No. COA 19-384 TENTH DISTRICT

****

NORTH CAROLINA COURT OF APPEALS

****

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

Plaintiffs,

v.

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

Defendants.

From Wake County
No. 18 CVS 9806

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FILED
2019 APR 26 A 10:59
CLERK COURT OF APPEALS
OF NORTH CAROLINA

****

RECORD ON APPEAL

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INDEX

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STATEMENT OF ORGANIZATION OF TRIAL COURT

Legislative Defendants 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 ("Legislative Defendants") appeal from the 22 February 2019 Order granting Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People's motion for partial summary judgment and denying Legislative Defendants' motion to dismiss rendered by the Honorable G. Bryan Collins, Jr., in the General Court of Justice, Superior Court Division of Wake County. Legislative Defendants filed and served written notice of appeal on 25 February 2019.

The Record on Appeal was filed in the Court of Appeals on 26 April 2019 and was docketed on 30 April 2019.

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STATEMENT OF JURISDICTION

The action was commenced by filing a complaint and issuance of summonses on 6 August 2018. The parties agree that the court had jurisdiction over the parties.

Legislative Defendants dispute that subject matter jurisdiction exists over the claims at issue before the Honorable G. Bryan Collins, Jr. because Legislative Defendants challenge Plaintiff Clean Air Carolina's standing as to these claims and invoke the doctrine that the claims may be non-justiciable political questions.

Plaintiff NC NAACP maintains that the court had subject matter jurisdiction over all claims and parties.

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18CV009806

STATE OF NORTH CAROLINA

File No.

Wake County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	
National Association for the Advancement of Colored People, et al.	
Address	**CIVIL SUMMONS**
1001 Wade Avenue, Suite 15	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
City, State, Zip	
Raleigh NC 27605	G.S. 1A-1, Rules 3 and 4
VERSUS	
Name Of Defendant(s)	Date Original Summons Issued
Tim Moore, in his official capacity, et al.	Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Tim Moore, Speaker of the N.C. House of Representatives c/o Josh Stein, Attorney General 9001 Mail Service Center Raleigh NC 27699-9001	

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IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
Tiene que contestar a más tardar en 30 días. ¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued	Time
Kym Hunter and Derb Carter Southern Environmental Law Center 601 West Rosemary Street, Suite 220 Chapel Hill NC 27516-2356	8-6-18	9 ☒ AM ☐ PM
	Signature	
	☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

(Over)

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RETURN OF SERVICE

I certify that this Summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	*Signature Of Deputy Sheriff Making Return*
$	
Date Received	*Name Of Sheriff (type or print)*
Date Of Return	*County Of Sheriff*

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STATE OF NORTH CAROLINA

File No. 18CV009806

Wake County

In The General Court Of Justice
☐ District ☒ Superior Court Division

Name Of Plaintiff	CIVIL SUMMONS
National Association for the Advancement of Colored People, et al.	☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)
Address: 1001 Wade Avenue, Suite 15	
City, State, Zip: Raleigh NC 27605	G.S. 1A-1, Rules 3 and 4
VERSUS	
Name Of Defendant(s): Tim Moore, in his official capacity, et al.	Date Original Summons Issued
	Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1	Name And Address Of Defendant 2
Phil Berger, President Pro Tem of North Carolina Senate c/o Josh Stein, Attorney General 9001 Mail Service Center Raleigh NC 27699-9001	

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IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You have to respond within 30 days. You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
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A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued	Time
Kym Hunter and Derb Carter Southern Environmental Law Center 601 West Rosemary Street, Suite 220 Chapel Hill NC 27516-2356	8/6/18	9 ☒ AM ☐ PM
	Signature	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

☐ ENDORSEMENT (ASSESS FEE)
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time
	☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

NOTE TO PARTIES: *Many counties have MANDATORY ARBITRATION programs in which most cases where the amount in controversy is $25,000 or less are heard by an arbitrator before a trial. The parties will be notified if this case is assigned for mandatory arbitration, and, if so, what procedure is to be followed.*

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☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copies Left (if corporation, give title of person copies left with)

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
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Date Received	Name Of Sheriff (type or print)
Date Of Return	County Of Sheriff

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18CV009806

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No._____

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

Plaintiffs,

v.

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

Defendants.

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C.S.C.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Comp]

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INTRODUCTION

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

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

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

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Central to the supreme law of North Carolina is the understanding that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35. To ensure this mandate "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

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

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

The judicial branch must again step in to promptly assess the validity of a sweeping ballot initiative set to be presented to the voters in November 2018. These four proposed amendments should be declared void and the Bipartisan State Board of Elections and Ethics Enforcement should be enjoined from including these amendments on the ballot.

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NATURE OF THE ACTION

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

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

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

4) Plaintiffs seek a declaration that the N.C.G.A's passage of Senate Bills 814 and 75 and House Bills 913 and 1092, which each place a constitutional amendment on the ballot, violated the North Carolina Constitution, and ask that these laws be declared void *ab initio*.

5) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 3 and Art XIII § 4 by legislating to place vague and misleading language to describe the constitutional amendments contained in Senate Bills 75, 814 and House Bills 913 and 1092 on the 2018 general election ballots.

6) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 2, 3, 35 and Art XIII § 4 when it passed vague and incomplete proposed constitutional amendments in Senate Bill 814 and House Bills 913 and 1092.

7) Plaintiffs seek immediate and permanent injunctive relief preventing the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November, 2018, ballot.

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THE PARTIES

Plaintiffs

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

9) Plaintiff NC NAACP has standing to challenge the proposed amendments on behalf of its members in that its members would otherwise have standing to sue in their own

rights; the interests it seeks to protect are germane to its purpose, which includes the core mission of protecting and expanding voting rights; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

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

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

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

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

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

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14) Plaintiff NC NAACP has standing to challenge the judicial vacancies amendment on behalf of its members and on its own behalf because it frequently litigates in court in order to vindicate the civil and political rights of its members. It thus has a strong and abiding interest in a fair and independent judiciary and will be harmed by the proposed constitutional amendment that would further politicize the judiciary and erode separation of powers principles that are themselves a form of protection for the rights of racial minorities. The proposed constitutional amendment also harms the NC NAACP because giving the General Assembly sole control over filling judicial vacancies endangers the NC NAACP's efforts to advocate for diversity in the North Carolina judiciary. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be

difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election.

15) Plaintiff NC NAACP has standing to challenge the boards and commissions amendment on behalf of its members and on its own behalf because the NC NAACP and its members regularly advocate before, participate in, and monitor activities governed by state boards and commissions, including the Bipartisan State Board of Ethics and Elections Enforcement. The NC NAACP and its members will be harmed by the boards and commissions amendment because giving the General Assembly unprecedented broad power to control these boards and commissions will make the boards and commissions less independent and less able to conduct their mission in an impartial way. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election.

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16) Plaintiff NC NAACP has standing to challenge the income tax cap amendment on behalf of its members and on its own behalf because the proposed constitutional amendment harms the NC NAACP, its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it

prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy. Because the amendment is misleading, NC NAACP will be forced to divert significant resources away from its core activities to educate voters about it before the 2018 election.

17) Plaintiff Clean Air Carolina is a not-for-profit corporation founded in 2002. Clean Air Carolina has approximately 3,400 members in North Carolina. Its mission is to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices. Its primary goal is to improve health by achieving the cleanest air possible. Clean Air Carolina is based in Charlotte, North Carolina and works on regional and statewide issues.

18) Plaintiff Clean Air Carolina advocates for increased state spending on measures that will improve air quality and mitigate against global climate change. Clean Air Carolina has encouraged its members to support the Governor's proposed 2018 budget which included increased spending for environmental protection. Clean Air Carolina's "Particle Falls" educational exhibits have received state funding, passed through the N. C. Department of Transportation and donated by the N.C. Clean Energy Technology Center at N.C. State

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University. Clear Air Carolina will be harmed by the amendment to cap the state income tax at 7%. Clean Air Carolina is concerned that the Department of Environmental Quality is already severely underfunded. Clear Air Carolina is also concerned that too little state money is spent on non-highway transportation solutions including bike and pedestrian improvements, buses, light, commuter, and heavy rail. Such spending helps reduce driving and improves air quality and minimizes impacts to climate change. If the income tax cap is lowered from 10% to 7%, Clean Air Carolina will be limited in its efforts advocating for more state spending on clean air and climate issues. As the climate continues to warm and global climate change becomes increasingly pressing, this limitation will become increasingly severe.

19) Clean Air Carolina regularly participates in and monitors activities governed by state boards and commissions, including the N.C. Environmental Management Commission, the Board of Transportation, and the N.C. Turnpike Athority Board of Directors. Clean Air Carolina staff and members have spoken at public hearings hosted by these boards and commissions in support of the Clean Power Plan and in opposition to harmful road projects. Clean Air Carolina will be harmed by the Boards and Commissions amendment because it will grant control over state boards and commissions to the N.C.G.A., which will make the boards and commissions less independent and less able to conduct their missions in an impartial, scientific way. Clean Air Carolina is further harmed because the amendment includes vague language and will require subsequent implementing legislation. As such, it is difficult for Clean Air Carolina to inform its members about the likely impact of the proposed amendment. Moreover, because the caption for the proposed amendment does not even mention the impact of the amendment on boards and commissions other than the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, Clean Air Carolina will be forced to divert staff time and resources away from

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other important organizational functions and reallocate that time and those resources to efforts to educate and inform its members about the likely impact of this amendment prior to the November 2018 elections.

20) Plaintiff Clean Air Carolina also regularly participates in litigation as a plaintiff to protect clean air in North Carolina and to mitigate against climate change. Clean Air Carolina has participated as a plaintiff in several lawsuits challenging the construction of new highways in North Carolina. Clean Air Carolina has also participated in the North Carolina Court of Appeals as *amicus curiae* in a case challenging Carolinas Cement Company's harmful air permit in the N.C. Court of Appeals in 2015. Further, Clean Air Carolina has recently participated as a petitioner in the N.C. Office of Administrative Hearings challenging a coal fired power plant air permit due to excessive bromide limits, and has submitted comments to the N.C. Department of Air Quality on numerous air permits in order to exhaust its administrative remedies in case legal action in N.C. state courts becomes necessary. Clean Air Carolina will be harmed by the provision shifting control of appointments to judicial vacancies from the Governor to the N.C.G.A. because it is concerned that this is likely to make the judiciary less independent and more political. Clean Air Carolina will also be harmed because it is concerned that the N.C.G.A. will use this provision to pass legislation that is not subject to gubernatorial veto. Moreover, Clean Air Carolina is further harmed because the amendment includes vague language and will require subsequent implementing legislation. As such, it is difficult for Clean Air Carolina to inform its members about the likely impact of the proposed amendment.

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21) Defendant Philip Berger is the President *Pro Tem* of the North Carolina Senate. Defendant Berger led the North Carolina Senate in its passage of Senate Bills 814 and 75 and House Bills 913 and 1092. Defendant Berger is sued in his official capacity.

22) Defendant Tim Moore is the Speaker of the North Carolina House of Representatives. Defendant Moore led the North Carolina House of Representatives in its passage of Senate Bills 814 and 75 and House Bills 913 and 1092. Defendant Moore is sued in his official capacity.

