No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

Plaintiff-Appellant,

vs.

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

Defendant-Appellees.

From Wake County

****

DEFENDANT-APPELLEES' NEW BRIEF

****

INDEX

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Session Laws

Other Authorities

No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

Plaintiff-Appellant,

vs.

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

Defendant-Appellees.

From Wake County

****

DEFENDANT-APPELLEES' NEW BRIEF

****

INTRODUCTION

Plaintiff seeks to invalidate two constitutional amendments that were ratified by North Carolina voters. Plaintiff does not challenge the language of the amendments or the results of the people's decision. Rather, relying upon the United States Supreme Court's determination that certain legislative districts were unconstitutionally drawn following the last decennial census, Plaintiff argues that the Legislature lost its popular sovereignty to pass the session laws that proposed the amendments to the people for ratification. To reverse the Court of Appeals for the reasons articulated by Plaintiff would require this Court to cast aside the analysis of

all other courts that have considered the issue dating back to the Civil War and have this Court adopt as mainstream a novel theory that no court before has endorsed.

When the state of Georgia seceded from the United States during the Civil War, its legislature passed laws, the subject of which was challenged before the United States Supreme Court after Georgia was reintegrated into the Union. There was no hesitancy by the Court in finding those laws valid.

> But it does not follow from this that it was not a legislature the acts of which were of force when they were made, and are in force now. If not a legislature of the State *de jure*, it was at least a legislature *de facto*. It was the only lawmaking body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States.

United States v. Home Ins. Co., 89 U.S. 99, 101 (1874). Over 90 years later, when examining malapportionment of state legislatures, the Supreme Court reiterated that "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act." *Baker v. Carr*, 369 U.S. 186, 250 n.5 (1962) (Douglas, J. concurring).

The plaintiff in *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939), argued just the opposite to this Court. In *Leonard*, the plaintiff challenged an act levying a tax as invalid because the Legislature that passed the act was correctly and timely apportioned. *Id.* This Court rejected that argument and noted it was "[q]uite a devastating argument, if sound." *Id.*

Nonetheless, Plaintiff, in advancing the same argument made by the plaintiff in *Leonard*, asks this Court to consider again an argument previously rejected,

reverse course, and be the first court to say it is, in fact, sound law. Plaintiff asks this Court to find that, due to redistricting violations, the legislative branch lost the sovereignty to take "extraordinary legislative activity" (*e.g.*, proposing constitutional amendments) but that "ordinary legislative activity" was not affected. The Court of Appeals majority saw such a determination as a bridge too far and determined that the trial court's order invalidating the challenged amendments was "not based upon law." *NC NAACP v. Moore*, 849 S.E.2d 87, 96 (N.C. Court App. 2020). The federal court, where this issue was originally raised, did not find any support for legislatures losing the authority to legislate upon redistricting violations. Plaintiff's and *Amici Curiae's* arguments before this Court also have no basis in law and provide no support for the conclusion that the Legislature lacked authority to pass the amendments challenged herein or that the judiciary has the authority to make such a determination.

Although it can point to no supporting case law, Plaintiff does offer theories as to why the General Assembly's proposal of two constitutional amendments should be voided for a lack of popular sovereignty. The Court of Appeals correctly considered and dismissed those theories as both incorrect and unworkable. This Court should do the same and should affirm the Court of Appeals' decision to reverse the trial court's determination.

EXAMINATION OF THE ISSUE PRESENTED

Plaintiff derives its Issue Presented from Judge Young's dissenting opinion at the Court of Appeals and asks whether the General Assembly "exceeded its authority

when it acted to amend the state Constitution."[1] (Appellant's Br. p 2; *see also* Appellant's Br. p 3). To be clear, there can be no disagreement that the *people* of North Carolina voted to amend the Constitution; the General Assembly did not (and cannot) amend the Constitution unilaterally. Indeed, by a three-fifths majority in both houses, the General Assembly passed House Bill 1092, which became Session Law 2018-128, to propose a voter identification amendment to the North Carolina Constitution, and Senate Bill 75, which became Session Law 2018-119, to propose a new cap on income tax rates. The citizens of North Carolina then voted to amend their Constitution by adding these two amendments (and two others). *See NC NAACP v. Moore*, 849 S.E.2d 87, 89-90 (N.C. Court App. 2020).

Plaintiff later more accurately states that the issue before the Court is "only the General Assembly's authority to enact proposed amendments to our state Constitution." (Appellant's Br. p 3). Thus, the issue is whether, notwithstanding the people's choice to amend their constitution, this Court should strike down those amendments because the General Assembly lacked popular sovereignty in proposing those amendments. The Court of Appeals correctly determined that the General Assembly never lacked the sovereign authority to act. Its decision should be affirmed.

STATEMENT OF THE CASE

In its Amended Complaint, Plaintiff argued that the General Assembly sitting in 2018 was a usurper body that lacked authority to pass the proposed amendments

[1] Before proceeding with their argument in rebuttal, Defendants must address aspects of the Issue Presented, Statement of the Case, and Statement of Facts in Plaintiff's New Brief.

and that the ballot language used to present the proposed constitutional amendments (specifically, the amendments set forth in Session Laws 2018-117, 2018-118, 2018-119, and 2018-128) to voters violated the Constitution. (R pp 121-153).[2] At the trial court, Judge Ridgeway determined that Plaintiff's challenges were facial challenges that must be heard and determined by a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1. (R pp 46-47). Former Chief Justice Martin appointed a three-judge panel on the afternoon of 7 August 2018, (R p 48), and the panel scheduled a hearing on Plaintiff's request for interlocutory injunctive relief for 15 August 2018, (R p 85).

On 21 August 2018, the three-judge panel enjoined the amendments as proposed in Session Laws 2018-117 and 2018-118 from being included on the ballot, (R pp 112-13), but found Plaintiff's usurper argument to be a collateral attack on the acts of the General Assembly that did not fall within the ambit of a facial challenge for the three-judge panel, (R pp 89-90). The unanimous panel noted, however, that if the argument were to fall within the panel's jurisdiction, the panel would not accept the argument that the General Assembly is a usurper body and would not invalidate any acts of the General Assembly as a usurper body. (*Id.*) Although Plaintiff filed petitions for writs of supersedeas with both the Court of Appeals and this Court

[2] Defendants generally agree with Plaintiff's Statement of the Case from the point in time following the election in November 2018. Defendants note, however, that between the enactment of legislation proposing amendments and the vote of the people in November 2018, Plaintiff sought several layers of review of the challenged amendments and others.

(twice) to enjoin the inclusion of the amendments proposed in Session Laws 2018-119 and 2018-128 on the November 2018 ballot, further injunctive relief was denied.

The trial court's 22 February 2019 order granting Plaintiff's Motion for Partial Summary Judgment, wherein it declared Session Laws 2018-119 and 2018-128 void *ab initio* and declared the amendments to the Constitution effectuated by Session Laws 2018-119 and 2018-128 void, (R pp 192-93), was appealed by Defendants the next business day: 25 February 2019. (R p 194). Defendants then filed their Petition for Writ of Supersedeas and Motion for Temporary Stay with the Court of Appeals on 4 March 2019. After granting a temporary stay, on 21 March 2019, the Court of Appeals allowed the Petition for Writ of Supersedeas and stayed the 22 February 2019 Order. On 15 September 2020, the Court of Appeals reversed the trial court's order.

STATEMENT OF FACTS

Plaintiff does not challenge redistricting; Plaintiff is not asking that this Court resolve a question of equal protection and enter an order requiring the Legislature to propose new voting district maps. In this appeal, Plaintiff challenges the power of the Legislature to act following a determination that there was unconstitutional racial gerrymandering. The Court of Appeals majority opinion walks through a brief history of gerrymandering in North Carolina, and Defendants will not attempt to summarize that history or the law surrounding it. However, the federal courts' determinations in the underlying redistricting case are useful in the consideration of the issues before the Court and merit a brief summary.

In May 2015, a group of plaintiffs filed a second federal lawsuit challenging nine North Carolina Senate districts and 19 North Carolina House of Representatives districts of the 2011 plan as racial gerrymanders.[3] *Covington v. North Carolina*, 316 F.R.D. 117, 128 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

On 11 August 2016, the *Covington* federal district court entered an opinion and judgment finding that the challenged legislative districts constituted racial gerrymanders. *See id*. at 124. Due to the timing of the pending elections, the *Covington* district court did not enjoin the use of the 2011 majority black districts for the 2016 election but prohibited the State from using those districts in elections after 2016. *Id*. at 176-77. The federal district court also directed that new plans be drawn by the General Assembly in its "next legislative session." *Id*. at 177-78.

By order entered on 29 November 2016, the federal district court ordered that a special election be held in 2017 for the purpose of electing new legislators in the redrawn districts. *Covington v. North Carolina*, No. 1:15-CV-399, 2016 WL 7667298, at *3 (M.D.N.C. Nov. 29, 2016), *vacated and remanded*, 137 S. Ct. 1624 (2017).

On 5 June 2017, the United States Supreme Court affirmed the decision of the *Covington* district court, *see North Carolina v. Covington*, 137 S. Ct. 2211 (2017), but also vacated the district court's order requiring a special election due to the district court's failure to undertake an equitable weighing process to select a fitting remedy

[3] The first case challenging, in part, the state legislative districts was *Dickson v. Rucho*, 367 N.C. 542, 545, 766 S.E.2d 238, 242 (2014), cert. granted, judgment vacated, 135 S. Ct. 1843 (2015) ("*Dickson I*"); *Dickson v. Rucho*, 368 N.C. 481, 485, 781 S.E.2d 404, 410 (2015) ("*Dickson II*"), vacated and remanded, 137 S. Ct. 2186 (mem.) (2017).

for the violations identified, *see North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017).

