NO. 261A18-3 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

INTRODUCTION

Defendants broke the law. To gain a legislative supermajority, Defendants illegally packed African-American voters into a few voting districts, to diminish their political power and increase the power of Defendants. Rather than pay for the consequences of their illegal actions Defendants argue that no matter how illegally they gerrymander the legislative body, they have unlimited authority to act without legal check until remedial elections.

Defendants argue that the trial court's Order voiding the amendments provided no manageable standard. But the trial court set forth a clear standard—limited by both time and scope of legislative action: after a final ruling that the legislature is the product of an illegal racial gerrymander, that legislative body cannot act to amend the state Constitution until remedial elections are held. It is Defendants who suggest no limit at all. Defendants argue that, no matter how extensively and illegally they gerrymander the State, they should be permitted to proceed entirely unchecked. Defendants argue there should be no limit whatsoever on the power of an illegally gerrymandered body. Defendants argue this Court does not even get a say in the matter.

But this Court cannot abandon its role to protect our Constitution. Popular sovereignty is central to our system of government. Our Constitution is sacrosanct and its amendment much different than regular legislation. Rewriting our foundational document to further entrench the policy preferences of an illegally

gotten supermajority is a line that this Court should not permit Defendants to cross.

This case poses an unsettled matter of State law that needs resolution by this Court. In their brief, Defendants wrongly rely on inapposite federal cases and argue the federal court in *Covington* already decided this issue. But that is not the case. The *Covington* court expressly abstained from ruling on this issue of state law out of respect for state sovereignty. Defendants also dredge up decades-old dicta to argue that this Court has already resolved this novel issue. But stray words from a period of obsolete jurisprudence do not trump the mandate of our Constitution that "all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Nor does it undercut the strict requirements of N.C. Const. art. XIII.

This Court faces an unprecedented legal issue only because of Defendants' unparralled attempt to enact eleventh-hour constitutional amendments following one of the most extensive racial gerrymanders in history. However,what is not new is this Court's role to protect our constitutional order. The NC NAACP thus respectfully asks this Court to uphold the trial court's Order.

ARGUMENT

I. NC NAACP'S CLAIM IS JUSTICIABLE[1]

A) This Court Must Decide this Unsettled Question of State Law

This Court has the authority and duty to determine this unsettled question of State law. In North Carolina, "[t]his Court is the ultimate interpreter of our State Constitution." *Corum v. University of North Carolina,* 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992); *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). The judiciary's duty to interpret the Constitution requires that courts determine whether government action "exceeds constitutional limits." *Leandro* at 345, 488 S.E.2d at 253. As a court of last resort, this Court "answers with finality" "issues concerning the proper construction and application of . . . the Constitution of North Carolina." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, (1989).

This Court has a duty to uphold constitutional order. Our Constitution "is intended to protect our rights as individuals from our actions as the government." *Corum,* 330 N.C. at 788, 413 S.E.2d at 293. In addition, "it is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens, this obligation to protect the fundamental rights of individuals is as old as the State." *M.E. v. T.J.*, 2020 W. L. 7906672, *9 (N.C. App. 2020) (quoting *Corum* at

[1] Defendants suggest an unspecified number of NC NAACP's arguments are beyond this Court's review. Def. Brief fn. 6. Not so. Plaintiffs have wide berth to argue reasoning that was the basis of the dissent. *See, e.g. State v. Kaley*, 343 N.C. 107, 468 S.E.2d 44 (1996) (holding that N.C. R. App. P. 16(b) should be interpreted narrowly and that Appellant should not be limited to arguing exact reasons in the dissent); *State v. Fly*, 348 N.C. 556, 501 S.E.2d 656 (1998).

783, 413 S.E. 2d at 290); see also *State ex rel. McCrory v. Berger*, 368 N.C. 633, 653, 781 S.E.2d 248, 261 (2016) (Newby, J., concurring) ("[T]he final check on the legislative power of the General Assembly is judicial review, the implied constitutional power of the Court to decide if a law violates the Constitution").

Defendants' reliance on the power of the legislature to determine the qualifications of individual legislators is misplaced. (Defendant-Appellees' New Brief ("Def. Br.") at 11-12). This case is not about the qualifications of individual legislators, but rather the legitimacy of the legislative body that passed the contested amendments. The United States Supreme Court affirmed that the legislature was the a product of an unconstitutional racial gerrymander. The narrow question remaining for this Court is how much power did that illegally formed legislative body have *after* the Supreme Court's ruling and *before* remedial elections.

