.C. Clean Energy Technology Center at N.C. State University. Clean Air Carolina will be harmed by the amendment to cap the state income tax at 7%. Clean Air Carolina is concerned that the Department of Environmental Quality is already severely underfunded. Clean Air Carolina is also concerned that too little state money is spent on non-highway transportation solutions including bike and pedestrian improvements, buses, light, commuter, and heavy rail. Such spending helps reduce driving and improves air quality and minimizes impacts to climate change. If the income tax cap is lowered from 10% to 7%, Clean Air Carolina will be limited in its efforts advocating for more state spending on clean air and

climate issues. As the climate continues to warm and global climate change becomes increasingly pressing, this limitation will become increasingly severe.

20) Plaintiff Clean Air Carolina has standing to challenge the judicial vacancies amendment on behalf of its members and on its own behalf because it frequently litigates in court in order to protect clean air in North Carolina and to mitigate against climate change. Clean Air Carolina has participated as a plaintiff in several lawsuits challenging the construction of new highways in North Carolina. Clean Air Carolina has also participated in the North Carolina Court of Appeals as *amicus curiae* in a case challenging Carolinas Cement Company's harmful air permit in the N.C. Court of Appeals in 2015. Further, Clean Air Carolina has recently participated as a petitioner in the N.C. Office of Administrative Hearings challenging a coal fired power plant air permit due to excessive bromide limits, and has submitted comments to the N.C. Department of Air Quality on numerous air permits in order to exhaust its administrative remedies in case legal action in N.C. state courts becomes necessary. Clean Air Carolina will be harmed by the provision shifting control of appointments to judicial vacancies from the Governor to the N.C.G.A. because it is concerned that this is likely to make the judiciary less independent and more political. Clean Air Carolina members will be harmed because they will be deprived of their constitutional right to participate in the selection of judges through the electoral process in a significant way—the purpose and effect of the proposed amendment are to concentrate power over the judiciary in the legislature, rather than distributing it amongst the three branches. Moreover, Clean Air Carolina is further harmed because the amendment includes vague language and will require subsequent implementing legislation. As such, it is difficult for Clean Air Carolina to inform its members about the likely impact of the proposed amendment.

21) Defendant Philip Berger is the President *Pro Tempore* of the North Carolina Senate. Defendant Berger led the North Carolina Senate in its passage of Session Laws 2018-119, 128, 132, and 133. Defendant Berger is sued in his official capacity.

22) Defendant Tim Moore is the Speaker of the North Carolina House of Representatives. Defendant Moore led the North Carolina House of Representatives in its passage of Session Laws 2018-119, 128, 132, and 133. Defendant Moore is sued in his official capacity.

23) Defendant North Carolina Bipartisan State Board of Elections and Ethics Enforcement is a state agency of North Carolina headquartered in Wake County, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot.

24) Defendant Andrew Penry is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Penry is sued in his official capacity.

25) Defendant Joshua Malcolm is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Malcolm is sued in his official capacity.

26) Defendant Ken Raymond is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Raymond is sued in his official capacity.

27) Defendant Stella Anderson is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Anderson is sued in her official capacity.

28) Defendant Damon Circosta is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Circosta is sued in his official capacity.

29) Defendant Stacy Eggers IV is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Eggers is sued in his official capacity.

30) Defendant Jay Hemphill is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Hemphill is sued in his official capacity.

31) Defendant Valerie Johnson is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Johnson is sued in her official capacity.

32) Defendant John Lewis is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and

which will be responsible for placing the Constitutional Amendments onto the ballot. Defendant Lewis is sued in his official capacity.

### **JURISDICTION AND VENUE**

33) The Superior Court has jurisdiction over this action pursuant to Article 26, Chapter 1, of the North Carolina General Statutes and N.C. Gen. Stat §§1-253 *et seq.* and 7A-245(a).

34) Venue for this action is proper in Wake County pursuant to N.C. Gen. Stat. § 1-77(2), in that Defendants are named herein in their official capacity and the causes of action asserted herein arose from the official acts of the N.C.G.A. occurring in Wake County, North Carolina.

35) Defendants lack sovereign immunity with respect to the claims asserted because Plaintiffs seeks declaratory relief and injunctive relief directly under the North Carolina Constitution, and no other adequate remedy at law is available or appropriate, and because the claims in this case arise under the exclusive rights and privileges enjoyed by North Carolina citizens under the North Carolina Constitution.