On 31 July 2017, the district court ordered that the General Assembly enact remedial legislative maps no later than 1 September 2017. *See Covington v. State*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017)). On 31 August 2017, the General Assembly enacted new legislative plans repealing all of the majority black legislative districts challenged in *Dickson*. *See* N.C. Sess. Law 2017-207; 2017-208.

On 19 September 2017, on remand of the question regarding special elections, the district court denied the plaintiffs' request for a special election. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

> We recognize that legislatures elected under the unconstitutional districting plans have governed the people of North Carolina for more than four years and will continue to do so for more than two years after this Court held that the districting plans amount to unconstitutional racial gerrymanders. But at this juncture, with only a few months before the start of the next election cycle, we are left with little choice but to conclude that a special election would not be in the interest of Plaintiffs nor the people of North Carolina.

Id. (emphasis in original); *see also id*. at 902.

Returning to the analysis of the newly proposed districts, the *Covington* court found additional issues with the General Assembly's proposed plan for legislative districts. After use of a Special Master and further appeal to the United States Supreme Court, legislative districts were set for the 2018 election.[4]

[4] The district court approved the Special Master's plan to redraw nine districts. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 414 (M.D.N.C. 2018). While the

Throughout all of the redistricting challenges, the General Assembly was never enjoined from making and passing laws. Other than requiring the General Assembly to propose alternative redistricting plans for the various courts' consideration, no court required or prohibited the General Assembly from taking any action. Therefore, the members of the North Carolina General Assembly continued to serve, passed 214 laws in 2017, and passed 136 laws in 2018, including the challenged Session Laws.[5]

ARGUMENT

Plaintiff's appeal is based on the dissenting opinion of Judge Reuben F. Young, who makes the scope of his dissent quite clear. "This is the extent of my position—only that the General Assembly, found to be unconstitutionally formed based on unlawful gerrymandering, could not attempt to amend our Constitution without first comporting itself to the requirements thereof." *Moore*, 849 S.E.2d at 106.

> 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

---

Supreme Court affirmed the redrawing of four districts, it rejected the redrawing of districts in Wake and Mecklenburg Counties that had not been based on racial gerrymandering. *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018).

[5] In its Second Amended Complaint filed on 19 September 2018, Plaintiff challenged Session Laws 2018-119 (lowering the tax cap), 2018-128 (establishing a requirement for voter identification), 2018-132 (establishing a commission to assist with the filling of judicial vacancies) and 2018-133 (proposing a bipartisan board of ethics and elections enforcement). At the 2018 general election, voters rejected the proposed amendments set forth in Session Laws 2018-132 and 2018-133, and, by motion filed on 28 December 2018, Plaintiff has dismissed its claims related to Session Laws 2018-132 and 2018-133 as moot.

> principles of democracy which elevate our State and our nation.

Id. at 105. Plaintiff attempts to buttress the Dissent's platitudes by referencing *Covington*, arguing that the Legislature lost its *de facto* status under state law and noting the narrowness of the requested relief.[6] Plaintiff's efforts, however, cannot overcome the determination and reasoning of the Court of Appeals that the trial court erred in holding that our General Assembly did not have the authority to propose amendments to the Constitution.

I. Under our state law, the judicial branch does not go behind a vote of the General Assembly and gauge the authority of its members to act.

The Dissent recognized that Defendants raised justiciability but criticizes an argument that is not actually the argument Defendants raised. There is no question that since *Baker v. Carr*, voters may challenge redistricting legislation on the grounds that it violates their individual rights. However, this case is not a redistricting case;

[6] Appellate Rule 16(b) notes that this Court's review is limited to those issues "specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, *and* (3) properly presented in the new briefs." N.C. App. R. 16(b); *see, e.g., State v. Moore*, 370 N.C. 338, 345, 807 S.E.2d 550, 555 (2017) (eschewing constitutional arguments that were not the subject of the dissent); *Blumenthal v. Lynch*, 315 N.C. 571, 577, 340 S.E.2d 358, 361 (1986) (noting a more limited basis for the dissent than the appellant had briefed). Plaintiff's notice of appeal simply sets forth that the Court of Appeals erred in reversing the trial court; there are no specifics laid out therein. Here, the Dissent did not discuss at all the majority's conclusions that the Legislature had not lost its *de jure* or *de facto* status under state law. In asserting that the General Assembly lacked sovereignty and, therefore, lacked the ability to propose the two challenged amendments (and not "ordinary legislation"), the Dissent cites the *Covington* court's opinion, *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963), a few state constitutional provisions, and President Lincoln's Gettysburg address. Plaintiff's arguments, which go well beyond these few points discussed in the Dissent, are arguably beyond this Court's review.

Plaintiff is not challenging legislation proposing new voting district maps. Instead, Plaintiff challenges as unconstitutional two session laws proposing constitutional amendments on the grounds that the Legislature lost its popular sovereignty; its members became usurpers of the office; and they were unable to propose constitutional amendments. The loss of popular sovereignty, or the inability to act, is a different question than whether redistricting is actionable. Determining whether the Legislature has popular sovereignty to pass an act is a question the Court is not equipped to answer: it is nonjusticiable.

As recently noted by the United States Supreme Court, there are indeed issues courts are not equipped to handle, and whether a legislative body enjoys popular sovereignty is one of them. *See, e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2499 (2019). In *Rucho*, the Court determined that partisan gerrymandering is a political question for federal courts. While it is the role of the Court to say what the law is, the Court noted that sometimes "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Id.* at 2494 (quotations omitted). That analysis applies here as well.

A.

Several aspects of Plaintiff's challenge implicate powers reserved for the General Assembly or that are solely within its rights to determine. For instance, the qualifications of the members of the General Assembly are textually given to the two houses of the Legislature. Article II, Section 20 of our Constitution provides that

"[e]ach house shall be judge of the qualifications and elections of its own members[.]" In *Alexander v. Pharr*, 179 N.C. 699, 103 S.E. 8 (1920), this Court, in a swift *per curiam* opinion, followed the text of the Constitution and held that a challenge to "determine the right of the defendant to hold said office" in the North Carolina House of Representatives was a challenge beyond the jurisdiction of the state courts. *See* John V. Orth and Paul M. Newby, *The North Carolina Constitution* 104 (2d ed. 2013) ("[T]he judicial branch has determined that this power is exclusive, so the courts lack jurisdiction over such questions.").

Plaintiff's argument rests on the principle that the individually elected representatives and senators lacked the ability (i.e., popular sovereignty) to represent their constituents. Plaintiff essentially argues that the legislators elected from the districts affected by what was found to be unconstitutional gerrymandering did not qualify as members of the General Assembly. That issue would be a question for the Legislature. *Pharr*, 179 N.C. at 699, 103 S.E. at 8.

Plaintiff, the Dissent, and the trial court all affirmatively acknowledge that Article XIII, Section 4's requirement of a three-fifths vote of both houses to propose the amendments was satisfied, but each questions the ability of the members to act. The public record House and Senate Journals both reflect the three-fifths vote, and the acts were certified by the presiding officers of each chamber.[7] It is not for the

[7] The respective house journals detail passage of the session laws at issue. *See* Journal of the House of Representatives of the 2017 General Assembly of the State of North Carolina ("House Journal"), Sessions 2018, pp 382-83 (HB 1092 passed second reading by three-fifths vote), 398 (HB 1092 passed third reading by three-fifths), 450-51 (HB 1092 enrolled, ratified as Session Law 2018-128, and sent to Secretary of

courts to go behind a vote of the Legislature and question whether it is rooted in popular sovereignty.[8]

In *Baker*, the United States Supreme Court acknowledged that, in certain circumstances (like if the enrolled statute lacked an effective date), a court could look at a legislature's records (like legislative journals) in order to preserve the enactment but noted judicial reluctance to inquire whether legislation complied with all requisite formalities. 369 U.S. at 214-15; *see also Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204 (Ala. 2005) (court would not determine what "majority" meant for the passage of an act). This Court has also held the same. In *Frazier v. Bd. of Comm'rs of Guilford Cty.*, 194 N.C. 49, 138 S.E. 433, 438 (1927),

State), available at: https://www.ncleg.gov/DocumentSites/HouseDocuments//2017-2018%20Session/Journals/2018%20House%20Journal.pdf; Journal of the Senate of the 2017 General Assembly of the State of North Carolina Second Session 2018 ("Senate Journal"), pp 353 (HB 1092 passed second reading), 366 (HB 1092 passed third reading by three-fifths vote), 366, 375-76 (enrolled as Session Law 2018-128 and sent to Secretary of State), available at: https://www.ncleg.gov/DocumentSites/SenateDocuments/Journals/2018%20Senate%20Journal%20(01-10-2018).pdf; House Journal, *supra*, pp 424-25 (SB 75 passed second reading by three-fifths vote), 432 (SB 75 passed third reading by three-fifths vote), 442 (SB 75 enrolled, ratified as Session Law 2018-119, and sent to the Secretary of State); Senate Journal, *supra*, pp 343-44 (concurrence on SB 75 received from House in substitute bill), 346 (concurring vote of 34-13 for SB 75 and bill ordered enrolled), 352 (Session Law 2018-119 ratification noted and sent to the Secretary of State); *Hinton v. Lacy*, 193 N.C. 496, 137 S.E. 669, 670 (1927) ("Judicial notice will be taken of an act passed by Legislature in accordance with constitutional requirement.").

[8] This Court, in *Reade v. City of Durham*, 173 N.C. 668, 92 S.E. 712, 715 (1917), noted that the "power given to the General Assembly to submit amendments to the people is a general and unrestricted one, in the sense that they may, without any limitation, prescribe the method by which this shall be done; in other words, the procedure throughout, and from beginning to end."

this Court rejected a proffer of evidence that went beyond the Legislative journals or certification of the presiding officers to determine whether an amendment received the requisite number of votes.