There is no dispute that this Court can place a check on legislative action that "exceeds constitutional limits." *Leandro*, at 345, 488 S.E.2d at 253; *see also State v. Harris*, 216 N.C. 746, 746, 6 S.E.2d 854, 866 (1940). Determining whether an extensively racially gerrymandered legislature can use its ill-gotten supermajority to initiate a constitutional amendment is precisely the type of legislative limit that this Court can consider. This Court has recognized that it cannot refrain from resolving novel constitutional questions, but must instead carefully scrutinize the rights involved and ensure means of redress. *See, e.g.,*

Craig ex. rel. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 342, 678 S.E.2d 351, 357 (2009).

The cases cited by Defendants in support of their position are inapposite. *See* Def. Br. at 13-14. The court in *Frazier* held that a Court may refer to a Legislative journal to determine whether an issuance of bonds was "read three times in each House and duly passed and ratified by both Houses," but declined to consider evidence in the form of "slips of paper" from the Clerk of the Senate. *Frazier v. Bd. Of Comm'rs*, 194 N.C. 49, 52-57, 138 S.E. 433, 435-37 (1927). And the court in *Birmingham-Jefferson* ruled that "whether the legislature conducted its internal voting proceedings in compliance with Section 63 [of the Alabama Constitution] is a nonjusticiable issue." *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912 So. 2d 204 (Ala. 2005). Neither of these cases resolves whether the issue before this Court is justiciable.

B) The Court has not Previously Decided this Issue

Defendants attempt to argue that this Court has already determined this novel issue to be a nonjusticiable political question. *See* Def. Br. at 18-20. To reach this conclusion, Defendants suggest the case should be controlled entirely by dicta from *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939). In *Leonard*, a plaintiff sought a declaration that the General Assembly was not properly apportioned as part of his effort to evade a modest retail sales tax. *Id.* at 324. The opinion mostly focused on whether the sales tax was discriminatory and

therefore unconstitutional. In closing, however, the court briefly rejected the apportionment-related claim as a non-justiciable political question. *Id.*

NC NAACP and amici have already distinguished *Leonard*, noting it was decided well before apportionment and redistricting became justiciable. (Plaintiff-Appellant's New Brief ("Pl. Br.") at 21-22; Black Caucus' Br. at 19; Professors' Br. fn. 11; Governor's Br. at 16; ACLU Br. at 7-8).

As the Legislative Black Caucus notes, the language in *Leonard* "reflects a bygone era when political-question-type reasoning was invoked to reject challenges . . . that disenfranchised African-Americans in the Jim Crow South," and is "out of step with modern decisions on the political question doctrine, which make clear that courts . . . must rule on challenges to state laws that target minority voting rights."[2] Further, the *Leonard* case did not involve a constitutional amendment, but rather regular legislation.[3] As the ACLU notes, "this Court's precedent does not allow for hasty dismissal of an important constitutional question based on the dicta of a single case." *See, e.g., State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949).

Defendants are wrong to suggest that this case amounts to a collateral attack on the amendments. (Def. Br. at 19). There is nothing collateral about NC

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[2] As the Illinois case cited by Defendants makes clear, (*See* Def. Br. at 19) the question of justiciability of apportionment is inextricably linked with justiciability of consequences of malapportionment. *People ex rel. Fergus v. Blackwell,* 342 Ill. 223, 225, 173 N.E. 750, 751 (1930) ("What this court cannot do directly in this respect it cannot do indirectly."). When redistricting was considered non-justiciable, courts naturally lacked authority to address related questions regarding limits to legislative authority.

[3] Defendants' recitation that there are claims that remain non-justiciable after *Baker* is immaterial here. (*See* Def. Br. at 20). The question of racial gerrymandering is justiciable.

NAACP's claim. The United States Supreme Court already determined that the legislature was the product of an unconstitutional racial gerrymander. *Covington v. North Carolina ("Covington I")*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd,* 137 S. Ct. 2211 (2017) (per curiam). The direct question before this Court is whether that illegally drawn legislature had the power to initiate amendments to our State Constitution.