### **FACTS AND ALLEGATIONS**

#### **The Unconstitutional N.C.G.A.**

36) The N.C.G.A. is comprised of 50 Senate seats and 120 House of Representative seats pursuant to the North Carolina Constitution, Art. II, §§ 2, 4.

37) In 2011, following the decennial census, the N.C.G.A. redrew the boundaries of North Carolina legislative districts for both the NC Senate and the NC House of Representatives. The districts were enacted in July 2011.

38) The N.C.G.A. unconstitutionally and impermissibly segregated voters by race in drawing the 2011 legislative maps, resulting in legislative districts that unlawfully packed black voters into election districts in concentrations not authorized or compelled under the Voting Rights Act of 1965.

39) On November 4, 2011, the NC NAACP joined by three organizations and forty-six individual plaintiffs filed a state court action, *NC NAACP v. North Carolina*, 11 CVS 16940 (Wake Cty. Super. Ct. filed Nov. 4, 2011), that raised state and federal claims challenging the districts as unconstitutionally based on race. That case was consolidated for all purposes with *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.), *remanded to* 781 S.E.2d 404 (N.C. 2015); *vacated and remanded*, 198 L. Ed. 2d 252 (U.S. 2017) (mem.), *remanded* 813 S.E.3d 230 (N.C. 2017).

40) On May 19, 2015, plaintiffs Sandra Little Covington *et. al*, filed a parallel challenge in federal court alleging that twenty-eight districts, nine Senate districts and nineteen House of Representative districts, were unlawful racial gerrymanders in violation of the Equal Protection Clause of the Fourteen Amendment of the United States Constitution. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016).

41) In August 2016, the three-judge federal district court panel unanimously ruled for plaintiffs, holding that “race was the predominant factor motivating the drawing of all challenged districts,” and struck down the twenty-eight challenged districts (nine Senate districts and nineteen House districts) as the result of an unconstitutional racial gerrymander. *See Covington v. North Carolina*, 316 F.R.D. 117, 124, 176 (M.D.N.C. 2016), *aff’d*, 581 U.S. —, 137 S.Ct. 2211 (2017) (per curiam).

42) On June 5, 2017, the United States Supreme Court summarily affirmed the lower court's ruling that the twenty-eight challenged districts were the result of an unconstitutional racial gerrymander, *North Carolina v. Covington*, 581 U.S. —, 137 S.Ct. 2211 (2017) (per curiam). On June 30, 2017, mandate issued as to the U.S. Supreme Court's order affirming the lower court's judgment. See Certified Copy of U.S. Supreme Court Order, ECF No. 158, *Covington v. North Carolina*, 15-cv-03399-TDS-JEP (filed June 30, 2017).

43) The United States Supreme Court, however, vacated and remanded the lower court's remedial order for a special election, ordering the lower court to provide a fuller explanation of its reasoning for the U.S. Supreme Court's review, *North Carolina v. Covington*, - -- U.S. ---, 137 S. Ct. 1624 (2017) (per curiam).

44) On remand, the three-judge panel granted the N.C.G.A. an opportunity to propose a new redistricting plan to remedy the unconstitutional racial gerrymander. *Covington v. North Carolina*, 283 F.Supp.3d 410, 417–18 (M.D.N.C. 2018). In August 2017, the N.C.G.A. submitted a proposed remedial map -- drawn by Dr. Thomas Hofeller, the same mapmaker the General Assembly had hired to draw the 2011 invalidated maps -- that redrew a total of 117 of the 170 state House and Senate districts from the 2011 unconstitutionally racially-gerrymandered maps. *Id.* at 418.

45) After reviewing the General Assembly's remedial plan, the three-judge panel determined that a number of the new districts put forward by the N.C.G.A. in its 2017 remedial plan were essentially continuations of the old, racially gerrymandered districts that had been previously rejected as unconstitutional and either failed to remedy the unconstitutional racial gerrymander or violated provisions of the North Carolina Constitution. *Id.* at 447-58. For those defective districts, the three-judge panel adopted remedial districts proposed by a court-



appointed special master. *Id.* at 447-58. The United States Supreme Court affirmed the districts adopted by the three-judge panel, except for certain districts in Wake and Mecklenburg Counties that had not been found to be tainted by racial gerrymanders, but were drawn in alleged violation of the state constitutional prohibition against mid-decade redistricting. *North Carolina v. Covington*, 138 S.Ct. 2548 (2018).