> To permit evidence of this character to be received and considered by the courts in order to sustain an attack upon the validity of an act of the General Assembly would destroy the integrity of the laws of this state and leave its citizens and others, who rely upon statutes duly enacted by the General Assembly, in hopeless uncertainty and confusion.

Id.; *see also State ex rel. Dyer v. City of Leaksville*, 275 N.C. 41, 48, 165 S.E.2d 201, 205–06 (1969) (examining certificates and legislative journals as conclusive evidence of proper enactment). Here, the record shows that the session laws in question were validly enacted.[9] Looking behind that is not a path the Court takes.

B.

Determining the sovereignty of the General Assembly or whether a proposed amendment is being offered by "a legislature formed by the will of the people, representing our population in truth and fact," *Moore*, 849 S.E.2d at 105 (Young, J. dissenting), does not readily translate into "judicially enforceable rights." *Rucho*, 139 S. Ct. at 2494.

In *Pacific State Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) (favorably cited in *Rucho*), the United States Supreme Court reviewed a collateral

[9] Plaintiff proposes a hypothetical in which a rogue amendment is placed on the ballot but not questioned until after the election. Given that courts can most certainly review the certification of the presiding officers of the two houses of the General Assembly or review those houses' Journals as conclusive evidence of passing a law, Plaintiff's hypothetical situation would not be beyond a court's authority to review.

attack on a tax against a telephone company passed by the Oregon State legislature. As part of its argument, the plaintiff argued that the referendum authority for the tax denied it a republican form of government under the United States Constitution. *Id*. at 136. The Court rejected such an argument as a political question, noting in contrast that a *direct* attack about the due process afforded or equal protection denied by the law itself might not have been a political question.

> Its essentially political nature is at once made manifest by understanding that the assault which the contention here advanced makes is not on the tax as a tax, but on the state as a state. It is addressed to the framework and political character of the government by which the statute levying the tax was passed.

Id. at 150. The same is true here.

Here, the trial court focused on the lack of popular sovereignty of the body passing the session laws. It did not invalidate the constitutional amendments at issue because the amendments themselves violated individual rights under the Fourteenth Amendment or the Equal Protection Clause of the federal Constitution or the Law of the Land Clause of the North Carolina Constitution. Whether a session law violates an individual, constitutional right of a plaintiff is a question the courts are adept at determining. Whether the General Assembly had or did not have popular sovereignty when it passed legislation is completely different.[10]

[10] As recognized by this Court,

> It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is

That "[p]opular sovereignty is the basis of American democracy" is undisputed. John V. Orth and Paul M. Newby, *The North Carolina Constitution* 48 (2d ed. 2013). But, like the Supreme Court found in *Rucho*, this foundational, republican principle does not render an individual right that can be easily adjudicated. Plaintiff pushes this Court to adjudicate the contours of republican principles here, too, by arguing that this Court's role is to "ensure that the fundamental principles of representative democracy and a government that is derived from the will of the people is not lost." (Appellant's Br. p 24) (*see also* Appellant's Br. p 25 ("courts play an important role in ensuring that popular sovereignty remains unbroken" and that the question before the court "poses a question essential to the underpinnings of our democracy.").

> any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.

State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). There is a presumption of constitutionality, *see Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001), that is not precatory or hollow but, instead, fundamental, *see Morris v. Holshouser*, 220 N.C. 293, 295, 17 S.E.2d 115, 117 (1941); *see also N. Carolina State Bd. of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018) ("Put another way, since every presumption favors the validity of a statute, that statute will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.") (citations and quotations omitted).

Does Plaintiff believe that it can avoid this Court's fundamental presumption of valid enactments by indirectly challenging the validity of the members of the body who enacted it instead of the constitutionality of the enactment itself? If so, how far should the taint of redistricting violations permeate the analysis of the constitutionality of later legislative enactments? Even though Plaintiff argues that the redistricting violations should take down at least the two challenged amendments, (Appellant's Br. pp 20, 24), the Fourth Circuit Court of Appeals' recent decision rebuffs that claim, finding that the taint of gerrymandering does not control the analysis of later enacted laws. *N. Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303-06 (4th Cir. 2020) ("A legislature's past acts do not condemn the acts of a later legislature, which we must presume acts in good faith.").

Appellant looks to Article I, Sections 2 and 3 of our Constitution for the answers. (Appellant's Br. pp 11, 13). But these sections of our Constitution have not been interpreted to grant justiciable rights.

> Since the state's first constitution lacked a preamble proclaiming the constituting authority as "We, the people," these sections originally served to declare the revolutionary faith in popular sovereignty. Displaced in 1868, when a conventional preamble was added, they now serve as a fuller theoretical statement of that principle. *Because of their abstractness, they have not yet given rise to justiciable rights*; the details of democracy—which officials are elected, for what terms, and by whom—are reserved for later articles of the constitution.

Orth, *supra*, at 48 (emphasis added); *see also Dickson v. Rucho*, 368 N.C. 481, 534, 781 S.E.2d 404, 440–41 (2015), *opinion modified on denial of reh'g*, 368 N.C. 673, 789 S.E.2d 436 (2016), *and cert. granted, judgment vacated on other grounds*, 137 S. Ct. 2186 (2017) (finding that the plaintiff's argument that redistricting plans violated Article I, Section 2 of the Constitution "is not based upon a justiciable standard."). Thus, Plaintiff's reliance on Article I, Sections 2 and 3—which simply set forth the abstract principle that all power resides in the people—to strike down a session law proposing a constitutional amendment is misplaced. These Sections are similar to the Guaranty Clause of the federal Constitution.[11]

Plaintiff also argues that Article I, Section 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty,")

---

[11] Under U.S.C.A. Const. Art. IV § 4, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ." The Supreme Court "has consistently held that a challenge to state action based on the Guaranty Clause presents no justiciable question." *Baker*, 369 U.S. at 224.

directly supports striking the legislation in question. (Appellant's Br. p 23). Section 35 "is a salutary reminder that commentaries of all sorts, whether in judicial opinions or in academic treatises, no matter how helpful in explicating particular texts, are no substitute for the originals." Orth, *supra*, at 91. The plain text of Section 35, even when read with the other cited provisions of the Constitution, provides no support for Plaintiff's position that the General Assembly lacked authority to pass the challenged session laws.

In *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939), this Court heard challenges to the constitutionality of a sales tax provision. While arguing that the provision created arbitrary exemptions, the plaintiff also argued that the law was unconstitutional because "the General Assembly of 1937 was not properly constituted . . . and that none of the legislation attempted at this session can be regarded as possessing the sanctity of law." *Id.* at 324. The Court rejected that theory, noting that the great weight of precedent was against such a determination regarding the validity of laws like that espoused by Plaintiff. Particularly, though, our Supreme Court noted that the question in North Carolina was a political one, and one that was non-justiciable. *Id.* The *Leonard* court did not hold that a constitutional challenge to redistricting or apportionment itself was a political question, as the plaintiff in *Leonard* was not asking the Court to mandate or enforce redistricting or reapportionment. Rather, the plaintiff was using the Legislature's failure to apportion itself properly as a basis for attacking a law passed by the Legislature.

Similar to the plaintiff in *Leonard*, Plaintiff uses what it contends to be the absence of a legitimately drawn legislature to attack Session Laws 2018-119 and 2018-128 as passed by that elected body. Just like in *Leonard*, wherein the plaintiffs were collaterally attacking a tax law, Plaintiff here uses an argument regarding the illegitimacy of the General Assembly to attack two proposed constitutional amendments ratified by the 2017-2018 General Assembly. This Court has said such an attack is non-justiciable. *Id*. at 324.

In holding that such an argument was non-justiciable, this Court cited an Illinois Supreme Court opinion holding the same thing—that there is no authority for the courts to issue such a ruling:

> There is no indication in any of the provisions of the Constitution . . . that members of a subsequent General Assembly should not be permitted to hold office as such because of the fact that a preceding General Assembly had refused to apportion the state. In other words, we hold that we are not authorized by the Constitution of Illinois to declare that the General Assembly that passed the Deadly Weaspon [sic] Act of 1925 was not a de jure legislative body and the members thereof de jure members and officers of that General Assembly. The Act of 1925 is therefore not unconstitutional on the grounds contended for in this case.

People v. Clardy, 334 Ill. 160, 167, 165 N.E. 638, 640–41 (1929).

To try to distinguish *Leonard*, Plaintiff argues that redistricting and apportionment cases prior to *Baker v. Carr,* 369 U.S. 186 (1962), lack precedential value because apportionment itself was nonjusticiable at the time. The apportionment challenge in *Baker*, which was based on a denial of equal protection, was found to be justiciable, but the *Baker* court confirmed that other challenges (like

those questioning republican form of government under the Guaranty Clause[12] or those questioning validity of enactments[13]) remain political questions. *See id.* at 210, 214, 222-24. *Baker* relied on *Coleman v. Miller*, 305 U.S. 433 (1939), a case dealing with a constitutional challenge to a state's ratification of a proposed amendment to the federal Constitution and not apportionment, in analyzing the scope of what constitutes a political question. *See Baker,* 369 U.S. at 210. In *Leonard*, our Supreme Court cited *Coleman* for the point that courts "do not cruise in nonjusticiable waters." *Leonard*, 3 S.E.2d at 324. *Leonard*, therefore, is not a case to be tossed aside simply because it was decided before *Baker*. After all, despite courts ruling on apportionment and redistricting since the 1962 *Baker* decision, Plaintiff, the Dissent, the trial court, and the *Amici Curiae* have failed to identify a case in which a law was found invalid due to passage by an improperly constituted legislature.

C.

Plaintiff argues that Session Laws 2018-119 and 2018-128 are void, but the core principle of its argument—that the General Assembly lacked popular sovereignty due to redistricting—is a premise that, if recognized, affects any law that the General Assembly has passed between 2011 and 2018. Plaintiff provides no manageable standards to guide the Court in determining what laws are void and

---

[12] As referenced above, challenges based on the Guaranty Clause have been found to be nonjusticiable. *Baker*, 369 U.S. at 224.