The political question doctrine has very rarely been invoked by this Court. The doctrine applies to controversies that "revolve around *policy choices* and *value determinations*," not to the interpretation of the Constitution. *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)) (emphasis supplied). Here, the question relates to the authority of the racially gerrymandered legislature to place amendments on the ballot, not a challenge to the substance of the amendments.

Constitutional Law Professor Amici emphasize that the text of our State Constitution does not commit to the legislature "the discretionary and unreviewable assessment of whether the constitutional obligation [of N.C. Const. Art. XIII, § 4] has been met." (Professors' Br. at 10). And in earlier rulings in this very case, this Court confirmed the issue of constitutional amendment is not unreviewable. *NC NAACP v. Moore*, 817 S.E.2d 589 (N.C. 2018) (North Carolina Supreme Court order on injunctive relief, declining to overturn ruling by three-judge panel that two constitutional amendments violated Art. XIII).

C) The Claim is Governed by Manageable Standards

Defendants are also incorrect that NC NAACP's claim is "unworkable" and without "manageable standards." (Def. Br. at 19). The Superior Court ruling was limited in time—applying only from June of 2017 when the United States Supreme Court reached its final merits ruling in *Covington* until a new General Assembly was elected and seated under remedial districts at the beginning of 2019. And it was limited in reach: limited to constitutional amendment—not regular legislation. And it was further subject to a finding that voiding the challenged amendments would not unleash "chaos and confusion" in our State. R. at 192.

Defendants nevertheless claim that the trial court's Order is not limited by time and would affect any law passed between 2011 and 2018. This ignores without discussion the longstanding *de facto* doctrine, which allows acts of even illegitimate bodies to stand prior to a formal adjudication of legitimacy. (Pl. Br. at 16-18).[4]

Defendants also protest that it is not possible to draw a line between constitutional amendment and regular legislation. (Def. Br. at 40-41). But, as NC NAACP set forth, constitutional amendment holds a unique place in state law. (Pl. Br. at 18-19). Not only is the Constitution the fundamental law of our State, its amendment is extremely difficult to undo.

[4] Defendants also provide a superfluous citation to *N. Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303-06 (2020), for the proposition that acts of previous legislature cannot be imputed to later ones. (Def. Br. at 16). But Plaintiff here challenges only the acts of the racially gerrymandered legislature, not a later one.

Law Professor Amici describe the unique nature of constitutional amendment. (Professors' Br. at 2-5). Unlike regular legislation, there is a structural barrier to undoing constitutional amendment. Whereas regular legislation—including that achieved via the override of a gubernatorial veto—can be undone with a simple majority, it is far more difficult to undo a constitutional amendment, which requires its own supermajority process.[5] This structural difficulty is compounded because Constitutional Provisions cannot be declared unconstitutional under the State Consitution once they are cemented in place. Thus, under Defendants' argument, North Carolina would be stuck with the policy preference of the illegally gerrymandered legislature so long as at least two fifths of one house of the General Assembly reject a corrective change.

This severe consequence is in contrast to the lack of harm to the legislature, which is not prevented from proposing constitutional amendment at a later date. If, for example, this Court upholds the trial court's Order, there is no structural barrier to the General Assembly enacting such proposed amendments again. After remedial maps were drawn, however, the Defendants no longer have the necessary votes to propose constitutional amendments on a party-line vote. (Black Caucus' Br. at 11 ("when voters were finally able to vote in districts untainted by racial gerrymandering in 2018, the Caucus added two members—which . . . jeopardized Defendants' ability to pass the Amendments")). If, as the Law Professor Amici note, adoption of the amendments was "merely the product of unconstitutional legislative

[5] As noted by Governor Cooper, North Carolina has never seen a constitutional amendment repealed through this challenging process. (Governor's Br. at fn. 2)

gerrymandering . . . they deserve no place among the constitutional protections in which the people of North Carolina place their trust." (Professors' Br. at 2)

There are other differences between regular legislation and constitutional amendment. As noted by the Black Caucus, it is necessary to let even a racially gerrymandered legislature pass ordinary laws like an annual budget or emergency measures to address issues like the current pandemic in order to keep the state running. (Black Caucus' Br. at 16). By contrast, there is no need to allow constitutional amendment to keep our state running on a daily basis. No emergency relief or day-to-day spending change requires constitutional change.