46) In order to cure the 2011 unconstitutional racial gerrymander, the remedial maps redrew 117 legislative districts, more than two-thirds of the total seats in the General Assembly.

47) In November of 2018, elections for all N.C.G.A. seats will be held based on the redrawn districts, the first opportunity that voters will have had since before 2011 to choose representatives in districts that have not been found to be the illegal product of an unconstitutional racial gerrymander.

48) Since June 5, 2017, the N.C.G.A. has continued to act and pass laws.

#### **Limitation on actions of usurpers**

49) When the Supreme Court issued its mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority, and became a usurper legislature. *See Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005, 1007-08 (1891) (once it becomes known that an officer is in his position illegally, that officer ceases to have *de facto* status, but is a usurper to the office); *State v. Carroll*, 38 Conn. 449, 473-74 (1871) (acts of an officer elected under an unconstitutional law are only valid before the law is adjudged as such); *State v. Lewis*, 107 N.C. 967, 12 S.E. 457, 458 (1890) (the acts of an officer elected pursuant to an unconstitutional law are invalid after the unconstitutionality of the law has been judicially determined); *Keeler v. City of Newbern*, 61 N.C. 505, 507 (1868) (mayor and town council lack public presumption of authority to office, making them usurpers).

50) As the N.C. Supreme Court has explained:

The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government.

*Van Amringe*, 108 N.C. at 198, 12 S.E. at 1006.

51) To the extent that a usurper legislature may engage in any official acts, the only actions they may take are those day-to-day functions of its office necessary to avoid chaos and confusion. *See also Dawson v. Bomar*, 322 F.2d 445 (6th Cir.1963) ("the doctrine of avoidance of chaos and confusion which recognizes the common sense principle that courts, upon balancing the equities between the individual complainant and the public at large, will not declare acts of a malapportioned legislature invalid where to do so would create a state of chaos and confusion"); *Butterworth v. Dempsey*, 237 F. Supp. 302, 311 (D. Conn. 1964) (enjoining the Connecticut legislature from passing any new legislation unless reconstituted in constitutionally-drawn districts, but staying that order so long as the Court's timeframe for enacting new districts is followed). In keeping with this principle, some of the actions taken by the usurper N.C.G.A. since the U.S. Supreme Court issued its mandate in *Covington* may have been permissible under this exception for day-to-day functions.

52) Similarly, a usurper legislature may take actions to reconstitute itself in a legal fashion. *See Kidd v. McCannless*, 200 Tenn. 273, 281 (1956) (determining that an unconstitutionally apportioned legislature must have a way to reapportion itself so as not to bring

about the destruction of the state). *See also Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963) (noting the need for a malapportioned legislature to be able to pass an act of reapportionment.). Thus, the federal court in *Covington* lawfully gave the N.C.G.A. the opportunity to reapportion itself, while noting that the status of the N.C.G.A. as a usurper more generally was an “unsettled question of state law” which should be “more appropriately directed to North Carolina courts, the final arbiters of state law.” *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017).

53) Amending the N.C. Constitution cannot be considered essential to the day-to-day functions of legislative office, nor is it necessary to avoid chaos and confusion. In fact, allowing this unconstitutional body to amend the fundamental law of the state, of which they themselves are in violation, would itself result in chaos. It has been adjudged by the United States Supreme Court that the current legislature is illegally constituted by way of an unconstitutional racial gerrymander – chaos will result if this undemocratically elected body is permitted to take such fundamental steps. Elections based on legal boundaries will take place this November. In January 2019 a constitutional *de jure* legislature will take office. That constitutional body may take up the matter of constitutional amendments and place any proposals that achieve a three-fifths majority on a future ballot so long as they are presented before the people in a clear, complete, and unambiguous way.

### **Constitutional Amendments**

54) N.C. Const. Art. I § 2 establishes that “[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.”

55) N.C. Const. Art. I § 3 requires that the people of North Carolina “have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.”

56) N.C. Const. Art. I § 35 establishes that “[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

57) N.C. Const. Art. XIII establishes the procedures for amending the North Carolina Constitution.