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

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

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

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

27) Defendant Stella Anderson is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and

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

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

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

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

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

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

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JURISDICTION AND VENUE

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

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

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

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FACTS AND ALLEGATIONS

The Unconstitutional N.C.G.A.

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

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

38) The N.C.G.A. unconstitutionally and impermissibly considered race in drawing the 2011 legislative maps, resulting in legislative districts that unlawfully packed black voters

into election districts in concentrations not authorized or compelled under the Voting Rights Act of 1965.

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

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

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

42) On June 5, 2017, the United States Supreme Court summarily affirmed the lower court's ruling that the twenty-eight challenged districts were the result of an unconstitutional racial gerrymander, *North Carolina v. Covington*, 581 U.S. ——, 137 S.Ct. 2211, (2017) (per curiam). On June 30, 2017, mandate issued as to the U.S. Supreme Court's order affirming the

lower court's judgment. *See* Certified Copy of U.S. Supreme Court Order, ECF No. 158, *Covington v. North Carolina*, 15-cv-03399-TDS-JEP (filed June 30, 2017).

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

44) On remand, the three-judge panel granted the N.C.G.A. an opportunity to propose a new redistricting plan to remedy the unconstitutional racial gerrymander. *Covington v. North Carolina*, 283 F.Supp.3d 410, 417–18 (M.D.N.C. 2018). In August 2017, the N.C.G.A. submitted a proposed remedial map – drawn by Dr. Thomas Hofeller, the same mapmaker the General Assembly had hired to draw the 2011 invalidated maps – that redrew a total of 11 of the 170 state House and Senate districts from the 2011 unconstitutionally racially-gerrymandered maps. *Id.* at 418.

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45) After reviewing the General Assembly's remedial plan, the three-judge panel determined that a number of the new districts put forward by the N.C.G.A. in its 2017 remedial plan were essentially continuations of the old, racially gerrymandered districts that had been previously rejected as unconstitutional and either failed to remedy the unconstitutional racial gerrymander or violated provisions of the North Carolina Constitution. *Id.* at 447-58. For those defective districts, the three-judge panel adopted remedial districts proposed by a court-appointed special master. *Id.* at 447-58. The United States Supreme Court affirmed the districts adopted by the three-judge panel, except for certain districts in Wake and Mecklenburg Counties that had not been found to be tainted by racial gerrymanders, but were drawn in alleged violation

of the state constitutional prohibition against mid-decade redistricting. *North Carolina v. Covington*, 138 S.Ct. 2548 (2018).

46) In order to cure the 2011 unconstitutional racial gerrymander, the remedial maps redrew 117 legislative districts.

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

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

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Limitation on actions of usurpers

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

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

> The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or

> effect, because such election has no legal sanction. In settled, well regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government.
>
> *Van Amringe*, 108 N.C. at 198, 12 S.E. at 1006.

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

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52) Similarly, a usurper legislature may take actions to reconstitute itself in a legal fashion. *See Kidd v. McCanless*, 200 Tenn. 273, 281 (1956) (determining that an unconstitutionally apportioned legislature must have a way to reapportion itself so as not to bring about the destruction of the state). *See also Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963) (noting the need to a malapportioned legislature to be able to pass an act of reapportionment.).

Thus, the federal court in *Covington* lawfully gave the N.C.G.A. the opportunity to reapportion itself, while noting that the status of the N.C.G.A. as a usurper more generally was an "unsettled question of state law" which should be "more appropriately directed to North Carolina courts, the final arbiters of state law." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017).

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

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Constitutional Amendments

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

55) N.C. Const. Art. I § 3 requires that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be

necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States."

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

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

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

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

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

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

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

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

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

65) Since the current N.C. Constitution was adopted in 1971, it has been amended forty-five times. Only two of those amendments have required any additional implementing legislation after the amendments were voted upon by the citizens of North Carolina. *See* N.C. Sess L. 1983-526 (implementing the Constitutional amendment to allow the Supreme Court to review decisions of the N.C. Utilities commission), and N.C. Sess. L. 1998-212 § 19.4 (implementing the constitutional amendment creating rights for victims of crimes). Unlike in the instant case, this implementing legislation did not add substantively to the amendment that had been placed before the voters. Moreover, the legitimacy of the proposals was never adjudicated by any court.

The Challenged 2018 Proposed Amendments

The State Boards and Commission Amendment

66) On June 28, 2018, the N.C.G.A. passed House Bill 913, "An Act to Amend the Constitution of North Carolina to establish a bi-partisan board of ethics and elections enforcement and to clarify board appointments."

67) The Constitutional Amendment proposed in House Bill 913 will appear on the ballot misleadingly as "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

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68) The Amendment states that it would amend N.C. Const. Art. I, § 6; Art. II. § 2; Art. III. § 5; Art. IV. §. 11, and would establish a "Bipartisan State board of Ethics and Elections" to administer ethics and elections laws. The Board shall consist of eight members and no more than four members may be registered with the same political affiliation. All appointments shall be made by the N.C.G.A. The Amendment also alters the N.C. Constitution such that the N.C.G.A. will control the "powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law."

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

70) House Bill 913 passed the N.C. State House of Representatives by a vote of 77-44 and passed the N.C. State Senate by a vote of 32-14. In the House, the total number of aye votes

was just five votes over the three-fifths contingent required for a constitutional amendment and in the Senate just two votes over the required margin.

The Judicial Vacancies Amendment

71) On June 28, 2018, the N.C.G.A. passed Senate Bill 814, "An Act to Amend the Constitution of North Carolina to provide for nonpartisan judicial merit commissions for the nomination and recommendation of nominees when filling vacancies in the office of justice or judge of the general court of justice and to make other conforming changes to the constitution."

72) The Constitutional Amendment proposed in House Bill 814 will appear on the ballot misleadingly as "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

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73) The Amendment would alter N.C. Const. Art. IV. §§ 10; 18; 19; 22; 23. The Amendment would remove the Governor's broad authority to appoint judges to fill vacancies. Instead, the Amendment would require the Governor to select a judge from one of at least two candidates presented to him by the N.C.G.A., which it would select from nominations submitted by the public to a so-called "Nonpartisan Judicial Merit Commission."

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

75) Senate Bill 814 passed the N.C. State House of Representatives by a vote of 73-45 and passed the N.C. State Senate by a vote of 34-13. In the House the number of aye votes was

just one vote over three fifths contingent required for a constitutional amendment, and in the Senate the number was just four votes over the required margin.

The Voter ID Amendment

76) On June 28, 2018, the N.C.G.A. passed Senate Bill 1092, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person."

77) The Constitutional Amendment proposed in House Bill 1092 will appear on the ballot misleadingly as "Constitutional amendment to require voters to provide photo identification before voting in person."

78) The amendment would alter N.C. Const. Art. VI § 2(4) and would require individuals voting in person to present photo identification before doing so. The bill does not specify what might qualify as "photo identification." Rather, the amendment states that the N.C.G.A. will enact general laws governing the requirement of such photographic identification, "which may include exceptions." The amendment does not specify what these exceptions might be. Thus the amendment expressly requires additional implementing legislation.

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79) House Bill 1092 passed the N.C. House of Representatives by a vote of 74–43 and the N.C. Senate by a vote of 33-12. In the House the number of aye votes was just two votes over three fifths contingent required for a constitutional amendment, and in the Senate the number was just three votes over.

The Income Tax Amendment

80) On June 28, 2018, the N.C.G.A. passed Senate Bill 75, "An Act to Amend the North Carolina Constitution to provide that the maximum tax rate on incomes cannot exceed seven percent."

81) The Constitutional Amendment proposed in House Bill 75 will appear on the ballot misleadingly as "Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%)."

82) The Amendment would alter N.C. Const. Art V. § 2(6). It would lower the maximum state income tax rate from 10 to 7%.

83) Senate Bill 75 passed the N.C. Senate by a vote of 34–13 and passed the N.C. House of Representatives by a vote of 73–45. In the Senate the number of aye votes was just four votes over three fifths contingent required for a constitutional amendment, and in the House the number was just one vote over.

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Ballot Language for the 2018 Proposed Constitutional Amendments

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

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

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

87) On July 24, 2018, the NC House and Senate passed House Bill 3, which eliminates the authority of the Commission to draft the explanatory captions and instead requires that proposed constitutional amendments on the North Carolina ballot simply be captioned

"Constitutional Amendment." In addition, House Bill 3 mandates that the only other explanatory text to be presented on the ballot is the question presented in the legislation containing the proposed constitutional amendment as drafted by the N.C.G.A.

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

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

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

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

91) On information and belief, the State Board of Elections and Ethics may finalize the November 2018 ballot as soon as August 8.

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CLAIMS FOR RELIEF

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

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

94) Plaintiffs seek a declaratory judgment that pursuant to the U.S. Supreme Court's June 30, 2017, mandate in *Covington,* the N.C.G.A. ceased to be a legislature with any *de facto* lawful authority and assumed usurper status. To the extent that they had any power to act, it was

limited to those acts necessary to avoid chaos and confusion, such as acts necessary to conduct the day-to-day business of the state, but the usurper N.C.G.A. may not take steps to modify the N.C. Constitution. Art I § 2, 3, 35 and Art XIII § 4.

95) Plaintiffs seek a declaratory judgment that because the N.C.G.A. was without authority to pass Senate Bills 814 and 75 and House Bills 913 and 1092 they are void *ab initio*.

a. Senate Bill 814 was passed by the illegal act of usurpers and is void *ab initio*.

b. Senate Bill 75 was passed by the illegal act of usurpers and is void *ab initio*.

c. House Bill 913 was passed by the illegal act of usurpers and is void *ab initio*.

d. House Bill 1092 was passed by the illegal act of usurpers and is void *ab initio*.

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96) There exists a present controversy between Plaintiffs on the one hand, and Defendants, on the other hand, as to the constitutionality of the actions of the N.C.G.A. with respect to the passage of Senate Bills 814 and 75 and House Bills 913 and 1092.

97) Plaintiffs seek a declaratory judgment that the N.C.G.A. is in violation of N.C. Const. Art I, § 2, 3, 35 and Art. XIII § 4 because its proposed language for presenting the constitutional amendments contained in Senate Bill 814, and House Bills 913 and 1092 on the 2018 ballot does not satisfy the constitutional requirement that the legislature submit the proposal of the amendment to the qualified voters of North Carolina in that the amendments and the ballot descriptions are vague and misleading.

a. House Bill 913 will be presented on the ballot with vague and misleading language focused on the establishment of a "bipartisan Board of Ethics and Elections." This language fails to acknowledge the massive shift in authority over all boards and commissions from the executive to the legislative branch. The amendment states in a vague way that the amendment will "clarify the appointment authority of the Legislative and the Judicial Branches," when in fact it will radically alter the appointment authority of the Legislative branch. Moreover, the amendment will extend to powers far beyond the "appointment authority" of the NCGA but will cause the NCGA to control the "powers," "duties," "responsibility," and "terms of office" of all boards and commissions. By failing even to note this fundamental change to the NC Constitution on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina. Further, the question is misleading in that it states that it will clarify the appointment authority of the "Judicial Branch[]" when in fact the amendment has nothing to do with the judicial branch. In addition, the question is misleading because it states that it will "establish" the State Elections and Ethics Board, when in fact that board already exists. Finally, the question seeks to further confuse voters by stating that it will "prohibit legislators from serving on boards and commissions exercising executive or judicial authority." The question fails to acknowledge that legislators are already prohibited from serving on such boards.