[13] "The respect due to coequal and independent departments, and the need for finality and certainty about the status of a statute contribute to judicial reluctance to inquire whether, as passed, legislation complied with all requisite formalities." *Id.* at 214.

what laws are valid. *See, e.g., Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) ("In our view, not only are the applicable statutory and constitutional provisions persuasive in and of themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children."). Plaintiff's standard is manageable, it argues, because the trial court found only two amendments were void and did not try to apply its logic to all laws passed by the General Assembly. *See also Moore*, 849 S.E.2d at 105 (Young, J. dissenting). But that is a result-driven decision rather than a manageable standard. There are no manageable standards to determine the scope of popular sovereignty such that the concept is fully enveloped within the political question doctrine. *See Rucho*, 139 S. Ct. at 2505. (In determining how much partisanship is too much, "[t]he dissent's answer says it all: 'This much is too much.' That is not even trying to articulate a standard or rule.")

Plaintiff argues, in support of the trial court's ruling, that the General Assembly should just be prohibited from proposing constitutional amendments because of the "awesome power of constitutional amendment." (Appellant's Br. p 27). The trial court also noted that "the requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation." (R p 191); *see also Moore*, 849 S.E.2d at 105 (Young, J. dissenting) ("Those actions ['which sought to amend our Constitution'], and only those, strike the heart of our democracy."). The North Carolina Constitution does set forth a specific procedure for constitutional

amendments; the General Assembly initiates an amendment with a three-fifths vote to submit a proposed amendment to the voters of North Carolina for ratification or rejection, and the proposal becomes an amendment only if passed by a majority of voters. *See* N.C. Const. Article XIII, Section 4. What is unique about the constitutional amendment process is ratification of the proposed amendment directly by the people in a statewide vote. At the 2018 general election, over two million North Carolina voters ratified each of the challenged amendments, while voters also rejected two proposed amendments.

This unique aspect of the constitutional process is also what Plaintiff argues cannot save the session laws in question.[14] As Plaintiff argues, "[p]ermitting 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 amendment," and popular ratification of an amendment is insufficient to meet the constitutional requirements for amendment. (Appellant's Br. p 30); *see also Moore*, 849 S.E.2d at 106 (Young, J. dissenting).

If the concern for protection of the amendment process is not with the vote of the people but, rather, the vote of the General Assembly, then the three-fifths

---

[14] Plaintiff argues that Defendants understood any amendment could be challenged after enactment, and that, thus, an amendment adopted by the people does not save the enactments complained of here. (Appellant's Br. pp 29-30). Defendants acknowledge that an amendment to the North Carolina Constitution is not beyond review for alleged violations of the individual rights protected under the federal constitution. But Defendants never conceded that the usurper argument advanced by Plaintiff at the trial court, which was rejected as a facial challenge, entitled Plaintiff to any relief at all.

supermajority vote is actually not unique to the constitutional amendment process.[15] A three-fifths vote of the General Assembly is also required to override a gubernatorial veto. *See* N.C. Const. Article II, Section 22(1). But a gubernatorial veto is not further reviewed by the people. Arguably, that affirmative, statewide vote by the people provides a better reason for sustaining the constitutional amendments above other laws that were not reviewed directly by the people. The people rejected two of the allegedly tainted amendments proposed by a supermajority of the Legislature, but numerous laws created by the same supermajority were not put directly before voters. Indeed, Plaintiff argued to the federal court in C*ovington* that nearly every session law created by a veto override would be invalid:

> upon the issuance of [the Supreme Court's] mandate the members of the illegally constituted General Assembly lost the protection of the *de facto* doctrine and became usurpers unauthorized to act to protect the health and safety of all North Carolinians. It is entirely possible that any legislative actions they take without being elected from legal districts could be subject to challenge under state law.

(Appellees' Appx. p App. 2) (*See* Plaintiffs' Supplemental Brief on Remedies, *Covington*, 1:15-CV-00399-TDS-JEP, Dkt # 173, p. 6-7 (filed 21 July 2017) (Attached hereto)) (T pp 32-33).

[15] If the adoption of the proposed amendment by the people is to be ignored when evaluating whether the General Assembly had popular sovereignty to act, then is the rejection of amendments by the people to be ignored as well? Plaintiff dismissed, as moot, its challenge to two session laws that proposed amendments the people did not adopt, but those session laws, like the session laws challenged herein, were first steps on the path of an amendment.

Plaintiff also notes that "the General Assembly could not reach the three-fifths supermajority required to amend our constitution without resorting to votes from members whose legislative districts that [sic] were tainted by an unconstitutional racial gerrymander." (Appellant's Br. p 30). This raises further issues about the standards for such an argument. The number of districts redrawn following the *Covington* decision that 28 districts violated the Equal Protection Clause exceeded 80 in the House and 35 in the Senate. (R. pp 184, 191). Are all legislators elected in districts that were redrawn usurpers or just the ones elected from the 28 districts found to be unconstitutional? Is popular sovereignty tainted if fewer than a majority of legislators come from tainted districts? The legislators from untouched districts would not constitute a majority (and certainly not a supermajority) of the General Assembly. Is the law still unconstitutional if enough untainted votes could have been cast in favor of the action?[16] Questions like these, with no identifiable standard or end, are why the Court of Appeals majority reversed the trial court.

Drawing a line between session laws that propose constitutional amendments (which, without an affirmative vote of the people, are more like legislative resolutions) and other session laws that govern the people, on the premise that the General Assembly lacked the sovereignty to act, does nothing more than substitute

[16] In *NC NAACP v. Lewis*, Wake County Superior Court Case No. 18 CVS 2322, the three-judge panel's decision that four 2017 Wake County districts were unconstitutional due to mid-decade redistricting is final, and although the Wake County districts were redrawn for the 2020 election, those members elected in 2018 served from 2019 through 2020. As such, would the theories advanced by Plaintiff apply to this later General Assembly as well?

Plaintiff's will for that of the Legislature and, more importantly, that of more than two million voters. But this Court does not sit as a "super-legislature": "the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005)Determining which laws would be valid and which would not be valid would call upon the courts to weigh the policy implications or importance of each act subject to collateral attack under Plaintiff's theory. These policy determinations are not for the courts. *See Bank of Union v. Redwine*, 171 N.C. 559, 570, 88 S.E. 878, 883 (1916) ("The propriety and wisdom of female suffrage and of the eligibility of women to hold office are political questions, which must be settled by the people, and which we cannot discuss or consider in the determination of legal questions. We simply declare the law as we find it, without usurping the power to change the Constitution—a power which the people have reserved to themselves."). That is in part why the Court in *Leonard* characterized Plaintiff's argument about the illegitimacy of the legislature as "[q]uite a devastating argument, if sound." *Leonard*, 216 N.C. at 89, 3 S.E.2d at 324.

II. Despite improperly drawn districts, the General Assembly, with members duly elected, possessed the authority to enact legislation.

A. Federal law, including Covington v. North Carolina, does not support Plaintiff's argument that redistricting violations extinguish the Legislature's authority to act.

Plaintiff argues that the General Assembly lacked sovereignty to act because members were elected from unconstitutionally drawn districts. Plaintiff argues that

the federal court's opinion in *Covington*, which determined the appropriate remedy for the redistricting violations (*i.e.*, redrawing of districts) and was affirmed by the United States Supreme Court, also established that the General Assembly lacked sovereignty to act because of the widespread redistricting violations. Plaintiff now seeks a remedy for redistricting violations above and beyond the remedy required by the federal courts. Plaintiff seeks to void two constitutional amendments (neither of which addresses redistricting) on the theory that the previously-adjudicated redistricting violations led to a loss of popular sovereignty and that loss of popular sovereignty prohibited the Legislature from acting to pass the laws in question. Despite referencing sovereignty, the *Covington* court, like other federal courts examining similar facts, did not hold that the North Carolina Legislature lost the ability to act but rather gave the only remedy that any other court has ordered (i.e., to redraw maps in advance of election).

At the time of its initial decision, the District Court in *Covington* did not structure a remedy for the violation, and neither the District Court nor the Supreme Court enjoined the General Assembly from passing laws or held that the General Assembly lacked the popular sovereignty required to pass legislation. *Covington*, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). When the District Court later ordered a special election, that decision was appealed to the Supreme Court, which vacated the order and remanded the issue to the District Court for a more thorough review of what remedy was necessary. *North Carolina v. Covington*, 137 S. Ct. 1624 (2017).

Based on its own precedent, in vacating the District Court order for a special election, the Supreme Court presumably believed that the existing General Assembly retained sovereignty to act. As recognized by the United States Supreme Court in the first case to recognize improper redistricting as a justiciable violation of individual rights, "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act." *Baker v. Carr*, 369 U.S. 186 250 n. 5 (1962) (Douglas, J. concurring). Justice Douglas favorably cited the Iowa Supreme Court's decision in *City of Cedar Rapids v. Cox*, 252 Iowa 948, 964, 108 N.W.2d 253, 262–63 (1961), which stated that "[i]f the judicial branch of government could by decree invalidate legislative enactments because of the failure of the Legislature to reapportion itself, chaos would result." *Id.* "We have no intention of attempting any such wholesale destruction of our statutory law." *Id.* Justice Douglas noted that such conclusion was "plainly correct." *Baker*, 369 U.S. at 250, n.5. The Supreme Court, years later, reiterated the same point: "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment" are "not therefore void." *Ryder v. United States*, 515 U.S. 177, 183 (1995) (acknowledging prior holding in *Connor v. Williams*, 404 U.S. 549, 550-51 (1972)); *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (holding legislative acts performed by legislators elected in accordance with unconstitutional apportionment plan are given de-facto validity).