58) Specifically, Art XIII § 4 sets out the procedures by which the N.C.G.A. may initiate amendments to the Constitution, mandating that a “proposal” of an “amendment or amendments” to the Constitution may be initiated by the N.C.G.A., “but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection.”

59) Three-fifths of all the members of the North Carolina House of Representatives equals 72 members. Three-fifths of the N.C. Senate equals 30 Senators.

60) Art XIII § 4 further requires that “the proposal shall be submitted at the time and in the manner prescribed by the General Assembly.” Thereafter, “[i]f a majority of the votes cast thereon are in favor of the proposed new or revised Constitution or constitutional amendment or amendments, it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters.”

61) In comparison to the requirements for amending the state Constitution, the usual process for passing legislation entails ratification of a bill by a majority of both houses of the legislature and then the Governor's signature.

62) Courts in other jurisdictions have adjudged the requirement to submit a proposal to the voters to mean that the proposal must be fairly and accurately reflected on the ballot. *See, e.g., Armstrong v. Harris*, 773 So.2d 7, 12 (Fla. 2000) (requiring accuracy on a Florida ballot based on a substantively identical provision in the Florida constitution); *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006) (requiring accuracy on a Minnesota ballot provision to amend that state's constitution based on substantively identical provision).

63) It is well established under North Carolina law that voters must be presented with clear, accurate information on ballots. N.C. Gen. Stat. § 163A-1108, requires the Board of Elections to ensure that official ballots, among other things, "[p]resent all candidates and questions in a fair and nondiscriminatory manner." N.C. Gen. Stat. § 163A-1108(1)-(2). *See also Sykes v. Belk*, 278 N.C. 106, 119, 179 S.E.2d 439, 447 (1971) (noting that a ballot may be invalidated if it contains a "misleading statement or misrepresentation").

64) North Carolinians have amended their constitution only six times in the past fifteen years.

65) Since the current N.C. Constitution was adopted in 1971, it has been amended forty-five times. Only two of those amendments have required any additional implementing legislation after the amendments were voted upon by the citizens of North Carolina. *See* N.C. Sess. L. 1983-526 (implementing the Constitutional amendment to allow the Supreme Court to review decisions of the N.C. Utilities commission), and N.C. Sess. L. 1998-212 § 19.4 (implementing the constitutional amendment creating rights for victims of crimes). Unlike in the

instant case, this implementing legislation did not add substantively to the amendment that had been placed before the voters. Moreover, the legitimacy of the proposals was never adjudicated by any court.

### **The Challenged 2018 Proposed Amendments**

66) In the final two days of the 2018 regular legislative session, the N.C.G.A. went beyond its day-to-day business and hurriedly passed six bills that would place six constitutional amendments before the voters: Session Laws 2018-96, 110, 117, 118, 119, and 128.

67) Four of the six amendments, Session Laws 2018-117, 118, 119, and 128, were the subject of the original Complaint for Declaratory and Injunctive Relief and a Motion for Temporary Restraining Order (“TRO”) filed in this matter on August 6, 2018. A similar challenge related to two of those constitutional amendments—Session Laws 2018-117 and 118—was filed the same day by the Governor. 18 CVS 9805, Wake County.

68) The next day, Wake County Superior Court Judge Paul Ridgeway transferred both matters to a three-judge panel of the Superior Court, and on August 21, 2018, the three-judge panel issued a final order as to the motions for preliminary injunctive relief in both cases. The Order enjoined the Board of Elections from placing the constitutional amendment proposals authorized by the Boards and Commissions and Judicial Vacancies Amendment proposals on the November 2018 ballot, finding that key elements of the ballot questions for these two amendments would either mislead or not sufficiently inform voters about the proposed amendments. But, the panel declined to enjoin the Board from placing amendment proposals authorized by the Voter ID and Tax Cap Amendments on the November 2018 ballot.

69) In response, the N.C.G.A. convened a special session, beginning on August 24, 2018, at which it took up new versions of the Judicial Vacancies and the Boards and

Commissions Amendments. Both bills passed both chambers, and they were enacted as Session Laws 2018-132 and 2018-133 on August 27, 2018.

*The Board of Elections Amendment*

66) Session Law 2018-133, “An Act to amend the Constitution of North Carolina to establish a bi-partisan board of ethics and elections enforcement” was ratified by the House of Representatives on August 24, 2018, and by the Senate on August 27, 2018.