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b. Senate Bill 814 will be presented on the ballot with vague and misleading language that highlights a "nonpartisan merit-based system" for the filling of judicial vacancies and fails to acknowledge that the Amendment will move power for the filling of judicial vacancies from the Governor to the N.C.G.A. Senate Bill 814 gives the N.C.G.A.—a partisan, political body—the power to nominate the ultimate candidates for judicial vacancies to the

Governor. The omission of this sweeping new grant of power to the N.C.G.A. from the ballot language is misleading. By failing even to note this fundamental change to the NC Constitution in the caption, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

c. House Bill 1092 will be presented on the ballot with vague and misleading language stating that the NC Constitution will be amended "to require photo identification to vote in person" without in anyway specifying what this voter ID will consist of, and without acknowledging that the Amendment requires the N.C.G.A. to pass additional legislation determining what photographic identification will be sufficient, and without specifying that there may be exemptions and what they will be. Under this broad language, the N.C.G.A. could later require something as difficult to obtain as a United States Government issued passport before allowing a person to vote, effectively disenfranchising the overwhelming majority of the population. On the other extreme, the N.C.G.A. may fail to enact any implementing legislation, leading to chaos as precints enact different inconsistent requirements. By presenting only this vague and misleading question on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

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98) Plaintiffs seek a declaratory judgment from this Court stating the N.C.G.A. is in violation of N.C. Const. Art I § 2, 3, 35 and Art. XIII § 4 because the vague and incomplete language in Senate Bill 814 and House Bills 913 and 1092 does not satisfy the requirement to submit the proposal of the constitutional amendment to the qualified voters of North Carolina.

a. House Bill 1092 includes the vague, unfinished new requirement that "voters offering to vote in person shall present photographic identification before voting. *The*

General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." (emphasis added). This provision expressly requires additional legislation to determine what photographic identification will consist of and what exceptions will be made. The N.C.G.A. has therefore failed to present a full proposal to the people of North Carolina.

b. House Bill 913 includes vague language that "[t]he legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." This sweeping language is vague, unclear, and will require significant additional legislation to implement. The full scope and force of this amendment is not fully before the people.

c. Senate Bill 814 includes vague and incomplete language that "in a manner *prescribed by law*, nominations [for judicial vacancies] shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, *as prescribed by law*. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, a*s prescribed by law*." The law referenced in the bill has not yet been written and will require the passage of additional legislation. The full scope and force of this amendment is not fully before the people.

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PRAYER FOR RELIEF

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

1. Adjudge and declare that following the U.S. Supreme Court mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status;

2. Adjudge and declare that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to Art I § 2, 3, 35 and Art XIII § 4;

3. Adjudge and declare that the vague and intentionally misleading questions that will appear on the ballot for the amendment set forth in Senate Bill 75, 814, and House Bills 913 and 1092 violates the N.C.G.A.'s responsibility to place the proposal of the constitutional amendments before the people;

4. Adjudge and declare that the vague and incomplete language in Senate Bill 814, and House Bills 913 and 1092, which will require further implementing legislation, does not amount to a proposal to be presented to the public pursuant to Art. XIII § 4;

5. Adjudge and declare that Senate Bills 814 and 75 and House Bills 913 and 1092 are void *ab initio*;

6. Issue preliminary and permanent injunctive relief prohibiting the Bipartisan State Board of Elections and Ethics Enforcement from placing any of the constitutional amendment proposed by Senate Bills 814 and 75 and House Bills 913 and 1092 onto the ballot;

7. Award costs to Plaintiffs pursuant to N.C. Gen. Stat. § 1-263;

8. Award reasonable attorneys' fees to Plaintiffs as permitted by law; and

9. Grant any other and further relief that the Court deems to be just and proper.

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Respectfully submitted, this the 6th day of August, 2018.

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18CV009806

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No.

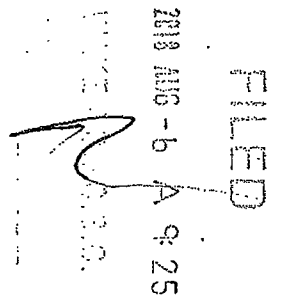
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

v.

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

Defendants.



PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND REQUEST FOR AN EXPEDITED HEARING

N.C. Civ. Pro. R. 65

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Plaintiffs the North Carolina State Conference for the National Association for the Advancement of Colored People ("NC NAACP") and Clean Air Carolina ("CAC") (collectively, "Plaintiffs") respectfully move the Court for a temporary restraining order ("TRO") and preliminary injunction ("PI") against Defendants, Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives, Philip Berger, in his official capacity as President Pro Tem of the North Carolina Senate, the North Carolina Bipartisan State Board of

Elections and Ethics Enforcement ("SBE"), Andrew Penry, in his official capacity as a board member of the SBE, Joshua Malcolm, in his official capacity as a board member of the SBE, Ken Raymond, in his official capacity as a board member of the SBE, Stella Anderson, in her official capacity as a board member of the SBE, Damon Circosta, in his official capacity as a board member of the SBE, Stacy Eggers IV, in his official capacity as a board member of the SBE, Jay Hemphill, in his official capacity as a board member of the SBE, Valerie Johnson, in her official capacity as a board member of the SBE, and John Lewis, in his official capacity as a board member of the SBE (collectively "Defendants") pursuant to Rule 65 of the North Carolina Rules of Civil Procedure.

Plaintiffs seek immediate and permanent injunctive relief preventing the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot. Plaintiffs assert that they are likely to be successful on the merits of the underlying case and that they will sustain irreparable harm unless the TRO and PI are issued. Plaintiffs request an expedited hearing on the matter pursuant to Local Rule 14.4.

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In support of this Motion, Plaintiffs show the Court the following:

1. On August 6, 2018, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief pursuant to N.C. Gen. Stat. §§ 1-253, et seq., and Rules 65 and 57 of the North Carolina Rule of Civil Procedure in the above-captioned action.

   a. Plaintiffs seek a declaration that following the U.S. Supreme Court's ruling in *Covington v. North Carolina, North Carolina v. Covington*, 581 U.S. ——, 137 S.Ct. 2211, (2017) (per curiam), for which mandate issued

on June 30, 2017, the N.C.G.A. ceased to be a legislature with any *de facto* lawful authority and assumed usurper status.

b. Plaintiffs seek a declaration that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to N.C. Const. art. I § 2, 3, 35 and art. XIII § 4.

c. Plaintiffs seek a declaration that N.C.G.A's passage of Senate Bills 814 and 75 and House Bills 913 and 1092, which would place four constitutional amendment proposals on the ballot was unconstitutional and ask that these laws be declared void *ab initio*.

d. Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. art. I § 3 and art. XIII § 4 when it enacted vague, incomplete and misleading ballot language to describe the constitutional amendments contained in Senate Bills 75, 814 and House Bills 913 and 1092.

e. Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. art. I § 3 and art. XIII § 4 when it passed proposed constitutional amendments that are vague, incomplete, and misleading as contained in Senate Bill 814 and House Bills 913 and 1092.

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2. The United States Supreme Court has ruled that twenty-eight North Carolina legislative districts were illegal racial gerrymanders in violation of the Equal Protection Clause of the Fourteen Amendment of the United States Constitution and the Voting Rights Act. *Covington* 137 S. Ct. at 2211. Mandate issued on this ruling on June 30, 2017.

3. In the 2018 legislative session, the N.C.G.A. drafted and passed into law six constitutional amendment proposals, which were ratified by both houses on June 28, 2018.

(House Bill 1092, Senate Bill 75, House Bill 551, House Bill 913, Senate Bill 677 and Senate Bill 814). Four of those proposed amendments achieved the required three-fifths majority in both houses of the legislature by only one or two votes. The proposed amendments are House Bill 1092, Senate Bill 75, House Bill 913, Senate Bill 814. In the present action, Plaintiffs challenge these as the invalid acts of an unconstitutional usurper legislature. They further challenge the proposed amendments as unconstitutional acts of the N.C.G.A. because they are vague, incomplete, and misleading, and the language with which they will be presented to the voter is vague, incomplete, and in some cases intentionally misleading.

4. Plaintiffs seek a TRO and PI because Plaintiffs will be seriously and irreparably harmed by the proposed constitutional amendments, which are the product of illegal acts by an unconstitutional, racially-gerrymandered usurper N.C.G.A. and that would further augment the power of this unconstitutional body while limiting the power of voters and the executive branch.

5. Plaintiffs seek a TRO and PI to prevent serious and irreparable harm to Plaintiffs that will arise if these vague and incomplete amendment proposals are placed on the ballot with the misleading, false language proposed by the N.C.G.A.

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6. Unless the court grants emergency preliminary relief, Plaintiffs will be required to immediately devote substantial resources to educating their members and the public about the unlawful proposed amendments.

7. This court has inherent authority to issue a TRO or PI to preserve the status quo of parties during litigation "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302

S.E.2d754, 759 (1983) (internal citations omitted). "The issuance of a TRO 'is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.'" *Nat'l Surgery Ctr. Holdings, Inc. v. Surgical Inst. of Viewmont, LLC*, No. 16 CVS 1003, 2016 WL 2757972, at *3 (N.C. Super. May 12, 2016) (quoting *A.E.P. Indust., Inc.* at 759).

8. As is detailed in Plaintiffs' memorandum in support of this motion, Plaintiffs are likely to succeed on the merits of their claims. The proposed constitutional amendments are the act of an illegally-constituted usurper legislature and thus invalid. Moreover, the vague, incomplete, and misleading language with which the proposed amendments will be presented to voters violates the constitutional requirements for amendment proposals. N.C. Const. art. I § 2, 3, 35 and art XIII § 4.

9. When considering whether a plaintiff is likely to suffer irreparable loss absent an injunction, a judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978). As outlined in detail in Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, the harm to Defendants in this case is negligible. A legally constituted N.C.G.A. will have the opportunity to place constitutional amendment proposals on the ballot at any time in the future, so long as those amendments are legally constituted.

10. The Court should grant preliminary injunctive relief because it is in the public interest. *Huggins v. Wake Cty. Bd. of Educ.*, 272 N.C. 33, 42, 157 S.E.2d 703, 709 (1967) (considering the disruption to the operation of a school and the interest of the children enrolled therein and the interests of the public in their education). There is a significant public interest in ensuring that the voting public is not presented with amendments to ratify that may later be

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deemed unconstitutional. Such an event would result in chaos, and would be likely to lead to years of confusion while the constitutionality of the amendments and their myriad implications are determined by the judicial system. The public interest weighs in favor of action now.