Other federal courts have reached similar conclusions. *See, e.g., Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (holding malapportioned

legislature is nonetheless still empowered to act). In *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F. 246, 252 (S.D. Fla. 1918), it was argued that the refusal of the legislature to reapportion following the census as required by the state constitution "makes void the taxes levied pursuant to laws passed by a Legislature elected subsequent to such refusal." The court found no support for voiding the law:

> If this contention is correct, it would upset all the laws passed subsequent to 1897. The statement of the effect of the court undertaking to declare invalid a law passed by a Legislature regularly organized and recognized as the existing legislative body by the executive of the state, because a census had been taken, but no apportionment of representation made, seems to me sufficient to condemn the contention of the bill. But the Legislature passing chapter 7430 was the Legislature *de facto*, and its acts are therefore binding. This I understand from the authorities to be the law, and no authority contra has been cited to me.

Id.

In light of this precedent, it is understandable that the Supreme Court did not envision the General Assembly of North Carolina would lose its status as North Carolina's Legislature once it affirmed the District Court's determination that unconstitutional gerrymandering had occurred. This point makes only more sense in light of the Supreme Court's decision to vacate the District Court's order calling for a fast-tracked special election. In asking the District Court to weigh the issue of a special election further, the Supreme Court noted that balancing the costs of a special election against the "prospect that citizens will be 'represented by legislators elected pursuant to a racial gerrymander,'" would appear to justify a special election in every racial-gerrymandering case. *Covington*, 137 S. Ct. at 1626.

On remand, the District Court opined that a redistricting violation "intrudes on popular sovereignty," *Covington*, 270 F. Supp. 3d at 897, because it violates the *republic principle* that the people should choose who governs them and that "the districting plans interfered with the very mechanism by which the people confer their sovereignty on the General Assembly," *id.* But, in referencing available remedies, the District Court did not reference the ability to strike down laws of the state legislature (other than the specific districting laws at issue). *See id.* at 896. And, in fact, the District Court ultimately decided against requiring a special election given the timing of the review, *see id.* at 901 ("In sum, at this late date, this Court cannot order a special election without materially disrupting the districting and electoral process in a manner that would harm all North Carolinians, including Plaintiffs."). The *Covington* court declined to order a special election even in the face of the very usurper argument being raised herein, which was offered by Plaintiff herein to the District Court as a reason to order a special election:

> We agree with Plaintiffs that the absence of a legislature legally empowered to act would pose a grave disruption to the ordinary processes of state government. But Plaintiffs cite no authority from state courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper, nor have we found any.

Id. at 901. The usurper argument did not sway the *Covington* court that an immediate special election was the necessary remedy for the redistricting violation.

The Court of Appeals rightfully took note of this. *See Moore*, 849 S.E.2d at 94-95, 97, 99-101. Plaintiff argues that *Covington* actually held that there was a lack of sovereignty, which barred the Legislature from acting. Thus, one would expect that

the *Covington* court would take steps to resolve such lack of sovereignty immediately. To the contrary, the *Covington* court specifically noted a lack of law in support of that theory. In fact, as noted above, other federal court decisions have held directly opposite and upheld actions of a legislature elected under illegal apportionment plans. Indeed, the *Covington* court acknowledged early in its opinion that because of its determination, the Legislature, as elected, *would continue to govern until the end of the term*. *See id*. at 884.

The Dissent believes the Court of Appeals and Defendants misread *Covington* to hold that the federal court was "approving" of the Legislature, when the federal court was not. *Moore*, 849 S.E.2d at 105. It is clear from the rhetoric and tone of the federal court's opinion discussing the remedies in *Covington* that the three-judge panel did not "approve" of the General Assembly. *See, e.g. Covington*, 270 F.Supp.3d at 881. Defendants, however, are not the ones relying on *Covington* as purportedly determining that the General Assembly lacked sovereignty and was, therefore, unable to enact proposed amendments to the Constitution. That falls to the Dissent:

> The fact that *Covington II* did not see a need to preclude the General Assembly from taking *any* legislative action by ordering an immediate special election does not mean that the General Assembly's demonstrably unlawful existence was thereafter approved. . . . The 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.

Moore, 849 S.E.2d at 105 (emphasis in original).

But this analysis is faulty. The *Covington* court did not hold that the General Assembly had an "unlawful existence," as characterized by the Dissent. Rather, despite the references to sovereignty in the District Court's order, the federal court stated it had found no law supporting legislators elected from unconstitutionally drawn districts to be usurpers without the ability to act, *Covington*, 270 F. Supp. 3d at 901, which was Plaintiff's argument then and is Plaintiff's argument now. Plaintiff argued that because the General Assembly could not act, the factor the federal court was weighing—"the extent of the likely disruption to the ordinary process of governance if early elections are imposed"—should dramatically tilt in favor of holding a special election; without a special election, the ordinary process of government would grind to a halt (or the laws enacted thereunder would be void) for the balance of the usurpers' terms. *Id.* But the federal court rejected the argument that legislators could not act, *id.*, and thus did not factor that theory into their analysis.

Plaintiff, the Dissent, and the trial court all look to the language in *Covington* as determinative of the General Assembly's "demonstrably unlawful existence." *Moore*, 849 S.E.2d at 105; (*see* R p 191) ("At that time, following 'the widespread, serious, and longstanding . . . constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—'the General Assembly lost its claim to popular sovereignty. *Covington*, 270 F. Supp. 3d at 884."); (Appellant's Br. pp 13-14) ("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 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."). But as the Court of Appeals correctly determined, *Covington* did not hold (explicitly or implicitly) that the members of the General Assembly could not act but rather noted that the federal court could find no law holding otherwise and that the authority of a legislature to act was a state law question.

B. Plaintiff's argument that members of the General Assembly elected from improperly drawn districts are usurpers lacks support in North Carolina law.

Like the trial court, the Dissent cites precious little state law to support the determination that a redistricting violation results in a lack of sovereignty such that the Legislature cannot act. Plaintiff looks to *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891) to support the notion that, under state law, the Legislature lost *de jure* and *de facto* status upon the United State Supreme Court affirming that redistricting violations occurred. As noted above, the United States Supreme Court would not agree that its affirmation of redistricting violations rendered the Legislature without the ability to act. North Carolina common law does not support such a determination either.

The members of the General Assembly are either *de jure* or *de facto* officers who were elected as members of the constitutionally-created state legislature. Either

way, at the time the challenged session laws were passed, they had not lost the authority to pass such laws. *See, e.g., United States v. Home Insurance Co.*, 89 U.S. 99 (1874) (the Georgia legislature "was the only lawmaking body which had any existence. Its members acted under color of office, by an election, though not qualified according to the requirements of the Constitution of the United States.").

In *Van Amringe*, 108 N.C. at 196, 12 S.E. at 1005, an individual employed as a clerk to assist the registrar obtained the county registers on false pretenses and tried to hold himself out as the registrar on election day, all while the actual appointed registrar was demanding the books back and openly challenging the circumstances. *Id.* The Supreme Court noted the difference between a usurper (one who takes possession without any authority and whose acts are utterly void) and one with *de facto* authority ("one who goes in under color of authority"). *Id.*; *see also Berry v. Payne*, 219 N.C. 171, 13 S.E.2d 217, 220 (1941) (discussing at least four ways an officer can have de facto status, including under color of *an election* or an appointment pursuant to a public, unconstitutional law, *before the same is adjudged to be such*.) Later decisions by the Supreme Court cite *Van Amringe* for the proposition that "[a] usurper is one who undertakes to act officially without any actual or apparent authority. Since he is not an officer at all for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding." *In re Wingler*, 231 N.C. 560, 564, 58 S.E.2d 372, 375 (1950).

No one argues that the General Assembly was not validly created in the Constitution; it is undisputed that there are legally existing offices to be filled within

the General Assembly. In other words, it was not the unconstitutional redistricting laws from 2011 that created the 170 offices occupied by members of the General Assembly. Case law establishes that a *de facto* officer is one who has a supportable claim to a *de jure* office. *Compare Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313, 316 (1951) (act establishing joint city-county board deemed unconstitutional such that it created no *de jure* or *de facto* board) *with Smith v. Town of Carolina Beach*, 206 N.C. 834, 175 S.E. 313 (1934) (although right to elect commissioners was improperly limited to landowners, those elected were *de facto* members, and their acts entitled to the force of law).

The General Assembly sitting in 2018 was not like the usurper registrar in *Van Amringe*. The members of the General Assembly were elected in 2016 before any final judgment regarding the validity or constitutionality of the districts from which they were elected; they were sworn into office; they served continually and openly; and they were recognized as members of the General Assembly until their terms expired at the end of 2018. *See* N.C. Gen. Stat. § 128-6 ("Any person who shall, by the proper authority, be admitted and sworn into any office, shall be held, deemed, and taken, by force of such admission, to be rightfully in such office until, by judicial sentence, upon a proper proceeding, he shall be ousted therefrom, or his admission thereto be, in due course of law, declared void."). There was no special election cutting short their terms, and no one sought their removal as members of the one and

only state legislature.[17] The Court of Appeals found this analysis convincing. *Moore*, 849 S.E.2d at 95, 100.

If members of the General Assembly were usurpers, who were the rightful members? Under Plaintiff's theory, there were none; there were no other duly-elected legislators claiming that intruders had taken their seats. As such, the members of the General Assembly had, at a minimum, *de facto* status.