67) The constitutional amendment proposed in Session Law 2018-132 will appear on the ballot misleadingly as “Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.”

68) The amendment states that it would amend N.C. Const. Art. IV, § 11, and purports to establish a “Bipartisan State Board of Ethics and Elections Enforcement” to administer ethics and elections laws. The Board shall consist of eight members and no more than four members may be registered with the same political affiliation. All appointments shall be made by the N.C.G.A.

69) Additional implementing legislation will be required to clarify and establish the full meaning of the amendment.

70) Session Law 2018-132 passed the N.C. State House of Representatives by a vote of 73-33 and passed the N.C. State Senate by a vote of 32-14. In the House, the total number of aye votes was just one vote over the three-fifths contingent required for a constitutional amendment and in the Senate just two votes over the required margin.



### *The Judicial Vacancies Amendment*

71) Session Law 2018-132, “An Act to amend the Constitution of North Carolina to provide for nonpartisan judicial merit commissions for the nomination and recommendation of nominees when filling vacancies in the office of justice or judge of the general court of justice and to make other conforming changes to the Constitution” was ratified by the House of Representatives on August 24, 2018 and by the Senate on August 27, 2018.

72) The constitutional amendment proposed in Session Law 2018-132 will appear on the ballot misleadingly as “Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.”

73) The amendment would alter N.C. Const. Art. II, § 22 and IV, §§ 10; 18; 19; 23. The amendment would remove the Governor’s broad authority to appoint judges to fill vacancies. Instead, the amendment would require the Governor to select a judge from one of at least two candidates presented to him by the N.C.G.A., which it would select from nominations submitted by the public to a so-called “Nonpartisan Judicial Merit Commission.” In the event that the Governor did not appoint any of the preselected nominees put forward by the N.C.G.A. within ten days, the legislature itself would have the power to fill the vacancy.

74) Additional implementing legislation will be required to clarify and establish the full meaning of the amendment.

75) Session Law 2018-132 passed the N.C. State House of Representatives by a vote of 72-34 and passed the N.C. State Senate by a vote of 32-13. In the House, the total number of aye votes was exactly the three-fifths required for a constitutional amendment without a vote to spare, and in the Senate just two votes over the required margin.

### *The Voter ID Amendment*

76) On June 28, 2018, the N.C.G.A. passed Session Law 2018-128, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person."

77) The constitutional amendment proposed in Session Law 2018-128 will appear on the ballot misleadingly as "Constitutional amendment to require voters to provide photo identification before voting in person."

78) The amendment would alter N.C. Const. Art. VI, §§ 2; 3, and would require individuals voting in person to present photo identification before doing so. The bill does not specify what might qualify as "photo identification." Rather, the amendment states that the N.C.G.A. will enact general laws governing the requirement of such photographic identification, "which may include exceptions." The amendment does not specify what these exceptions might be. Thus, the amendment expressly requires additional implementing legislation.

79) Session Law 2018-128 passed the N.C. House of Representatives by a vote of 74-43 and the N.C. Senate by a vote of 33-12. In the House the number of aye votes was just two votes over three fifths contingent required for a constitutional amendment, and in the Senate the number was just three votes over.

### *The Tax Cap Amendment*

80) On June 28, 2018, the N.C.G.A. passed Session Law 2018-119, “An Act to Amend the North Carolina Constitution to provide that the maximum tax rate on incomes cannot exceed seven percent.”

81) The constitutional amendment proposed in Session Law 2018-119 will appear on the ballot misleadingly as “Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).”

82) The amendment would alter N.C. Const. Art. V., § 2. It would lower the maximum state income tax rate from ten percent to seven percent.

83) Session Law 2018-119 passed the N.C. Senate by a vote of 34–13 and passed the N.C. House of Representatives by a vote of 73–45. In the Senate the number of aye votes was just four votes over three fifths contingent required for a constitutional amendment, and in the House the number was just one vote over.

### **Ballot Language for the 2018 Proposed Constitutional Amendments**

84) Until very recently, responsibility for writing explanatory captions for proposed constitutional amendments on the ballot belonged to the Constitutional Amendments Publication Commission, comprised of the Secretary of State, the Attorney General, and the Legislative Operations Chief. N.C. Sess. L. 2016-109.

85) Shortly after the Constitutional Amendments Publication Commission announced its plan for holding meetings and receiving public input in order to draft the captions for the six constitutional amendments, the N.C.G.A. called itself back into a special legislative session on July 24, 2018, with less than 24 hours’ notice to the public.