11. Plaintiffs seek a TRO and PI to prevent the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendment proposals authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot. This is necessary pending a trial on the merits in this case. Plaintiffs are likely to succeed on the merits of their claims that the N.C.G.A. is in violation of N.C. Const. art. I § 2, 3, 35; art XIII § 4, first, because to the extent that the usurper N.C.G.A. has any limited power to engage in acts, that power certainly does not extend to the authority to propose amendments to the Constitution; and, second, because the N.C.G.A. violated the requirement in N.C. Const. art XIII § 4 to submit the proposed constitutional amendments to the public because it used vague and misleading language to describe the constitutional amendment proposals on the ballot and because the amendments themselves are vague and incomplete and thus also acted in violation of N.C. Const. art. I § 2, 3, 35. Placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot will result in irreparable injury to Plaintiffs.

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12. Plaintiffs respectfully request that, in view of the circumstances of this case, the Court exercise its discretion to require no security or only a nominal security and set the matter for expedited hearing as permitted under Local Rule 14.4.

WHEREFORE, Plaintiffs respectfully request that:

1. The Court enter a Temporary Restraining Order and Preliminary Injunction enjoining the N.C. Bipartisan State Board of Elections and Ethics Enforcement from taking any

steps to place the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November, 2018 ballot.

2. The Court order the restraining order and injunction to remain in effect for the duration of this litigation.

3. The Court order that no security be required.

4. The Court set this matter for expedited hearing for August 7, 2018.

5. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 6th day of August, 2018.

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Attorney for Plaintiff NC NAACP

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18 CVS 9806

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

Plaintiffs,

v.

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

Defendants.

ORDER

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FILED

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This matter, before the Court upon the Plaintiffs' Complaint, requires transfer for hearing to a three-judge panel of the Wake County Superior Court as herein indicated.

Under the provisions of N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), because Plaintiffs have asserted facial challenges to the constitutionality of acts of the North Carolina General Assembly, the challenges must be heard and determined by a three-judge panel of the Wake County Superior Court.

It is therefore ORDERED that the portions of this action challenging such acts are transferred to a three-judge panel of the Wake County Superior Court, to be appointed by the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4).

This the 7th day of August, 2018.

The Honorable Paul C. Ridgeway
Senior Resident Superior Court Judge
Tenth Judicial District

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Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
CHIEF JUSTICE MARK D. MARTIN

BOX 1841
ZIP CODE 27602
TEL. (919) 831-5712

Office of the
Chief Justice of the Supreme Court
of North Carolina

ORDER

To the Honorables **Forrest Donald Bridges, Thomas H. Lock, and Jeffery K. Carpenter,** Judges of the Superior Court of North Carolina, Greetings:

As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina, specifically N.C.G.S. § 1-267.1, I hereby assign you to serve on a Three-Judge Panel in Wake County to hear constitutional challenges raised in the case of North Carolina State Conference of the National Association for the Advancement of Colored People, and Clean Air Carolina v. Tim Moore, in his official capacity, Philip Berger, in his official capacity, The North Carolina Bipartisan State Board of Elections and Ethics Enforcement, Andrew Penry, in his official capacity, Joshua Malcolm, in his official capacity, Ken Raymond, in his official capacity, Stella Anderson, in her official capacity, Damon Circosta, in his official capacity, Stacy Eggers IV, in his official capacity, Jay Hemphill, in his official capacity, Valerie Johnson, in her official capacity, John Lewis, in his official capacity, 18 CVS 9806 (Wake County).

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In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, August 7, 2018.

Mark Martin

Mark Martin, Chief Justice
Supreme Court of North Carolina

STATE OF NORTH CAROLINA

WAKE COUNTY

FILED
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WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No.18 CVS 9806

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

Plaintiffs,

v.

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

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Comp]

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INTRODUCTION

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

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

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

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Central to the supreme law of North Carolina is the understanding that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35. To ensure this mandate "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

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

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

The judicial branch must again step in to promptly assess the validity of a sweeping ballot initiative set to be presented to the voters in November 2018. These four proposed amendments should be declared void and the Bipartisan State Board of Elections and Ethics Enforcement should be enjoined from including these amendments on the ballot.

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NATURE OF THE ACTION

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

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

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

4) Plaintiffs seek a declaration that the N.C.G.A's passage of Senate Bills 814 and 75 and House Bills 913 and 1092, which each place a constitutional amendment on the ballot, violated the North Carolina Constitution, and ask that these laws be declared void *ab initio*.

5) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 3 and Art XIII § 4 by legislating to place vague and misleading language to describe the constitutional amendments contained in Senate Bills 814 and 75 and House Bills 913 and 1092 on the 2018 general election ballots.

6) Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. Art I § 2, 3, 35 and Art XIII § 4 when it passed vague and incomplete proposed constitutional amendments in Senate Bill 814 and House Bills 913 and 1092.

7) Plaintiffs seek immediate and permanent injunctive relief preventing the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November, 2018, ballot.

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THE PARTIES

Plaintiffs

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

9) Plaintiff NC NAACP has standing to challenge the proposed amendments on behalf of its members in that its members would otherwise have standing to sue in their own

rights; the interests it seeks to protect are germane to its purpose, which includes the core mission of protecting and expanding voting rights; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

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

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

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

would again require voters to present photo identification in order to access the ballot, which would have an irreparable impact on the right to vote of African Americans in North Carolina.

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

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14) Plaintiff NC NAACP has standing to challenge the judicial vacancies amendment on behalf of its members and on its own behalf because it frequently litigates in court in order to vindicate the civil and political rights of its members. It thus has a strong and abiding interest in a fair and independent judiciary and will be harmed by the proposed constitutional amendment that would further politicize the judiciary and erode separation of powers principles that are themselves a form of protection for the rights of racial minorities. The proposed constitutional amendment also harms the NC NAACP because giving the General Assembly sole control over filling judicial vacancies endangers the NC NAACP's efforts to advocate for diversity in the North Carolina judiciary. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be

difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election. Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

15) Plaintiff NC NAACP has standing to challenge the boards and commissions amendment on behalf of its members and on its own behalf because the NC NAACP and its members regularly advocate before, participate in, and monitor activities governed by state boards and commissions, including the Bipartisan State Board of Ethics and Elections Enforcement. The NC NAACP and its members will be harmed by the boards and commissions amendment because giving the General Assembly unprecedented broad power to control these boards and commissions will make the boards and commissions less independent and less able to conduct their mission in an impartial way. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot language are vague and misleading. In addition, the proposed amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election. Members of the NC NAACP who are qualified, registered voters in North Carolina will also be confused about the vague, misleading, and incomplete ballot language.

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

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17) Plaintiff Clean Air Carolina is a not-for-profit corporation founded in 2002. Clean Air Carolina has approximately 3,400 members in North Carolina. Its mission is to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices. Its primary goal is to improve health by achieving the cleanest air possible. Clean Air Carolina is based in Charlotte, North Carolina and works on regional and statewide issues.

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

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19) Clean Air Carolina regularly participates in and monitors activities governed by state boards and commissions, including the N.C. Environmental Management Commission, the Board of Transportation, and the N.C. Turnpike Athority Board of Directors. Clean Air Carolina staff and members have spoken at public hearings hosted by these boards and commissions in support of the Clean Power Plan and in opposition to harmful road projects. Clean Air Carolina will be harmed by the Boards and Commissions amendment because it will grant control over state boards and commissions to the N.C.G.A., which will make the boards and commissions less independent and less able to conduct their missions in an impartial, scientific way. Clean Air

Carolina is further harmed because the amendment includes vague language and will require subsequent implementing legislation. As such, it is difficult for Clean Air Carolina to inform its members about the likely impact of the proposed amendment. Moreover, because the caption for the proposed amendment does not even mention the impact of the amendment on boards and commissions other than the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, Clean Air Carolina will be forced to divert staff time and resources away from other important organizational functions and reallocate that time and those resources to efforts to educate and inform its members about the likely impact of this amendment prior to the November 2018 elections.

20) Plaintiff Clean Air Carolina also regularly participates in litigation as a plaintiff to protect clean air in North Carolina and to mitigate against climate change. Clean Air Carolina has participated as a plaintiff in several lawsuits challenging the construction of new highways in North Carolina. Clean Air Carolina has also participated in the North Carolina Court of Appeals as *amicus curiae* in a case challenging Carolinas Cement Company's harmful air permit in the N.C. Court of Appeals in 2015. Further, Clean Air Carolina has recently participated as a petitioner in the N.C. Office of Administrative Hearings challenging a coal fired power plant air permit due to excessive bromide limits, and has submitted comments to the N.C. Department of Air Quality on numerous air permits in order to exhaust its administrative remedies in case legal action in N.C. state courts becomes necessary. Clean Air Carolina will be harmed by the provision shifting control of appointments to judicial vacancies from the Governor to the N.C.G.A. because it is concerned that this is likely to make the judiciary less independent and more political. Clean Air Carolina will also be harmed because it is concerned that the N.C.G.A. will use this provision to pass legislation that is not subject to gubernatorial veto. Moreover,

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Clean Air Carolina is further harmed because the amendment includes vague language and will require subsequent implementing legislation. As such, it is difficult for Clean Air Carolina to inform its members about the likely impact of the proposed amendment.

21) Defendant Philip Berger is the President *Pro Tempore* of the North Carolina Senate. Defendant Berger led the North Carolina Senate in its passage of Senate Bills 814 and 75 and House Bills 913 and 1092. Defendant Berger is sued in his official capacity.

22) Defendant Tim Moore is the Speaker of the North Carolina House of Representatives. Defendant Moore led the North Carolina House of Representatives in its passage of Senate Bills 814 and 75 and House Bills 913 and 1092. Defendant Moore is sued in his official capacity.

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

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

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

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

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

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

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

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

31) Defendant Valerie Johnson is a member of the Bipartisan State Board of Elections and Ethics Enforcement, which administers the election laws of the State of North Carolina and

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

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

JURISDICTION AND VENUE

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

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

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

FACTS AND ALLEGATIONS

The Unconstitutional N.C.G.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Limitation on actions of usurpers

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

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

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

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

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

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

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

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

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Constitutional Amendments

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

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

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

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

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

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

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

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

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

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

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

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

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(implementing the constitutional amendment creating rights for victims of crimes). Unlike in the instant case, this implementing legislation did not add substantively to the amendment that had been placed before the voters. Moreover, the legitimacy of the proposals was never adjudicated by any court.

The Challenged 2018 Proposed Amendments

The State Boards and Commissions Amendment

66) On June 28, 2018, the N.C.G.A. passed House Bill 913, "An Act to Amend the Constitution of North Carolina to establish a bi-partisan board of ethics and elections enforcement and to clarify board appointments."

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67) The Constitutional Amendment proposed in House Bill 913 will appear on the ballot misleadingly as "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

68) The Amendment states that it would amend N.C. Const. Art. I, § 6; Art. II, § 2; Art. III, § 5; Art. IV, § 11, and purports to establish a "Bipartisan State Board of Ethics and Elections Enforcement" to administer ethics and elections laws. The Board shall consist of eight members and no more than four members may be registered with the same political affiliation. All appointments shall be made by the N.C.G.A. The Amendment also alters the N.C. Constitution such that the N.C.G.A. will control the "powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law."

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

70) House Bill 913 passed the N.C. State House of Representatives by a vote of 77-44 and passed the N.C. State Senate by a vote of 32-14. In the House, the total number of aye votes was just five votes over the three-fifths contingent required for a constitutional amendment and in the Senate just two votes over the required margin.