By contrast, the Constitution *is* required to protect individual and minority rights. The careful process surrounding constitutional amendment is thus all the more important. At-large popular votes have historically failed to protect marginalized groups. (ACLU's Br. at 13). And there is an ever-present concern that political majorities may succumb to temporary passions. *Id*. citing John v. Orth & Paul Martin Newby, THE NORTH CAROLINA CONSTITUTION 109 (G. Alan Tarr ed., 2d ed. 2013).

This important constitutional role differentiates it from regular legislation. It also explains why the Court should not be persuaded by Defendants' argument that the popular vote places a check on constitutional amendment that cleanses away the taint of the racially gerrymandered legislature. (Def. Br. at 23-24). As noted by the Black Caucus, "[t]he three-fifths requirement exists to ensure that *more than* a bare majority of voters, acting through their representatives, is needed

to amend the Constitution." (Black Caucus' Br. at 21). *See also* Law Professors' Br. at 4 ("the amendment process deserved higher protection than that offered by a mere legislative majority"). To rule otherwise would be to rewrite the text of our constitution and ignore that longstanding, protective three-fifths requirement.

One further manageable standard arises because the two challenged amendments *relied on the racial gerrymander* in order to pass. Where Defendants pose hypotheticals about invalidating all legislation passed by a simple majority of the legislature, the two amendments challenged here cleared the constitutionally required supermajority by a margin of just one or two votes. (Def. Br. at 6). Given that two-thirds of legislative districts had to be redrawn to remedy the racial gerrymander, it is beyond dispute that the amendments would not have passed without it. Thus, the Court can limit its ruling to instances where the number of districts impacted by the gerrymander was greater than the number of votes needed to enact proposed constitutional amendment.

II. A QUESTION OF STATE LAW

A) The *Covington* Court Directed this Unsettled Question to North Carolina Courts

Defendants ignore entirely the express statement from the federal court in *Covington* that the question here is an "unsettled question of state law," "more appropriately directed to North Carolina courts, the final arbiters of state law." *Covington v. North Carolina ("Covington II"),* 270 F. Supp. 3d 881, 901 (M.D.N.C.

2017*)*.[6] The *Covington* court found no established precedent on this novel question,[7] but that is precisely why the federal court directed it to North Carolina courts.

Defendants are thus wrong to argue that the *Covington* court's decision to delay remedial elections was a *sub silentio* grant of unchecked authority to the racially-gerrymandered General Assembly to enact proposed constitutional amedments. (Def. Br. at 26-30).

First, as the *Covington* court noted, it did not have the power to intrude into state sovereignty and dictate how much power a racially gerrymandered legislature should retain. The court relied on the Supreme Court's caution that federal courts "need to act with proper judicial restraint when intruding on state sovereignty." (*Covington II* 270 F. Supp. 3d at 888 quoting *Covington I*). The court explained:

> The North Carolina Constitution also expressly preserves inviolate the "[s]overeignty of the people. "N.C. Const. art. I, § 2. Because the North Carolina Constitution vests "ultimate sovereignty ... in the people ... they alone can say how they shall be governed." *Jamison v. City of Charlotte*, 239 N.C. 682, 80 S.E.2d 904, 915 (1954). Accordingly, we must assess any intrusion on state sovereignty from the perspective of the people of North Carolina.

Id. at 894. Thus, the court went out of its way not to intrude into matters unsettled under state law, leaving those questions for this Court.

Second, the *Covington* court's decision to delay elections was made extremely reluctantly as the best way to "return to the people of North Carolina their

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[6] The three-judge panel Defendants repeatedly refer to as "the District Court" was a three judge voting rights panel that included judges Wynn, Schroder and Eagles.

[7] Defendants make much of the fact that the *Covington* Court could not identify North Carolina law on this precise issue. (Def. Br. at 31). But that is exactly the point, the question is novel and the federal court reserved it for this Court to decide.

sovereignty." *Id.* at 884. Because of Defendants' delay tactics,[8] the court was left with little choice but to put off a remedial vote until there was sufficient time to hold orderly elections. *Id*. The federal court's reluctant decision to delay elections as the best way to restore sovereignty to North Carolina further favors the necessity of a legal check to legislative power in the interim. That unfortunate situation—of Defendants' own making—does not support their argument.