86) One of the purposes of the July 24, 2018, session was to pass legislation removing the caption writing authority from the Commission.

87) On July 24, 2018, the NC House and Senate passed House Bill 3, which eliminates the authority of the Commission to draft the explanatory captions and instead requires that proposed constitutional amendments on the North Carolina ballot simply be captioned "Constitutional Amendment." In addition, House Bill 3 mandates that the only other explanatory text to be presented on the ballot is the question presented in the legislation containing the proposed constitutional amendment as drafted by the N.C.G.A.

88) On July 27, 2018, Governor Cooper vetoed House Bill 3, stating:

These proposed constitutional amendments would dramatically weaken our system of checks and balances. The proposed amendments also use misleading and deceptive terms to describe them on the ballot.

89) On August 4, 2018, the N.C.G.A. returned for a special session. Before the session commenced, several members of the N.C.G.A. leadership, including Defendant Berger, held a press conference. At this press conference Senator Berger acknowledged the ambiguity inherent in the Judicial Vacancies amendment, but stated his belief that statements at the press conference could be used by a court to infer legislative intent, and thus clarify any ambiguity.

90) During the special session, Governor Cooper's veto of House Bill 3 was overridden 70-39 in the House and 28-12 in the Senate.

#### **CLAIMS FOR RELIEF**

92) Plaintiffs reallege and incorporate herein by reference the foregoing paragraphs of this Complaint.

93) There exists a present controversy between Plaintiffs on the one hand, and Defendants on the other hand, as to the status of the N.C.G.A. subsequent to the U.S. Supreme Court mandate in *Covington*.

94) Plaintiffs seek a declaratory judgment that, pursuant to the U.S. Supreme Court's June 30, 2017, mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de facto* lawful authority and assumed usurper status. To the extent that they had any power to act, it was limited to those acts necessary to avoid chaos and confusion, such as acts necessary to conduct the day-to-day business of the state, but the usurper N.C.G.A. may not take steps to modify the N.C. Constitution. Art I § 2, 3, 35 and Art XIII § 4.

95) Plaintiffs seek a declaratory judgment that because the N.C.G.A. was without authority to pass Session Laws 2018-119, 128, 132, and 133 they are void *ab initio*.

a. Session Law 2018-119 was passed by the illegal act of usurpers and is void *ab initio*.

b. Session Law 2018-128 was passed by the illegal act of usurpers and is void *ab initio*.

c. Session Law 2018-132 was passed by the illegal act of usurpers and is void *ab initio*.

d. Session Law 2018-133 was passed by the illegal act of usurpers and is void *ab initio*.

96) There exists a present controversy between Plaintiffs on the one hand, and Defendants, on the other hand, as to the constitutionality of the actions of the N.C.G.A. with respect to the passage of Session Laws 2018-119, 128, 132, and 133.

97) Plaintiffs seek a declaratory judgment that the N.C.G.A. is in violation of N.C. Const. Art I, § 2, 3, 35 and Art. XIII, § 4 because its proposed language for presenting the constitutional amendments contained in Session Laws 2018-119, 128, 132, and 133 on the 2018 ballot does not satisfy the constitutional requirement that the legislature submit the proposal of the amendment to the qualified voters of North Carolina in that the amendments and the ballot descriptions are vague and misleading.

a. Session Law 2018-132 will be presented on the ballot with vague and misleading language that highlights a “nonpartisan merit-based system” for the filling of judicial vacancies and fails to acknowledge that the Amendment will move power for the filling of judicial vacancies from the Governor to the N.C.G.A. Senate Bill 814 gives the N.C.G.A.—a partisan, political body—the power to nominate the ultimate candidates for judicial vacancies to the Governor. The omission of these sweeping new grants of power to the N.C.G.A. from the ballot language is misleading. By failing even to note this fundamental change to the NC Constitution in the caption, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

b. Session Law 2018-128 will be presented on the ballot with vague and misleading language stating that the NC Constitution will be amended “to require photo identification to vote in person” without in anyway specifying what this voter ID will consist of, and without acknowledging that the amendment requires the N.C.G.A. to pass additional legislation determining what photographic identification will be sufficient, and without specifying that there may be exemptions and what they will be. Under this broad language, the N.C.G.A. could later require something as difficult to obtain as a United States Passport before allowing a person to vote, effectively disenfranchising the overwhelming majority of the