The Judicial Vacancies Amendment

71) On June 28, 2018, the N.C.G.A. passed Senate Bill 814, "An Act to Amend the Constitution of North Carolina to provide for nonpartisan judicial merit commissions for the nomination and recommendation of nominees when filling vacancies in the office of justice or judge of the general court of justice and to make other conforming changes to the constitution."

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72) The Constitutional Amendment proposed in Senate Bill 814 will appear on the ballot misleadingly as "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

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

Amendment also exempts any bill from the check of a gubernatorial veto so long as that bill also contains a legislative nomination or appointment to fill a judicial vacancy.

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

75) Senate Bill 814 passed the N.C. State House of Representatives by a vote of 73-45 and passed the N.C. State Senate by a vote of 34-13. In the House the number of aye votes was just one vote over three fifths contingent required for a constitutional amendment, and in the Senate the number was just four votes over the required margin.

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The Voter ID Amendment

76) On June 28, 2018, the N.C.G.A. passed House Bill 1092, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person."

77) The Constitutional Amendment proposed in House Bill 1092 will appear on the ballot misleadingly as "Constitutional amendment to require voters to provide photo identification before voting in person."

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

79) House Bill 1092 passed the N.C. House of Representatives by a vote of 74–43 and the N.C. Senate by a vote of 33-12. In the House the number of aye votes was just two votes over three fifths contingent required for a constitutional amendment, and in the Senate the number was just three votes over.

The Income Tax Amendment

80) On June 28, 2018, the N.C.G.A. passed Senate Bill 75, "An Act to Amend the North Carolina Constitution to provide that the maximum tax rate on incomes cannot exceed seven percent."

81) The Constitutional Amendment proposed in Senate Bill 75 will appear on the ballot misleadingly as "Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%)."

82) The Amendment would alter N.C. Const. Art. V,, § 2. It would lower the maximum state income tax rate from 10 to 7%.

83) Senate Bill 75 passed the N.C. Senate by a vote of 34–13 and passed the N.C. House of Representatives by a vote of 73–45. In the Senate the number of aye votes was just four votes over three fifths contingent required for a constitutional amendment, and in the House the number was just one vote over.

Ballot Language for the 2018 Proposed Constitutional Amendments

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

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

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

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

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

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

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

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

91) On information and belief, the State Board of Elections and Ethics may

finalize the November 2018 ballot as soon as August 8.

CLAIMS FOR RELIEF

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

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

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

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95) Plaintiffs seek a declaratory judgment that because the N.C.G.A. was without authority to pass Senate Bills 814 and 75 and House Bills 913 and 1092 they are void *ab initio*.

a. Senate Bill 814 was passed by the illegal act of usurpers and is void *ab initio*.

b. Senate Bill 75 was passed by the illegal act of usurpers and is void *ab initio*.

c. House Bill 913 was passed by the illegal act of usurpers and is void *ab initio*.

d. House Bill 1092 was passed by the illegal act of usurpers and is void *ab initio*.

96) There exists a present controversy between Plaintiffs on the one hand, and Defendants, on the other hand, as to the constitutionality of the actions of the N.C.G.A. with respect to the passage of Senate Bills 814 and 75 and House Bills 913 and 1092.

97) Plaintiffs seek a declaratory judgment that the N.C.G.A. is in violation of N.C. Const. Art I, § 2, 3, 35 and Art. XIII, § 4 because its proposed language for presenting the constitutional amendments contained in Senate Bills 814 and 75 and House Bills 913 and 1092 on the 2018 ballot does not satisfy the constitutional requirement that the legislature submit the proposal of the amendment to the qualified voters of North Carolina in that the amendments and the ballot descriptions are vague and misleading.

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a. House Bill 913 will be presented on the ballot with vague and misleading language focused on the establishment of a "bipartisan Board of Ethics and Elections." This language fails to acknowledge the significant shift in authority over all boards and commissions from the executive to the legislative branch. The amendment states in a vague way that the amendment will "clarify the appointment authority of the Legislative and the Judicial Branches," when in fact it will radically alter the appointment authority of the Legislative branch. Moreover, the amendment will extend to powers far beyond the "appointment authority" of the N.C.G.A. but will cause the N.C.G.A. to control the "powers," "duties," "responsibility," and "terms of office" of all boards and commissions. By failing even to note this fundamental change to the NC Constitution on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina. Further, the question is misleading in that it states that it will clarify the appointment authority of the "Judicial Branch[]" when in fact the amendment has nothing to do with the judicial branch. In addition, the question is misleading because it states that it will "establish a bipartisan Board of Ethics and Elections"

when in fact that board has already been established. *See* N.C. Gen. Stat. § 163A-1. Finally, the question seeks to further confuse voters by stating that it will "prohibit legislators from serving on boards and commissions exercising executive or judicial authority." The question fails to acknowledge that legislators are already prohibited from serving on such boards.

b. Senate Bill 814 will be presented on the ballot with vague and misleading language that highlights a "nonpartisan merit-based system" for the filling of judicial vacancies and fails to acknowledge that the Amendment will move power for the filling of judicial vacancies from the Governor to the N.C.G.A. Senate Bill 814 gives the N.C.G.A.—a partisan, political body—the power to nominate the ultimate candidates for judicial vacancies to the Governor. This amendment would also grant the General Assembly with the new power that would exempt all legislation from the check of a gubernatorial veto as long as the bill contained a judicial nominee or appointment. The omission of these sweeping new grants of power to the N.C.G.A. from the ballot language is misleading. By failing even to note this fundamental change to the NC Constitution in the caption, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

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c. House Bill 1092 will be presented on the ballot with vague and misleading language stating that the NC Constitution will be amended "to require photo identification to vote in person" without in anyway specifying what this voter ID will consist of, and without acknowledging that the Amendment requires the N.C.G.A. to pass additional legislation determining what photographic identification will be sufficient, and without specifying that there may be exemptions and what they will be. Under this broad language, the N.C.G.A. could later require something as difficult to obtain as a United States Government issued passport before allowing a person to vote, effectively disenfranchising the overwhelming majority of the

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

d. Senate Bill 75 will appear on the ballot as "Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%)." The phrase "reduce the income tax rate in North Carolina," suggests that the tax rate currently applicable in the state will be reduced and thus misleads the voters. In fact, the current income tax rate is 5.5% ,well below 7%. The amendment itself will actually lower the maximum allowable income tax cap—which is currently set at 10%. By presenting this misleading question on the ballot, the N.C.G.A. has failed in its duty to submit the amendment proposal to the qualified voters of North Carolina.

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98) Plaintiffs seek a declaratory judgment from this Court stating the N.C.G.A. is in violation of N.C. Const. Art I, § 2, 3, 35 and Art. XIII, § 4 because the vague and incomplete language in Senate Bill 814 and House Bills 913 and 1092 does not satisfy the requirement to submit the proposal of the constitutional amendment to the qualified voters of North Carolina.

a. House Bill 1092 includes the vague, unfinished new requirement that "voters offering to vote in person shall present photographic identification before voting. *The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.*" (emphasis added). This provision expressly requires additional legislation to determine what photographic identification will consist of and

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

b. House Bill 913 includes vague language that "[t]he legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." This sweeping language is vague, unclear, and will require significant additional legislation to implement. The full scope and force of this amendment is not fully before the people.

c. Senate Bill 814 includes vague and incomplete language that "in a manner *prescribed by law*, nominations [for judicial vacancies] shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, *as prescribed by law*. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as *prescribed by law*." The law referenced in the bill has not yet been written and will require the passage of additional legislation. The full scope and force of this amendment is not fully before the people.

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PRAYER FOR RELIEF

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

1. Adjudge and declare that following the U.S. Supreme Court mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status;

2. Adjudge and declare that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to Art I § 2, 3, 35 and Art XIII § 4;

3. Adjudge and declare that the vague and intentionally misleading questions that will appear on the ballot for the amendment set forth in Senate Bill 75, 814, and House Bills 913 and 1092 violates the N.C.G.A.'s responsibility to place the proposal of the constitutional amendments before the people;

4. Adjudge and declare that the vague and incomplete language in Senate Bill 814, and House Bills 913 and 1092, which will require further implementing legislation, does not amount to a proposal to be presented to the public pursuant to Art. XIII, § 4;

5. Adjudge and declare that Senate Bills 814 and 75 and House Bills 913 and 1092 are void *ab initio*;

6. Issue preliminary and permanent injunctive relief prohibiting the Bipartisan State Board of Elections and Ethics Enforcement from placing any of the constitutional amendment proposed by Senate Bills 814 and 75 and House Bills 913 and 1092 onto the 2018 ballot;

7. Award costs to Plaintiffs pursuant to N.C. Gen. Stat. § 1-263;

8. Award reasonable attorneys' fees to Plaintiffs as permitted by law; and

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9. Grant any other and further relief that the Court deems to be just and proper.

Respectfully submitted, this the 9th day of August, 2018.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

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

Plaintiffs,

vs.

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

Defendants.

FILED
2018 AUG 13 A 10:24
WAKE CO., C.S.C.
BY

DEFENDANTS BERGER AND MOORE'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

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COME NOW Defendants 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 (collectively,

"Defendants"), and hereby move this Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1),[1] to dismiss Plaintiffs' claims for relief as set forth in Paragraphs 97 and 98 of the Amended Complaint due to lack of subject matter jurisdiction. Plaintiffs lack standing to bring the claims for relief set forth in Paragraphs 97 and 98 of the Amended Complaint, and said claims also constitute non-justiciable political questions.

Respectfully submitted this the 13th day of August, 2018.

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ATTORNEYS FOR DEFENDANTS 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

[1] Defendants do not waive the right to assert additional defenses and grounds for dismissal by the filing of this motion.

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2018 AUG 21 P 5:19

18-CVS-9805

ROY A. COOPER, III, in his official Capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON INJUNCTIVE RELIEF

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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

18-CVS-9806

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

Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity; PHILIP E. BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; JAMES A. ("ANDY") PENRY, in his official capacity; JOSHUA MALCOM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in her official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; and, JOHN LEWIS, in his official capacity, Defendants.	**ORDER ON INJUNCTIVE RELIEF**

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THESE MATTERS CAME ON TO BE HEARD before the undersigned three-judge panel on August 15, 2018. All adverse parties to these actions received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, briefs and arguments of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following findings of fact and conclusions of law:

1. As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

STANDING OF PLAINTIFFS

2. Defendants 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, (hereinafter "Legislative Defendants") do not contend, nor do we otherwise conclude, that Plaintiff Governor Roy A. Cooper (hereinafter "Governor Cooper") lacks standing to bring a separation of powers challenge in this case. Indeed, "if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim." *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018).

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3. Legislative Defendants have, however, filed a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure asserting that Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (hereinafter "NC NAACP") and Plaintiff Clean Air Carolina (hereinafter "CAC") lack standing to bring a challenge to the Session Laws at issue in this matter.

4. NC NAACP contends that it has standing to bring its claims on behalf of its members, citing the core mission of the organization to advance and improve the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination. (Plaintiffs' Amended Complaint ¶ 8). In order for NC NAACP to have standing to challenge the proposed amendments on behalf of its individual members, each individual member must have standing to sue in his or her own right. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159 (2001)

(citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). This showing has not been made here. NC NAACP has not demonstrated that each individual member is a registered voter in North Carolina, or that each individual member is a member of a minority group.