B) Federal Cases are not Determinative

Because this case poses an unsettled matter of state law, the federal cases cited by Defendants do not assist them. *See* Def. Br. at 27-28 (citing *Baker v. Carr*, 369 U.S. 186 (1962) (interpreting the 14th Amendment of the U.S. Constitution); *Ryder v. United States*, 515 U.S. 177, 183 (1995) (interpreting Article II of the United States Constitution); *Buckley v. Valeo*, 424 U.S. 1 (1976) (interpreting Federal Election Campaign Act and United States Constitution); and *Martin v. Henderson*, 289 F. Supp. 411 (1967) (Habeas appeal discussing federal criminal statute). When "construing and applying our laws and the Constitution of North Carolina, this Court is not bound by the decisions of federal courts, including the Supreme Court of the United States." *Preston,* 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) (*quoting White v. Pate,* 308 N.C. 759, 766, (1983)).

[8] These delay tactics included footdragging, and failure to be forthcoming about the feasibility of creating new maps quickly even after their expert ***had already*** prepared new maps. A state court later found troubling the discrepancy between when legislative defendants had prepared remedial district maps and contrary representations made to the *Covington* court that delayed the remedy. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *101-05 (Wake Cty. Super. Ct. Sept. 3, 2019)."

Moreover, despite Defendants' insistence, none of the cited cases address the matter before the Court. Rather, these cases stand for the proposition that *some* acts of illegally constituted legislatures *may* be permitted to stand to avoid chaos and confusion—which is consistent with the trial court's Order. For example, in *Baker*, the United States Supreme Court held that a malapportioned legislature may be permitted to act, specifically to reapportion itself. NC NAACP does not disagree. The question before this Court is not whether an illegally constituted legislature may act at all, but whether it has unlimited power to initiate constitutional amendments.

Similarly, because the trial court's Order did not invalidate any legislative acts taken *before* the final decision in *Covington*, the other cited cases are irrelevant because they consider only the legality of the *past* acts of a subsequently-invalidated officer. *See Buckley*, 424 U.S. at 78 (holding that "[t]he past acts of the Commission are . . . accorded de facto validity"); *Ryder*, 515 U.S. at 184 (declining to apply *de facto* doctrine where defendant challenged the appointment of the judges). Because the trial court's Order did not disturb any legislative acts prior to the final ruling in *Covington*, these cases applying the *de facto* doctrine do not aid Defendants.

CONCLUSION

Affirming the Court of Appeals' opinion would condone the legislature's illegal power-grab. Going forward, a legislature could extensively and illegally gerrymander itself—without limit—and then enact proposed constitutional amendments before remedial elections were held. There would be no remedy. Such a result is at odds with the sacrosanct nature of our Constitution and democracy.

We ask this Court to fulfil its role in our system of checks and balances and hold that constitutional amendment is a step too far for an unconstitutionally racially gerrymandered body. The Court of Appeals should be reversed and the Trial Court opinion upheld.

Respectfully submitted, this the 3rd day of February, 2021.

/s/ Kimberley Hunter
Kimberley Hunter
N.C. Bar No. 41333
Southern Environmental Law Center
601 W. Rosemary Street
Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org

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

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

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

Daryl V. Atkinson
N.C. Bar No. 39030

Kathleen E. Roblez
N.C. Bar No 57039
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
Telephone: (919) 323-3889

Attorneys for Plaintiff- Appellant NC NAACP

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a 12-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of services, this certificate of compliance, and appendixes) as reported by the word processing software.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiff-Appellant's Reply Brief was served this date upon the persons named below via the N.C. Supreme Court electronic filing system.

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

Attorney for Defendants

Daniel F. E. Smith
Jim W. Phillips, Jr.
Eric M. David
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Suite 2000 Renaissance Plaza
230 North Elm Street (27401)
Post Office Box 26000
Greensboro, NC 27420 6000
Phone: 336-373-8850
dsmith@brookspierce.com
jphillips@brookspierce.com
edavid@brookspierce.com

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

Robert E. Harrington
Adam K. Doerr
Erik R. Zimmerman
Travis S. Hinman
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
Phone: (704) 377-2536
rharrington@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
thinman@robinsbradshaw.com

Attorneys for the North Carolina Legislative Black Caucus

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

Attorneys for North Carolina Professors of Constitutional Law

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

Attorneys for ACLU of North Carlina

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

Attorneys for Democracy North Carolina

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

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

Attorneys for NCAJ

This the 3rd day of February, 2021.

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