Other state courts that have faced similar arguments to those raised by Plaintiff have rejected them. In *Scholle v. Secretary of State*, 116 N.W.2d 350, 352-53 (1962), the Michigan Supreme Court faced a similar argument about the validity of the Michigan legislature in a redistricting case remanded by the United States

[17] Notably, this Court has recognized the long-standing policy of the State against vacancies:

> The provision that the incumbents of offices, both elective and appointive, shall hold until their successors are selected and qualified, is in accord with a sound public policy which is against vacancies in public offices and requiring that there should always be someone in position to rightfully perform these important official duties for the benefit of the public and of persons having especial interest therein.
>
> [The provisions] in reference to these appointive offices .... are recognized both in our Constitution and general statutes, and whether regarded as part of an original term or a new and conditional term by virtue of the statute, the holders are considered by the authorities as officers de jure until their successors have been lawfully elected or appointed by the body having the right of selection, and have been properly qualified....

Baxter v. Danny Nicholson, Inc., 363 N.C. 829, 834–35, 690 S.E.2d 265, 268 (2010) (quoting *Markham v. Simpson*, 175 N.C. 135, 137, 175 N.C. 146, 148, 95 S.E. 106, 107 (1918)). Thus, even if there had been a special election, under the policy of this State, the legislators to be replaced would have had authority to act until their replacements were elected and properly qualified.

Supreme Court after *Baker v. Carr, supra*. The Michigan court held that the legislative officers would not continue to serve beyond the next scheduled election and, in fact, prohibited primaries from taking place under the districts as drawn, *see id.* at 356. Nevertheless, the court validated prior laws and any law that would be passed by the legislature through the end of the term. *Id.* The court found the legislature to be a *de facto* legislature. *Id.* at 356-57.

Redistricting challenges to state legislative districts have a lengthy history; in North Carolina alone, the challenges go back over 30 years. *See Thornburg v. Gingles*, 478 U.S. 30 (1986) (holding that four out of five legislative districts challenged under the 1982 redistricting plan were unconstitutional). Indeed, legislative districts in North Carolina have been repeatedly challenged for decades. *See id.; Stephenson v. Bartlett* (*Stephenson I*), 355 N.C.354, 562 S.E.2d 377, 383–84 (2002) (holding that a 2001 redistricting plan was unconstitutional under our state Constitution); *Stephenson v. Bartlett* (*Stephenson II*), 357 N.C.301, 582 S.E.2d 247 (2003) (holding that a revised 2002 redistricting plan was also unconstitutional); *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007) (holding that a 2003 redistricting plan was unconstitutional based on House District 18 but not requiring redistricting until after the 2008 election); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (affirming North Carolina Supreme Court determination that House District 18 in the redistricting plan violated the Constitution). During those years of fighting over the districts and redrawing them, the General Assembly was never enjoined from passing legislation; the General Assembly continued to act. Despite the many challenges to how districts

were drawn, not once has a court determined that unconstitutional redistricting yields a state legislature without authority to act.

To date, no court (other than the trial court) has held that voiding laws passed by an unconstitutionally districted legislature is an appropriate remedy for a violation of Plaintiff's equal protection rights. For instance, in *Ryan v. Tinsley*, 31 F.2d 430, 431 (10th Cir.1963), the court examined the issue before this Court: "whether statutes passed by an unconstitutionally apportioned legislature are constitutional." *Id*. After recognizing that a denial would push the government into peril, the Tenth Circuit Court of Appeals upheld Colorado's habitual criminal laws.

> The Colorado legislature, a body created by the state constitution, has de jure existence which is not destroyed by any failure to redistrict in accordance with the constitutional mandate. The members of the various legislatures that enacted the laws now under attack were, so far as the record discloses, all elected in compliance with the then existing statutes. Accordingly they were de jure officers.
>
> Even if the districting statutes then in existence were to be held invalid, the offices, created by the state constitution, were de jure offices and the incumbents were, at the very least, de facto members of the legislature, and their acts are as valid as the acts of de jure officers.

Id. at 432.

The *Covington* court, interpreting the United States Constitution, fashioned the remedy for the constitutional violation (redrawing districts), and that remedy did not include setting aside otherwise validly passed laws. "Nothing in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663, intimates that a legislature elected from districts that are invidiously discriminatory in violation of the Fourteenth

Amendment is without power to act." *Id.*. And there is nothing to suggest that our State Constitution requires a more invasive and disruptive remedy than does the federal Constitution, under which the unconstitutionality of the voting districts was adjudicated. The Court of Appeals was correct to reverse the trial court, and this Court should affirm.

III. The Court of Appeals was correct to reject Plaintiff's argument that striking just two amendments is a valid, narrow request that would not be subject to expansion.

Plaintiff's requested remedy—the invalidation of the two challenged amendments—calls for judicial override of the will of the people and could then be used to challenge other legislation. Plaintiff's arguments that striking two amendments is a narrow request, is limited in time, is not subject to de facto protection, will not implicate other acts of the Legislature, and will not cause chaos and confusion fail. These arguments are incorrect and misread the authorities Plaintiff seeks to distinguish. In an effort to avoid running afoul of the avoidance of chaos and confusion doctrine that will be discussed in more detail below, Plaintiff uses the date (June 2017) of the United States Supreme Court's opinion affirming the District Court's determination that numerous legislative districts were unconstitutionally drawn to draw a line in the sand, arguing that no laws passed before that point can be challenged. (Appellant's Br. pp 16-17). But Plaintiff also argues that "North Carolinians were governed for six years by an unconstitutional body that did not reflect the will of the people," (*Id.* at 11), harkening back to the language in *Covington*. In an effort to try to limit the impact of a decision in this

case, Plaintiff appears willing to concede that, although the districts were improperly drawn in 2011, the *de facto* doctrine would protect any law before 2017 (when the Supreme Court made a final determination regarding the constitutionality of the districts) but argues that the doctrine would not apply from June 2017 forward. However, as pointed out previously, neither the United States Supreme Court nor the *Covington* court would agree that the members of the Legislature lacked the ability act after June 2017. The United States Supreme Court has held otherwise, *see Baker*, 369 U.S. at 250, n.5; *Ryder*, 515 U.S. at 183, and the *Covington* court found no basis for the determination that the legislators in the General Assembly could not act.

Further, there is no indication that the *de jure* or *de facto* doctrine would not apply after the Supreme Court's decision. As noted earlier, the General Assembly is a constitutionally created body, and members were duly elected in 2016, sworn in with valid oaths, and served from January 2017 all the way to the end of December 2018—their full terms. The members were not removed, not challenged, and served under color of title. No court, until the trial court, had held that the fact that the districts from which the members were duly elected were unconstitutionally drawn limited their power to pass legislation. Thus, it is misguided to suggest that the Court of Appeals applied the *de facto* doctrine incorrectly. The trial court in 2019 reviewing amendments passed in 2018—and not the *Covington* court--was the first to hold—as requested by Plaintiff—that the General Assembly lost its sovereignty to act.

Plaintiff's argument is not as limited as it would have this Court think— it applies to more than the challenged constitutional amendments proposed in 2018. Plaintiff argues that legislators elected from improperly drawn districts do not have the *popular sovereignty* of the people to act. (Appellant's Br. 18) ("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 . . . ."). The trial court found that the "General Assembly has the authority to submit proposed amendments to the Constitution *only insofar as it has been bestowed with popular sovereignty*." (R p 191) (emphasis added). But what could the General Assembly enact without popular sovereignty? And why would the General Assembly lose popular sovereignty from 2017 forward only when the case was about district maps drawn in 2011? *See, e.g., Covington*, 270 F. Supp. 3d at 894 (noting that the 2011 maps affected three election cycles). If the loss of popular sovereignty for redistricting violations and the resulting inability of the Legislature to act were a sound argument, it could be nothing but absolute and would relate back to the first improper election.

It was appropriate for the Court of Appeals to recognize the binary choice between whether or not popular sovereignty existed for the General Assembly elected under the unconstitutional lines. "[T]here is no law to support this [limitation] argument and no logical way to limit the effect of the electoral defects noted in *Covington* to one, and only one, type of legislative action, and more specifically to just these two particular amendments which plaintiff opposes." *See Moore*, 849 S.E.2d at

102; *id*. at 96 ("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, thus creating chaos and confusion.") (emphasis in original). The General Assembly either had the ability to act—because it was a de jure body, its members had de facto status, or something else—or it could not. A single legislator could not possess popular sovereignty to vote on the state budget, for example, and, without any intervening difference in status, lack popular sovereignty to propose a constitutional amendment.[18]

In an effort to put the genie back in the bottle, Plaintiff misconstrues a third doctrine designed to protect the sanctity of legislative action: avoidance of chaos and confusion. Plaintiff, the trial court, and the Dissent note that it would not create chaos and confusion to void the two proposed constitutional amendments at issue for lack of popular sovereignty and leave all the other laws untouched because of the importance of amendments. Each relies on *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963) for this point. *See* Moore, 849 S.E.2d at 104-05; (Appellant's Br. pp 19-20) ("The principle requires judges to draw a line between the regular functioning of

[18] Plaintiff argues about the difference in "regular legislation" "achieved by a simple majority" and constitutional amendments, which require a three-fifths majority of each house. However, veto overrides also require a three-fifths majority. *See* N.C. Const. Art. II § 22. And veto overrides may occur on "regular" legislation. For instance, "on 22 June 2017, the General Assembly adopted Senate Bill 257, which approved a state budget for the 2017–2019 biennium. Although the Governor vetoed Senate Bill 257, the General Assembly overrode the Governor's veto, so that the legislation in question became law as Session Law 2017-57." *Cooper v. Berger*, No. 315PA18-2, 2020 WL 7414675, at *1 (N.C. December 18, 2020) (this Court held that Legislative appropriation of federal block grants through the state budget was not unconstitutional). The veto override required a similar supermajority vote to the proposal of constitutional amendments.

government necessary to avoid chaos and confusion and actions that step over that line."); (R p 192).

In *Dawson*, a state prisoner filed a petition for habeas corpus against the Warden of the Tennessee State Penitentiary. *Id.* at 446. The plaintiff asserted that the failure of the Tennessee legislature to reapportion itself in 1901 violated the Constitution of Tennessee and the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Id.* As a result, the plaintiff argued that the capital punishment laws enacted by the allegedly unconstitutionally apportioned legislature were void. *Id.* The *Dawson* court, for purposes of its analysis, assumed the Tennessee legislature was malapportioned in violation of the United States Constitution. *Id*. at 447.