5. NC NAACP does, however, have standing to bring its claims on behalf of the organization itself. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). The claims asserted by NC NAACP with respect to the language of the proposed amendments directly impact the ability of the organization to educate its members of the likely effect of the proposed legislation, which is pertinent to the organization's purpose. The undersigned three-judge panel therefore concludes that NC NAACP does have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

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6. CAC has not asserted the right to bring its claim on behalf of its members. In order to have standing on its own behalf, CAC must demonstrate that the legally protected injury at stake is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The requirement of particularity has not been met here. The general challenge of informing its members of the effects of the proposed legislation is not an injury particularized to CAC, whose stated mission is

"to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices." (Plaintiffs' Amended Complaint ¶ 17).

7. The specific injuries put forth by CAC concern the merit of the proposed amendments, rather than the manner in which the amendments will appear on the ballot. The courts are not postured to consider questions which involve "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Cooper v. Berger*, 370 N.C. 393, 809 S.E. 2d 98 (2018) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). Article XIII, Section 4 of the North Carolina Constitution expressly grants the North Carolina General Assembly (hereinafter "General Assembly") the authority to initiate the proposal of a constitutional amendment. This authority exists notwithstanding the position of the courts on the wisdom or public policy implications of the proposal. The undersigned three-judge panel therefore concludes that CAC does not have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is granted as to CAC.

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POLITICAL QUESTION DOCTRINE

8. Governor Cooper, cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "State Board of Elections"), and NC NAACP have asserted facial challenges to the constitutionality of acts of the General Assembly. The portions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Legislative Defendants have filed a motion under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure in both cases, asserting that the undersigned three-judge panel lacks subject matter jurisdiction on the theory that the claims constitute non-justiciable political questions. A majority of the three-judge panel has concluded that Governor Cooper's facial constitutional challenges, as expressed, present a justiciable issue as distinguished from "a non-justiciable political question arising from nothing more than a policy dispute," *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110, and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is denied as to Governor Cooper.

10. Likewise, a majority of this panel has concluded that NC NAACP's facial constitutional challenges, as expressed, present a justiciable issue, as distinguished from a non-justiciable political question and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

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NC NAACP "USURPER LEGISLATIVE BODY" CLAIM

11. NC NAACP has also asserted a claim that the General Assembly, as presently constituted, is a "usurper" legislative body whose actions are invalid. While this panel acknowledges the determinations made in this regard in *Covington v. North Carolina*, 270 F. Supp. 3d 881 (2017), we conclude that this claim by NC NAACP in this action constitutes a collateral attack on acts of the General Assembly and, as a result, is not within the jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1. We therefore decline to consider NC NAACP's claim that the General Assembly, as presently constituted, is a "usurper" legislative body.

12. Furthermore, even if NC NAACP's claim on this point was within this three-judge panel's jurisdiction, the undersigned do not at this stage accept the argument that the General Assembly is a "usurper" legislative body. And even if assuming NC NAACP is correct,

a conclusion by the undersigned three-judge panel that the General Assembly is a "usurper" legislative body would result only in causing chaos and confusion in government; in considering the equities, such a result must be avoided. See *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). For the reasons stated above, we decline to invalidate any acts of this General Assembly as a "usurper" legislative body.

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE[1]

13. On June 28, 2018, the General Assembly enacted Session Law 2018-117 (hereinafter the "Board Appointments Proposed Amendment"), Session Law 2018-118 (hereinafter the "Judicial Vacancies Proposed Amendment"), Session Law 2018-119 (hereinafter the "Maximum Tax Rate Proposed Amendment") and Session Law 2018-128 (hereinafter "Photo Identification for Voting Proposed Amendment"). Each Session Law contains the text of proposed amendments to the North Carolina Constitution. *See* 2018 N.C. Sess. Laws 117 §§ 1-4; 2018 N.C. Sess. Laws 118 §§ 1-5; 2018 N.C. Sess. Laws 119 § 1; 2018 N.C. Sess. Laws 128 §§ 1-2. Each Session Law also contains the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 117 § 5; 2018 N.C. Sess. Laws 118 § 6; 2018 N.C. Sess. Laws 119 § 2; 2018 N.C. Sess. Laws 128 § 3.

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14. Governor Cooper and State Board of Elections have asserted claims that the sections containing the ballot language in S.L. 2018-117 and S.L. 2018-118 are facially in violation of the North Carolina Constitution. NC NAACP also has asserted claims that these

[1] In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~strikethrough~~ text in the proposed amendments represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

same sections containing the ballot language, as well as in S.L. 2018-119 and S.L. 2018-128, are facially in violation of the North Carolina Constitution.

15. Section 1 of S.L. 2018-117 proposes to amend Article VI of the North Carolina Constitution by adding a new section to read:

> **Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**
> (1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.
> (2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:
>
> (a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.
>
> (b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader.

2018 N.C. Sess. Laws 117, § 1.

16. Section 2 of S.L. 2018-117 proposes to amend Article I, Section 6 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 6. Separation of powers.**
> (1) The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.
> (2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission.

2018 N.C. Sess. Laws 117, § 2.

17. Section 3 of S.L. 2018-117 proposes to amend Article II, Section 20 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 20. Powers of the General Assembly.**
> (1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.
> (2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers.

2018 N.C. Sess. Laws 117, § 3.

18. Section 4 of S.L. 2018-117 proposes to amend Article III, Section 5 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 5. Duties of Governor.**
> ...
> (4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.
> ...
> (8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative, or judicial appointment and shall be faithfully executed as enacted.
> ....

2018 N.C. Sess. Laws 117, § 4.

19. Section 5 of S.L. 2018-117 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-4 of S.L. 2018-117 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-117 to read as follows:

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[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority.

2018 N.C. Sess. Laws 117, § 5.

20. Section 1 of S.L. 2018-118 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect,

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in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law.

2018 N.C. Sess. Laws 118, § 1.

21. Section 2 of S.L. 2018-118 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

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(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 118, § 2.

22. Section 3 of S.L. 2018-118 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 118, § 3.

23. Section 4 of S.L. 2018-118 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:[2]

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 118, § 4.

[2] For the sake of clarity, this section is not displayed as ~~struck through~~ despite the proposed amendment fully removing the language from the North Carolina Constitution.

24. Section 5 of S.L. 2018-118 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

> (5) Other exceptions. Every bill:
> (a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;
> (b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;
> (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter;~~or~~
> (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter;~~matter;
> (e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or
> (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,
> shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 118, § 5.

25. Section 6 of S.L. 2018-118 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-118 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-118 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

2018 N.C. Sess. Laws 118, § 6.

26. Section 1 of S.L. 2018-119 proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 2. State and local taxation.

...

(6) Income tax. The rate of tax on incomes shall not in any case exceed ~~ten~~ seven percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

....

2018 N.C. Sess. Laws 119, § 1.

27. Section 2 of S.L. 2018-119 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-119 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-119 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).

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2018 N.C. Sess. Laws 119, § 2.

28. Section 1 of S.L. 2018-128 proposes to amend Article VI, Section 2 of the North Carolina Constitution by adding a new subsection to read:

(4) Photo identification for voting in person. Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 1.

29. Section 2 of S.L. 2018-128 proposes to amend Article VI, Section 3 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 3. ~~Registration.~~Registration; Voting in Person.

(1) Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

(2) Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 2.

30. Section 3 of S.L. 2018-128 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-2 of S.L. 2018-128 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-128 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to require voters to provide photo identification before voting in person.

2018 N.C. Sess. Laws 128, § 3.

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Guiding Legal Principles

31. The analytical framework for reviewing a facial constitutional challenge is well-established. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016). Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when "it [is] plainly and clearly the case." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. Of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E. 2d 887, 889 (1991). "This is a rule of law which binds us in deciding this case." *Id.*

32. In considering these facial constitutional challenges, this panel understands and applies the following principles of law to the analysis: We presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt. The constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the

constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

33. Article I of the North Carolina Constitution declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Article I also declares that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." N.C. Const. art. I, § 3. Article I also preserves the right to due process of law, declaring that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Finally, Article I declares that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

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34. Article XIII of the North Carolina Constitution provides that "[t]he people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way." N.C. Const. art. XIII, § 2. The two permitted methods to amend the Constitution require an amendment to be proposed by a "Convention of the People of this State," or by the General Assembly. N.C. Const. art. XIII, §§ 3, 4.

35. An amendment to the Constitution "may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the

proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly." N.C. Const. art. XIII, § 4.

36. These provisions of the North Carolina Constitution make plain and clear a number of points: first, the power to govern in this State, including the power to write, revise, or abolish the Constitution is vested in the **people** of this State, founded upon the **will of the people**; second, the General Assembly may initiate a proposal for one or more amendments to the Constitution, by adopting an act submitting the proposal to the voters. The General Assembly has exclusive authority to determine the time and manner in which the proposal is submitted to the voters, but ultimately the issue must be submitted to the voters for ratification or rejection, whereupon the will of the people, expressed through their votes, will determine whether or not the proposal becomes law.

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37. Finally, while not a Constitutional provision, or standard for interpretation of the North Carolina Constitution, the State Board of Elections is required by our State's general statutes to "ensure that official ballots throughout the State have all the following characteristics: (1) Are readily understandable by voters. (2) Present all candidates and questions in a fair and nondiscriminatory manner." N.C.G.S. § 163A-1108. We note that while the State Board of Elections has asserted a cross-claim based upon these statutory requirements in N.C.G.S. § 163A-1108, such a claim is not within the jurisdiction of a three-judge panel constituted under N.C.G.S. § 1-267.1. The undersigned three-judge panel has therefore not considered this statutorily-based claim.

Issue Presented

38. The ultimate question presented to this three-judge panel by the facial constitutional challenges requires this panel to decide whether or not the language contained in the ballot questions adopted by the General Assembly satisfies the constitutional mandate that proposed amendments be submitted to the voters for ratification or rejection.

39. In addressing this issue, the Legislative Defendants have argued that the issue might better be decided after the November election rather than before and that the issue might even become moot, depending upon the outcome of the vote. We are compelled, however, in conducting our analysis, to do so through a neutral lens and to do so without considering the wisdom or lack thereof of the proposed amendments. The question is not whether the voters *should* vote for or against the measures, but whether the voters in this State have had a fair opportunity to declare themselves upon this question. *Hill,* 176 N.C. at 584, 97 S.E. at 503.

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Applicable Legal Standards When Examining Ballot Language

40. We are aware that our courts have not previously addressed a situation exactly like the one presented here. As a result, this panel must rely on principals of constitutional interpretation established by our courts, including the text of the Constitution and accepted canons of construction, as well as the historical jurisprudence of our courts on similar issues. Other courts provide persuasive, but not authoritative guidance in analysis of challenged ballot proposal language.

41. Since 1776 our constitutions have recognized that all political power resides in the people. N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § 1. Presently, our constitutional jurisprudence provides that "the General Assembly is checked and balanced by its structure and *its accountability to the people*." *State ex rel. McCrory*

v. Berger, 368 N.C. 533, 653, 781 S.E.2d 248, 261 (2016) (Newby, J. concurring in part and dissenting in part) (emphasis added). In order to amend the constitution, the amendment must "be submitted to the qualified voters of this State," N.C. Const. art. II, § 22. Notably, "the object of all elections is to ascertain, fairly and truthfully, the will of the people," *Wilmington, O. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895).