population. On the other extreme, the N.C.G.A. may fail to enact any implementing legislation, leading to chaos as precincts enact different inconsistent requirements. By presenting only this vague and misleading question on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

c. Session Law 2018-119 will appear on the ballot as “Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).” The phrase “reduce the income tax rate in North Carolina,” suggests that the tax rate currently applicable in the state will be reduced and thus misleads the voters. In fact, the current income tax rate is 5.5%, well below 7%. The amendment itself will actually lower the maximum allowable income tax cap—which is currently set at 10%. By presenting this misleading question on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

98) Plaintiffs seek a declaratory judgment from this Court stating the N.C.G.A. is in violation of N.C. Const. Art I, § 2, 3, 35 and Art. XIII, § 4 because the vague and incomplete language in Session Laws 2018-119, 128, 132, and 133 does not satisfy the requirement to submit the proposal of the constitutional amendment to the qualified voters of North Carolina.

a. Session Law 2018-128 includes the vague, unfinished new requirement that “voters offering to vote in person shall present photographic identification before voting. *The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.*” (emphasis added). This provision expressly requires additional legislation to determine what photographic identification will



consist of and what exceptions will be made. The N.C.G.A. has therefore failed to present a full proposal to the people of North Carolina.

b. Session Law 2018-133 includes vague language suggesting that the main purpose of the amendment is to establish a Bipartisan Board of Ethics and Elections Enforcement when in actuality, such a Board already exists, and it is already bipartisan. Skirting court rulings in recent litigation regarding this board is, in fact, the intended outcome of this amendment—an outcome that is hidden by voters by the benign language on the ballot. The ballot language is also misleading by omission. It fails to explain that although the governor makes appointments to the eight member board, it is from a list provided by the legislature, in yet another power shift. The full scope and force of this amendment is not fully before the people.

c. The ballot language for Session Law 2018-132 misinforms the voter by stating that the amendment would move North Carolina “from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals...” Currently, the local bar of the judicial district in which there is a vacancy nominates five candidates for the governor to consider in filling the vacancy. Members of the local bar are “people of the State,” and it is thus misleading to imply that citizens of North Carolina do not have a role in the current process, or that the Governor has “sole appointment power.” The new ballot language is also misleading by omission. Currently, an appointed judge finishes the term of his or her predecessor. Session Law 2018-132 would extend the term of the appointed judge by two years, which means a judge may serve up to four years before standing for election. The ballot language makes no mention of this. It also fails to mention what happens if Governor does not appoint one of the candidates presented by the N.C.G.A. Depending on the timing, the appointment would then be made by either the Chief Justice or the

N.C.G.A. Because the ballot language omits any information about these significant changes to the makeup of our judiciary, the full scope and force of this amendment is not fully before the people.

#### **PRAYER FOR RELIEF**


WHEREFORE, based upon all the allegations contained in the foregoing paragraphs, Plaintiffs respectfully request that this Court:

1. Adjudge and declare that following the U.S. Supreme Court mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status;
2. Adjudge and declare that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to Art I § 2, 3, 35 and Art XIII § 4;
3. Adjudge and declare that the vague and intentionally misleading questions that will appear on the ballot for the amendment set forth in Session Laws 2018-119, 128, and 132 violate the N.C.G.A.'s responsibility to place the proposal of the constitutional amendments before the people;
4. Adjudge and declare that the vague and incomplete language in Session Laws 2018-128, 132, and 133, which will require further implementing legislation, does not amount to a proposal to be presented to the public pursuant to Art. XIII, § 4;
5. Adjudge and declare that Session Laws 2018-119, 128, 132, and 133 are void *ab initio*;
6. Issue preliminary and permanent injunctive relief prohibiting the Bipartisan State Board of Elections and Ethics Enforcement from including these

amendments on the ballot or in the alternative, any amendment to the Consitution  
proposed by Session Laws 2018-119, 128, 132, and 133 should nto go into effect;

7. Award costs to Plaintiffs pursuant to N.C. Gen. Stat. § 1-263;
8. Award reasonable attorneys' fees to Plaintiffs as permitted by law; and
9. Grant any other and further relief that the Court deems to be just and proper.

Respectfully submitted, this the 19th day of September, 2018.



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