The *Dawson* court discussed the concepts of *de jure* existence, *de facto* existence, and a third overarching concern for avoiding chaos and confusion:

> It is further generally held that irrespective of the *de jure* or *de facto* doctrines, the Courts will refrain from declaring legislative acts unconstitutional, even though the legislature may itself have been adjudicated to have been unconstitutionally constituted by reason of malapportionment, where the result would be to create chaos and confusion in government. In such a situation it is generally held that in weighing the consequences of setting aside all legislation and the harm thus caused the public against the harm caused the party complaining of his rights having been violated by the refusal of the legislature to properly apportion itself, the equities favor sustaining the validity of all legislation.

Id. at 447. In *Dawson*, the plaintiff accepted that routine laws would stand but wanted the court to draw a distinction between those routine laws, which if set aside might lead to chaos and confusion, and the challenged law, which was related to

capital punishment and (according to the plaintiff) would not create the same issues if abrogated. *Id*. at 447-48.

Like the plaintiff in *Dawson,* Plaintiff, the Dissent, and the trial court attempt to draw a line of demarcation between the constitutional amendments at issue and other laws. The trial court concluded that "[i]t will not cause chaos and confusion to declare that Session Laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*." (R p 192). The Dissent agreed and saw the issue not as all or nothing but as shades of grey that courts can weigh. *Moore*, 849 S.E.2d at 106.

The Sixth Circuit in *Dawson* rejected the argument that a court could draw *any* distinction between the various laws passed by a legislature. Rather, the chaos and confusion doctrine, like the *de facto* doctrine, is *not* a pick and choose doctrine between otherwise valid laws, but, as the Court of Appeals correctly saw it, a savior to all laws or a savior to none.

> For the Court to select any particular category of laws and separate them from other laws for the purpose of applying either the *de facto* doctrine or the doctrine of avoidance of chaos and confusion would in fact circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws. . . . The purpose of both the *de facto* doctrine and the doctrine of avoidance of chaos and confusion would be defeated if the judiciary could be called upon to adjudicate respective equities between the public and the complaining party *as to any specific act*. Both doctrines must have overall application validating the otherwise valid acts of a malapportioned legislature, with a judicial severance of specific acts and a weighing of equities as to those specific acts precluded, if a government of laws and not of men is to remain the polar star of judicial action.

Id. at 448 (emphasis added). By striking down Session Laws 2018-119 and 2018-128 and the resulting constitutional amendments, the trial court in this matter violated that "polar star of judicial action." The Court of Appeals recognized that and reversed. Holding that a court, for whatever purpose, can void a law or a category of laws because they were passed by a malapportioned legislature and leave the remainder intact for the greater good is in direct violation of the chaos and confusion doctrine.

CONCLUSION

This Court should hold the issues raised by Plaintiff are nonjusticiable or otherwise affirm the Court of Appeals opinion. Pursuant to either pathway, the Court of Appeals rightfully recognized that there is no law to support an argument that the General Assembly lost popular sovereignty to act and that its members became usurpers upon the final determination that some of the members serving at the time were elected from improperly drawn districts. Despite Plaintiff's arguments to the contrary, this Court should not be the first known court to hold such a theory is sound.

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

[Signature Block on Next Page]

NELSON MULLINS RILEY & SCARBOROUGH LLP

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

N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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

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

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the forgoing Defendant-Appellees' New Brief upon the parties via e-mail to the attorneys named below:

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

Counsel for Plaintiff-Appellant NC NAACP

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420-6000
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com

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

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

Counsel for North Carolina Legislative Black Caucus

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

Counsel for North Carolina Professors of Constitutional Law

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

Counsel for ACLU of North Carolina

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

Counsel for Democracy North Carolina

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

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

Counsel for NCAJ

This the 20th day of January, 2021.

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

No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

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

Plaintiff-Appellant,

vs.

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

Defendant-Appellees.

From Wake County

****

APPENDIX TO DEFENDANT-APPELLEES' NEW BRIEF

****

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
No. 1:15-cv-00399-TDS-JEP

SANDRA LITTLE COVINGTON, *et al.*, Plaintiffs, v. THE STATE OF NORTH CAROLINA, *et al.*, Defendants.	**PLAINTIFFS' SUPPLEMENTAL BRIEF ON REMEDIES**

I. INTRODUCTION

Plaintiffs' submit that this Court should issue an Order permitting the General Assembly two weeks, that is, until August 11, 2017, to enact remedial districts in the parts of the state affected by the unconstitutional racial gerrymander that occurred in 2011. That should be the deadline for compliance with this Court's order whether or not the additional remedy of a special election is warranted.

Plaintiffs' further submit that a balancing of the relevant equitable considerations present in these circumstances demands that a special election be ordered before the General Assembly reconvenes for its 2018 legislative session on May 16, 2018. Resolution 2017-12, §3.1. Exhibit 1 is an illustrative schedule for further proceedings in this case that demonstrates the feasibility of concluding those elections in March with only slight modifications to state law requirements concerning absentee balloting periods. Notably, this schedule is consistent with the State of North Carolina's position that 1) a special election should occur while the General Assembly is in recess, and 2) no later

than March 2018. Position Stmt. By the State of North Carolina and the State Bd. of Elections 4 (Doc. 162, July 6, 2017).

Primary among the considerations justifying a special election include: 1) the fact that the constitutional violation here is significant, affecting approximately 75% of the state's Senate Districts and 67.5 percent of the House districts. Decl. of Dr. Thomas Hofeller, 5-6, (Doc. 136-1, Oct. 28, 2016); 2) that the irreparable injury experienced by voters assigned to districts based on their race is significant; 3) that a special election conducted while the General Assembly is not in session minimizes the disruption of the governmental functions; 4) that the intrusion on state sovereignty here is measured and required, particularly given that the Defendants to date have failed to comply with this Court's order to redraw the racially gerrymandered districts; 5) that the intrusion on state sovereignty is also minimal since it is the policy of this state, as expressed in the state constitution, that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held." N. C. Cont. Art. 1, § 5; and 6) that the legitimacy of further actions by this legislature is called into question under state law until its members are elected from districts that are constitutional.

As the Supreme Court made clear over fifty years ago: "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution." *Baker v. Carr*, 369 U.S. 186, 249 (1962). The legislative defendants have delayed as long as possible, the time has come for a remedy in this case.

II. ARGUMENT

A. The North Carolina Supreme Court Decisions in *Stephenson v Bartlett I* and *II* Provide Important Guidance for this Court in Determining the Timing and Scope of a Proper Remedy in this Case.

Decisions made by North Carolina's state courts in 2002 to remedy constitutional defects in legislative redistricting plans enacted by the General Assembly in 2001 are especially instructive as this Court considers the timing and scope of remedies for the constitutional defects in the legislative redistricting plans enacted by the General Assembly in 2011. On April 30, 2002, the North Carolina Supreme Court declared that both the House and Senate redistricting plans enacted by the General Assembly in 2001 were void in their entirety because those plans divided more counties than permitted by the "whole county provisions" of Article II, Sections 3(3) and 5(3) of the state constitution. *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002). To remedy those defects, the Court remanded the case to the trial court with instructions to determine if the General Assembly could promptly redraw the districts and if not, to redraw the districts itself. *Id*. 355 N.C. at 385.

Two weeks later, on May 17, 2002, the General Assembly enacted new plans. On May 20, the trial court declared that those new plans failed to remedy the violations of the state constitution and undertook to draw its own plans. The General Assembly's request to stay that order was denied by the Supreme Court on June 6. On July 12, 2002, the United States Department of Justice precleared the trial court's plans. Primaries were conducted under those plans nine weeks later (on September 9), and 8 weeks later (on

November 5) the 2002 general election was held for all 50 seats in the Senate and all 120 seats in the House. *Stephenson v Bartlett*, 357 NC 301, 303-04 (2003).

In 2002 the North Carolina courts acted promptly to prevent any injury to North Carolinians from being assigned a district improperly formed from pieces of counties. This Court should follow that model in remedying the personal injuries inflicted on North Carolinians over the past six years by Defendants' racially gerrymandered districts.

B. The Legislative Defendants seek more time to Redraw from the Court than the General Assembly has Allowed itself to Redraw.

In their July 6 Position Statement the Legislative Defendants state that "the General Assembly envisions completing the redistricting process no later than November, 15, 2017." Leg. Defs. Position Statement 2 (Doc. 161, July 6, 2017). That proposed leisurely pace demeans the extraordinary harm the Legislative Defendants have inflicted on the Plaintiffs and repudiates the express terms of a statute the General Assembly enacted in 2003. That statute establishes two weeks as the time the General Assembly needs to draw remedial redistricting plans and further provides that that when the General Assembly fails to act within that period the courts should draw an interim plan. N.C. Gen. Stat. § 120-2.4 (2003). Importantly, drawing remedial districts is not the same enterprise as redrawing districts following a new census which requires taking into account the population shifts that occur over a decade.