42. Legislative Defendants submit that this panel should apply a substantive due process standard in determining whether or not the language of the Ballot Questions satisfies constitutional requirements, *i.e.*, "When the ballot language purports to identify the proposed amendment by briefly summarizing the text, then substantive due process is satisfied and the election is not patently and fundamentally unfair so long as the summary does not so plainly mislead voters about the text of the amendment that they do not know what they are voting for or against, that is, they do not know which amendment is before them." *Sprague v. Cortes*, 223 F.Supp. 3d 248, 295 (M.D. Pa. 2016). A majority of this panel concludes that this standard, though relevant, is not determinative to an issue decided by state courts under our state constitution.

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43. A majority of this panel instead concludes that the requirements of our state constitution are more appropriately gleaned from the decisions of state courts, and in particular our own Supreme Court. In *Hill v. Lenoir County*, 176 NC 572, 97 SE 498 (1918), our Supreme Court said: "In elections of this character great particularity should be required in the notice in order that the voters may be *fully informed of the question they are called upon to decide*. There is high authority for the principle that even where there is no direction as to the form in which the question is submitted to the voters, it is essential that it be stated in such manner to enable

them *intelligently to express their opinion upon it*[.]" *Id.* at 578, 97 S.E. at 500-01 (emphasis added).

44. Drawing from the requirements expressed in *Hill*, as well as analyses from other jurisdictions, a majority of this panel find that relevant considerations include 1) whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon, 2) whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment, and 3) whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment. See *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 208, 34 A.3d 1164, 1191 (2012) (noting that ballot questions need to be determined on what would put an "average voter" on notice of "the purpose and effect of the amendment"); *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992) (establishing that the courts must "presume that the voters are informed" but the legislature should still "strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each . . . amendment"); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 668 (Fl. 2010) (noting that lawmakers, as well as the voting public, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be"); *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St. 3d 257, 978 N.E.2d 119 (2012) (finding that material omissions in the ballot language of a proposed amendment to the Ohio constitution deprived the voters of the right to know what they were voting upon).[3]

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[3] One of the cases cited by Legislative Defendants was *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974), which included the following language:

"Though we hold that the ballot language is not a proper subject for more than this minimal judicial review we must note that to the extent to which the legislature describes proposed amendments in any way other than through the most objective and brief of terms...it exposes itself to the temptation—yielded to here, we think—to interject its own value judgments concerning the amendments into the ballot language and thus to propagandize the voters in the very voting booth in denigration of the integrity of the ballot." 232 Ga. at 556, 208 S.E.2d at 100.

45. In the present case, as in *Hill,* there can be no doubt that our General Assembly has the exclusive power and authority to initiate a proposal for a constitutional amendment and to specify the time and manner in which voters of the State are presented with the proposal. But the proposal must be "**submitted**" to the voters. According to the Merriam-Webster Dictionary, "submit" means "to present or propose to another for consideration" or "to submit oneself to the authority or will of another." In order for the proposals to be submitted to the will of the people, the ballot language must comply with the constitutional requirements as expressed in *Hill.*

46. With those legal principles in mind, we now turn our attention to the particular issues presented by the present litigation.

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INJUNCTIVE RELIEF

47. This panel is presented with two lawsuits, one filed by Governor Cooper, along with a cross-claim filed by the State Board of Elections, and a second filed by NC NAACP. Although the Governor contests only two of the proposed measures, it is helpful to our analysis to discuss all four of the measures in each lawsuit, as we find the application of the aforementioned legal principles to be substantially different with respect to each of the four proposed amendments and, specifically, the proposed Ballot Question pertaining to each.

48. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is

necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

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The Tax Rate Proposed Amendment

49. S.L. 2018-119, as shown above, proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section. NC NAACP contend that the proposed Ballot Language in S.L. 2018-119 is misleading, suggesting that the currently-applicable tax rate will be reduced. We conclude otherwise. The language of the Ballot Question may not be perfect, but it is virtually identical to the wording of the amendment itself, referring clearly to "a maximum allowable rate." NC NAACP would prefer that the Ballot Question use the term "maximum tax rate cap," but the word "cap" appears nowhere in the amendment itself and we do not consider it necessary for the Ballot Question to explain all potential legal ramifications of the amendment, but only its purpose and effect.

The Photo Identification for Voting Proposed Amendment

50. S.L. 2018-128, as shown above, proposes an amendment requiring photo identification in order to vote in person. The proposed amendment would amend Article VI, Sections 2 and 3 of the North Carolina Constitution by adding identical language to each section, the pertinent provisions of which read as follows: "Voters offering to vote in person shall

present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." The language of the Ballot Question adopted by the General Assembly reads: "Constitutional Amendment to require voters to provide photo identification before voting in person."

51. NC NAACP contends that the ballot language is misleading by failing to define "photo identification" and failing to make clear that implementing legislation will be needed to establish which photo IDs would suffice. Again, we conclude otherwise. There can be little doubt whether or not the voters will be able to identify the issue on which they will be voting with respect to this proposed amendment. This panel takes judicial notice that Voter ID laws currently comprise a significant political issue in this country, on which an overwhelming majority of voters have strong feelings, one way or the other. The General Assembly has the exclusive authority to determine the details of any implementing legislation and it would be entirely inappropriate for this panel to speculate as to whether or not that legislation will comport with state and federal constitutional requirements. We have already noted that there is a presumption of constitutional validity afforded to every act of the General Assembly, and we must afford that same presumption to acts that may be enacted in the future.

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52. In making the aforementioned observations, we are mindful of the fact that there has been ongoing litigation in the federal courts concerning similar legislation previously passed by this General Assembly. Indeed, NC NAACP has devoted much of its argument on this amendment to the reasons for their philosophical opposition to the Voter ID amendment itself. These arguments go well beyond the function of this three-judge panel in these cases. In determining facial constitutional challenges, this court should not concern itself with the wisdom

of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-128, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

The Board Appointments Proposed Amendment

53. S.L. 2018-117, as shown above, proposes to amend Article VI of the North Carolina Constitution by adding a new section, amend Article I, Section 6 by rewriting the section, amend Article II, Section 20 by rewriting the section, and amend Article III, Section 5 by rewriting the section. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

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54. Governor Cooper, the State Board of Elections, and the NC NAACP complain that this ballot language is misleading in saying that the amendment "establishes" a bipartisan Board of Ethics and Elections, and will "prohibit" legislators from serving on boards and commissions exercising executive or judicial authority. While the language may not be the most accurate or articulate description of the effect of these provisions, we do not find that the language in these two parts of the Ballot Question is so misleading, standing alone, so as to violate constitutional requirements; although each of these provisions already exists under law, neither has previously been addressed specifically by our state constitution.

55. In addition to the two points described above, the Ballot Question says only: "to clarify the appointment authority of the Legislative and the Judicial Branches[.]" The Merriam-Webster Dictionary defines "clarify" as "to make understandable" or "to free of confusion." The concern here with this particular language in the Ballot Question is whether it describes the remaining portions of the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that this portion of the ballot language in the Board Appointments Proposed Amendment does not sufficiently inform the voters and is not stated in such manner as to enable them intelligently to express their opinion upon it. In particular:

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a. The proposed amendment substantially realigns appointment authority as allocated previously between the Legislative and Executive branches, but makes no mention of how the Amendment affects the Executive branch.

b. The ballot language mentions clarification of appointment authority of the Judicial Branch, but the Amendment makes no mention of any changes to appointment authority of the Judiciary.

c. The Amendment makes significant changes of the duties of the Governor in exercising his powers pursuant to the Separation of Powers clause, but no mention is made of that change in the ballot language.

The Judicial Vacancies Proposed Amendment

56. S.L. 2018-118, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section, amend Article IV, Section 10 by rewriting the section, amend Article IV, Section 18 by adding a new subsection, repeal in its entirety Article

IV, Section 19, and amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

57. Governor Cooper, the State Board of Elections, and NC NAACP complain that this ballot language is misleading in saying that the amendment implements a "nonpartisan merit-based system" that instead of relying on "political influence" relies on "professional qualifications." A majority of this panel agrees and finds that the language in this Ballot Question misleads and does not sufficiently inform the voters. The concern here with the Ballot Question, again, is whether it describes the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that the ballot language in S.L. 2018-118 does not sufficiently inform the voters and is not stated in such manner to enable them intelligently to express their opinion upon it. In particular:

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a. The ballot language indicates that the nonpartisan merit-based system will rely on "professional qualifications" rather than "political influence." The Amendment requires only that the commission screen and valuate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified, as prescribed by law. Aside from partisan affiliation, there is no limitation or control on political influence; the nominees are categorized only as qualified or not qualified rather than being rated or ranked in any order of qualification and

the General Assembly is not required to consider any criteria other than choosing nominees found "qualified" by the Commission. (As pointed out by Plaintiffs, current qualifications by law for holding judicial office in this state only require that the person be 21 years of age or more, hold a law license and, in some instances, be a resident of the District.)

b. The Amendment makes substantial changes to appointment powers of the Governor in filling judicial vacancies, but no mention is made of the Governor in the ballot language.

c. Perhaps most significantly, the ballot language makes no mention of the provisions of Section 5 of S.L. 2018-118, which adds two new provisions to Article II, Section 22, Subsection (5) of the North Carolina Constitution

   i. Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice in accordance with Section 23 of Article IV of this Constitution, or

   ii. Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution.

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Each of these provisions omits the words "and containing no other matter" included in each of the other enumerated exceptions in Section 5, meaning that proposed Bills coupled with judicial appointments would be immune to a veto by the Governor. The ballot language makes no mention of any effect of the Amendment upon veto powers of the Governor.

58. We therefore find that there is a substantial likelihood that Governor Cooper, the State Board of Elections, and NC NAACP will prevail on the merits of these actions with respect to the constitutionality of the Ballot Question language pertaining to the Board Appointments Proposed Amendment and the Judicial Vacancies Proposed Amendment. We do not find that there is a substantial likelihood that NC NAACP will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Tax Rate Proposed Amendment and the Photo Identification for Voting Proposed Amendment.

59. We find that irreparable harm will result to Governor Cooper, the State Board of Elections, and NC NAACP if the Ballot Language included in S.L. 2018-117 and S.L. 2018-118 is used in placing these respective proposed constitutional amendments on a ballot, in that we conclude beyond a reasonable doubt that such language does not meet the requirements under the North Carolina Constitution for submission of the issues to the will of the people by providing sufficient notice so that the voters may be fully informed of the question they are called upon to decide and in a manner to enable them intelligently to express their opinion upon it.

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60. Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regards to S.L. 2018-117 and S.L. 2018-118. The requested injunctive relief is denied in regards to S.L. 2018-119 and S.L. 2018-128. This court concludes that no security should be required of the Governor, as an officer of the State, but that security in an amount of $1,000 should be required of the NC NAACP pursuant to Rule 65 to secure the payment of costs and damages in the event that it is later determined that this relief has been improvidently granted.