C. The Failure to Hold Special Elections before the Next Legislative Session Brings into Question the Legitimacy of Any Actions by the Unconstitutionally Elected General Assembly

In weighing the equitable considerations relevant to the question of whether special elections should be held before the North Carolina General Assembly convenes again in its regular "short session" in May 2018, and in considering the individual and collective interests at stake, one consideration must be the extent to which the legitimacy of the actions of an unconstitutionally elected Legislature may be severely undermined. Under state law, officers elected pursuant to an unconstitutional law are "usurpers" and their acts are absolutely void. *In re Pittman,* 151 N.C. App. 112, 115, 564 S.E.2d 899, 901 (2002). While there is a *de facto* officer doctrine which is designed to validate the past acts of public officers illegally in office because otherwise, chaos would ensue. *Ryder v. United States*, 515 U.S. 177, 180 (1995), North Carolina courts have held that once the unconstitutionally of an election is finally determined, the *de facto* doctrine no longer applies and the officers elected at those invalid elections becomes usurpers. *See 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 valid if performed *before* the unconstitutionality of the law has been judicially determined.) *See also, Kings Mountain Bd. of Educ. v. North Carolina State Bd. of Educ.,* 159 N.C. App 568, 575, 583 S.E.2d 629, 635 (2003) (for a *de facto* officer's acts to be valid, there must be circumstances creating a public presumption of legal right); *Keeler v. City of Newbern,* 61 N.C. 505, 507 (1986) (mayor and town council lack public presumption of authority to office, making them usurpers).

Once a public officer is adjudged as illegally in office and exposed as acting without legal authority, any subsequent acts are "absolutely void for all purposes." *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E.1005, 1007 (1891).

The *Van Amringe* Court eloquently explained the reasoning for this conclusion:

> 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 can not 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. The *Van Amringe* principle applies with particular force here, because of the scope of the constitutional violation in this case. Where nearly two-thirds of all of the districts used to elect the legislature must be redrawn to comply with the state and federal constitutions, the integrity and authority of the legislature is called into question.

On June 30, 2017, the United States Supreme Court issued its mandate in this case. Arguably, under *State v Lewis* and *Van Amringe v. Taylor* upon issuance of that mandate the members of the illegally constituted General Assembly lost the protection of the *de facto* doctrine and became usurpers unauthorized to act to protect the health and

safely of all North Carolinians.[1] It is entirely possible that any legislative actions they take without being elected from legal districts could be subject to challenge under state law. This risk is not merely speculative. One public interest law organization has already publicly indicated its position that:

> Because the General Assembly is now a usurper legislature and their enactments have no binding effect, we believe that the General Assembly is without authority to override Governor Cooper's veto of H576, a bill that would allow landfills to use a new technology to spray liquid garbage waste into the air throughout North Carolina without a permit. Accordingly, if the usurper legislature does attempt to override the veto it opens itself up to litigation wherein the North Carolina State Courts may be asked to issue a declaratory judgment that the law is facially unconstitutional and void ab initio.

Declaration of Derb Stancil Carter, Jr., July 21, 2017, Attachment at 2, filed herewith as Exhibit 2. Moreover, the North Carolina NAACP has taken a similar position, arguing that this court "has strong justification to enjoin the current General Assembly from further convening or enacting any more legislation." Br. of Amicus Curiae of the North Carolina State Conf. of the NAACP, 20 (Doc. 164-3, July 11, 2017). *Cf. 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).

[1] While the legislature has lost the protection of the *de facto* doctrine under state law, it retains the legal authority under federal law to have the first opportunity to cure the constitutional defect, *Reynolds v. Sims*, 377 U.S. 533, 586, 84 S. Ct. 1362, 1394 (1964), and can act by virtue of this Court's order granting it leave to redraw the unconstitutional districts.

This risk is entirely the product of the dilatory tactics of the General Assembly. This Court should order them to enact remedial districts immediately and conduct special elections before the next session of the General Assembly in order to remove the risk that any acts the General Assembly takes, as usurpers, will be challenged as void *ab initio*.

D. Representative Lewis Cannot Revoke His Waiver of Legislative Privilege

Plaintiffs have subpoenaed Defendant Representative David Lewis, who Plaintiffs believe has information relevant to the issue of how quickly remedial districts can be drawn. Plaintiffs anticipate that Representative Lewis may assert legislative privilege, however, courts disfavor parties strategically taking inconsistent positions on their legislative privilege throughout different stages of litigation. *See Favors v. Cuomo*, 285 F.R.D. 187, 212 (E.D.N.Y. 2012). In his deposition in this case, Representative Lewis was asked "And let me begin, Representative Lewis, by simply confirming that you continue to waive your legislative privilege with regard to this matter." He answered: "With regard to this matter, yes, sir." Dep. of Representative David Lewis, p. 5, lines 4-8, February 5, 2016 (copy attached as Exhibit 3). He cannot now selectively assert the privilege to avoid testifying about facts relevant to the court's considerations of a proper remedy in this case. Moreover, even if the court were to conclude that the legislative privilege can be selectively waived and then asserted within a single case, the privilege is qualified, not absolute, and the circumstances of this case would mandate disclosure of the information that Plaintiffs seek. *See, e.g., Benisek v. Lamone*, No. 13-cv-3233, 2017

U.S. Dist. LEXIS 35396 (D. Md. Mar. 13, 2017) (three judge court) (legislative witnesses not entitled to claim legislative privilege in redistricting case, applying five-factor test).

E. CONCLUSION

Plaintiffs' respectfully request that in conducting the "equitable weighing process" required by the Supreme Court on remand herein, Order at 2, (Doc. 149, June 5, 2017), (per curiam), this court consider the evidence, factual materials, legal authorities and arguments by Counsel already in the record in this matter, including:

1. Pls' Post-Trial Briefing on Remedy, (Doc. 115, May 6, 2016) at 3-14 (irreparable harm suffered by Plaintiffs, authority of court to order special elections, public interest in discontinuing illegal election systems, past experience ordering special elections in North Carolina) and at 15-17 ¶¶ 1,2,6-8 (agreements between the parties still relevant now to determining a special election schedule.)

2. *Stephenson v. Bartlett*, No. 1 CV 02885 (Johnston Co. Sup. Ct.), Pls' Mem. Concerning An Appropriate Remedy (Doc. 115-7, Feb. 19, 2002) at 2-5; 19-22 (why immediate remedy for unconstitutional districts is in the public interest and plaintiffs otherwise suffer irreparable harm); and at 6-19 (measures taken in the past in North Carolina and other states to alter election schedules to remedy unconstitutional plans).

3. Decl. of Gary Bartlett (Doc. 115-9, May 6, 2016) (facts relating to past shortened election schedules and time required for ballot preparation).

4. Deposition Test. of Kelly Doss, Joseph Fedrowitz, Gary Sims (Docs. 115-10, 115-11, and 115-12) (assigning voters to new districts is a quick process, Guilford, Durham and Wake Counties completed it in a few days).

5. Mem. in Support of Pls' Mot. for Additional Relief (Doc. 133, September 30, 2016) at 3-4 (two weeks is a reasonable time to enact a remedial plan), at 5-8 (harm suffered by plaintiffs, examples of special elections ordered in other cases), at 11-12 (courts have the authority to modify election deadlines and state constitutional residency requirements).

6. *Stephenson v. Bartlett,* No. 01-cvs-2885, Johnson County Superior Ct., Order of May 8, 2002 (Doc. 133-1) at 2 (remedial legislative plan required within 12 days, response a day later and a court hearing two days later).

7. *Perez v. Perry,* Case No. 5:11-cv-360, ECF No. 486 at *3 (W.D. Tex. Nov. 4, 2011) and ECF No. 685 at *3 (W.D. Tex. March 1, 2012) filed herein as Docs. 133-3 and 133-4 (shortening the residency requirement in the Texas Constitution in connection with ordering special election schedule).

8. Pls' Reply to Defs' Mem. on Add'l Relief (Doc. 139, Nov. 15, 2016) (time required to enact remedial districts and significance of Defendants' admission that if they have maps drawn by May 1st, they can have a General Election in November).

9. Decl. of Gary Bartlett (Doc. 139-2, Nov. 15, 2016) at 2-3 (administering special elections is not unduly burdensome).

10. Pls' Br. in Opp'n to Defs' Emergency Mot. to Stay (Doc. 143, Dec. 23, 2016) at 7-10 (court has authority to order special elections to remedy unconstitutional districts).

11. Pls' Mot. to Set Deadlines for Remedial Plan (Doc. 150, June 8, 2017) at 1-3 (procedural history of case as it relates to remedy).

12. Proclamation, June 7, 2017 (Doc. 150-1) (Governor's Proclamation to call a special session "for the purpose of enacting new House and Senate district plans for the General Assembly that remedy the legislative districts ruled unconstitutional.)

13. Pls. Statement in Response to Court's Notice of June 9, 2017, (Doc. 156, June 16, 2017).

Based on the facts and legal authorities contained in all of these materials in the record, Plaintiffs respectfully request that the Court give the General Assembly no more than two weeks to enact remedial districts, and require the State of North Carolina to conduct special elections in the affected districts in March of 2018.

This the 21st day of July, 2017.

POYNER SPRUILL LLP

By: s/ Edwin M. Speas, Jr.

Edwin M. Speas, Jr.
N.C. State Bar No. 4112
espeas@poynerspruill.com
Caroline P. Mackie
N.C. State Bar No. 41512
cmackie@poynerspruill.com
P.O. Box 1801 (27602-1801)
301 Fayetteville St., Suite 1900
Raleigh, NC 27601
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

Counsel for Plaintiffs

SOUTHERN COALITION FOR SOCIAL JUSTICE

By: s/ Anita S. Earls

Anita S. Earls
N.C. State Bar No. 15597
anita@southerncoalition.org
Allison J. Riggs
State Bar No. 40028
allisonriggs@southerncoalition.org
Southern Coalition for Social Justice
1415 Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3380
Facsimile: 919-323-3942

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this date I have electronically filed the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF ON REMEDIES** with the Clerk of Court using the CM/ECF system which will provide electronic notification of the same to the following:

Alexander M. Peters
Special Deputy Attorney General
Office of the Attorney General
P.O. Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
Counsel for Defendants

Thomas A. Farr
Phillip J. Strach
Michael D. McKnight
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27602
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com
michael.mcknight@ogletreedeakins.com
Counsel for Defendants

This the 21st day of July, 2017.

/s/ Anita S. Earls
Anita S. Ear.s