61. This three-judge panel recognizes the significance and the urgency of the questions presented by this litigation. This panel also is mindful of its responsibility not to

disturb an act of the law-making body unless it clearly and beyond a reasonable doubt runs counter to a constitutional limitation or prohibition. For that reason, this Order is being expedited so that (1) the parties may proceed with requests for appellate review, if any, or (2) the General Assembly may act immediately to correct the problems in the language of the Ballot Questions so that these proposed amendments, properly identified and described, may yet appear on the November 2018 general election ballot. This panel likewise does not seek to retain jurisdiction to "supervise" or otherwise be involved in re-drafting of any Ballot Question language. That process rests in the hands of the General Assembly, subject only to constitutional limitations.

62. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

63. The Honorable Jeffrey K. Carpenter dissents from portions of this Order and will file a separate Opinion detailing his positions on each of the issues herein addressed.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Governor Cooper's motion for a preliminary injunction is hereby GRANTED as follows:
    a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.

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b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

2. Cross-claimant State Board of Elections' motion for a preliminary injunction is hereby GRANTED as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

3. Plaintiff NC NAACP's motion for preliminary injunction is hereby GRANTED IN PART AND DENIED IN PART, as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

4. Except as hereinbefore described, all requests for injunctive relief are hereby DENIED.

5. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff Governor Cooper's claims is hereby DENIED.

6. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff NC NAACP's claims is hereby DENIED.

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7. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff CAC's claims is hereby GRANTED.

8. The Motions for realignment of the Defendant Board of Elections is hereby remanded to the Wake County Superior Court for determination.

SO ORDERED, this 21st day of August, 2018.

Forrest D. Bridges, Superior Court Judge

Thomas H. Lock, Superior Court Judge

as a majority of this Three Judge Panel

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CV-009806

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

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

ACCEPTANCE OF SERVICE

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D. Martin Warf, counsel for Defendants 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, hereby certifies that he is authorized to accept service of the Complaint and Summons (18 CVS 9806) issued by counsel for Plaintiff and filed in Wake County Superior Court on August 6, 2018, and that on August 6, 2018, he accepted service of the same on behalf of Defendant Berger and Defendant Moore, in their official capacities, without waiving any defenses except as to the sufficiency of the service thereof.

Respectfully submitted, this the 28th day of August, 2018.

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
on behalf of Defendants Philip E. Berger and
Timothy K. Moore, in their official capacities

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STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No. 18 CVS 9806

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

Plaintiffs,

v.

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

Defendants.

FILED
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WAKE CO., C.S.C.
BY

PLAINTIFFS' UNOPPOSED MOTION TO AMEND COMPLAINT

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Pursuant to North Carolina Rule of Civil Procedure 15, Plaintiffs North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") and Clean Air Carolina hereby move the Court for leave to amend their Complaint in the above captioned action. In support of this Motion, the Plaintiffs show the Court as follows:

1) The Plaintiffs filed their Complaint against Defendants Philip E. Berger and Timothy K. Moore (the "Legislative Defendants") and the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, and James A. ("Andy") Penry, Joshua Malcolm, Ken

Raymond, Stella Anderson, Damon Circosta, Stacy Eggers, Jay Hemphill, Valerie Johnson and John Lewis in their official capacities (together, the "Board Defendants"), on Monday, August 6, 2018.

2) Plaintiffs filed a first Amended Complaint on August 9, 2018.

3) Neither the Board Defendants nor Legislative Defendants have answered the Amended Complaint yet, and Legislative Defendants were granted an extension of time to file their Answer until October 8, 2018 and State Board Defendants were granted an extension of time to file their answer until October 15, 2018

4) On August 21, the Court entered its Order on Injunctive Relief (the "Order"). The Legislative Defendants filed their notice of appeal the next day.

5) On August 27, while the Legislative Defendants' appeal was pending, the legislature convened a Second Extra Session and enacted two new proposals to amend the Constitution.

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6) Although the Plaintiffs seek to amend their Complaint to challenge these new proposals, they are not withdrawing or dismissing their original Complaint.

7) Plaintiffs also seek to amend their Complaint to clarify some of the intervening procedural history that has taken place since the original complaint.

8) Defendants do not oppose Plaintiffs' Motion.

9) Amendments to a complaint "shall be freely given when justice requires." N.C. R. Civ. P. 15(a); *see Pickard v. Pickard,* 176 N.C. App. 193, 195, 625S.E.2d 869, 871 (2006) ("Rule 15(a) contemplates liberal amendments to the pleadings, which should always be allowed unless some material prejudice is demonstrated.").

10) Neither Legislative Defendants nor the Board Defendants have yet answered the Amended Complaint, and Plaintiffs' Second Amended Complaint seeks to bring the same claims already pleaded in their Amended Complaint against two new constitutional amendment proposals that were enacted very recently, so there can be no claim of delay on Plaintiffs' part. Neither the State Board Defendants nor the Legislative Defendants will be prejudiced by this amendment.

11) A copy of the Second Amended Complaint is attached as Exhibit A to this Motion.

WHEREFORE, the Plaintiffs respectfully request leave to amend their Complaint in this matter as set forth in the Second Amended Complaint attached as Exhibit A.

Respectfully submitted this 19th day of September, 2018.

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STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No.18 CVS 9806

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

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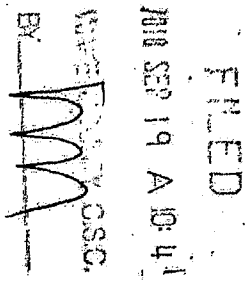
Defendants.



SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[Comp]

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INTRODUCTION

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

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

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

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Central to the supreme law of North Carolina is the understanding that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35. To ensure this mandate "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

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

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

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

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NATURE OF THE ACTION

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

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

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

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

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

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

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

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THE PARTIES

Plaintiffs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JURISDICTION AND VENUE

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

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

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

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FACTS AND ALLEGATIONS

The Unconstitutional N.C.G.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Limitation on actions of usurpers

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

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

> The ascertainment of the popular will or desire of the electors under the mere semblance of an election unauthorized by law is wholly without legal force or effect, because such election has no legal sanction. In settled, well regulated government, the voice of electors must be expressed and ascertained in an orderly way prescribed by law. It is this that gives order, certainty, integrity of character, dignity, direction and authority of government to the expression of the popular will. An election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however honestly expressed. Government cannot take notice of such voice until it shall in some lawful way take on the quality and character of lawful authority. This is essential to the integrity and authority of government.
>
> *Van Amringe*, 108 N.C. at 198, 12 S.E. at 1006.

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

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

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

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

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Constitutional Amendments

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

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

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

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

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

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

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

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

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

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

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

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

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

The Challenged 2018 Proposed Amendments

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

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

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

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

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

The Board of Elections Amendment

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

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

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

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

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

The Judicial Vacancies Amendment

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

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

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

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

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

The Voter ID Amendment

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

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

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

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

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The Tax Cap Amendment

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

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

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

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

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Ballot Language for the 2018 Proposed Constitutional Amendments

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

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

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

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

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

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

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

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

CLAIMS FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRAYER FOR RELIEF

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

1. Adjudge and declare that following the U.S. Supreme Court mandate in *Covington*, the N.C.G.A. ceased to be a legislature with any *de jure* or *de facto* lawful authority and assumed usurper status;

2. Adjudge and declare that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to Art I § 2, 3, 35 and Art XIII § 4;

3. Adjudge and declare that the vague and intentionally misleading questions that will appear on the ballot for the amendment set forth in Session Laws 2018-119, 128, and 132 violate the N.C.G.A.'s responsibility to place the proposal of the constitutional amendments before the people;

4. Adjudge and declare that the vague and incomplete language in Session Laws 2018-128, 132, and 133, which will require further implementing legislation, does not amount to a proposal to be presented to the public pursuant to Art. XIII, § 4;

5. Adjudge and declare that Session Laws 2018-119, 128, 132, and 133 are void *ab initio*;

6. Issue preliminary and permanent injunctive relief prohibiting the Bipartisan State Board of Elections and Ethics Enforcement from including these

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

7. Award costs to Plaintiffs pursuant to N.C. Gen. Stat. § 1-263;

8. Award reasonable attorneys' fees to Plaintiffs as permitted by law; and

9. Grant any other and further relief that the Court deems to be just and proper.

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

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STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No.18 CVS 9806

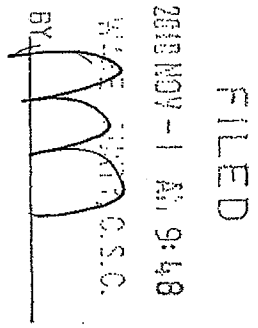
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE and CLEAN AIR CAROLINA,

Plaintiffs,

v.

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

Defendants.



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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGEMENT

Pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure and the Rules of Practice and Procedure for the Superior and District courts, the Plaintiffs in the above-captioned civil action, North Carolina Conference of the National Association for the Advancement of Colored People and Clean Air Carolina move this Court for the entry of an order granting summary judgement in favor of Plaintiffs as to their claim that the General Assembly lacks authority to propose constitutional amendments. Plaintiffs submit that there is no genuine issue

as to any material fact and that Plaintiffs are entitled to a judgement as a matter of law on this claim.

Prior to the hearing on this Motion, Plaintiffs will submit to the Court a brief in Support of their Motion for Partial Summary Judgement as allowed by the North Carolina Rules of Civil Procedure, the Rules of Practice and Procedure for the Superior and District Courts, and the local rules.

WHEREFORE, Plaintiffs respectfully pray that this Court enter summary judgement for Plaintiffs and that the Court grant Plaintiffs such other and further relief as it may deem just and proper.

Respectfully submitted, this the 1st day of November, 2018.

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
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WAKE COUNTY, C.S.C.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CV-009806

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

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

DEFENDANTS BERGER AND MOORE'S ANSWER TO SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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COME NOW Defendants 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 (collectively, the "Defendants"), and hereby respond to the Second Amended Complaint (the "Complaint") of Plaintiffs North Carolina State Conference of the National Association for the Advancement of Colored People ("NAACP") and Clean Air Carolina ("CAC") as follows:

FIRST DEFENSE
(Motion to Dismiss Pursuant to Rule 12(b)(1))

Defendants move this Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), to dismiss Plaintiff's claims for lack of subject matter jurisdiction. Plaintiffs lack standing to bring the claims raised in the Complaint, the facial constitutional challenges present non-justiciable

political questions, and Plaintiffs' claims related to Session Laws 2018-132 and 2018-133 are moot.

SECOND DEFENSE
(Motion to Dismiss Pursuant to Rule 12(b)(6))

Defendants move this Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), to dismiss Plaintiffs' claims for failure to state a claim upon which relief can be granted.

THIRD DEFENSE
(Answer to the Allegations of the Complaint)

The first five paragraphs of the Complaint, which are unnumbered and appear to be intended as introductory paragraphs, are not factual. Rather, what is set forth in the first five unnumbered paragraphs appears to be legal argument to which no response is necessary. However, to the extent a response is necessary, Defendants deny all allegations and assertions of the first five unnumbered paragraphs of the Complaint.

With respect to each of the numbered allegations contained in the Complaint, Defendants respond as follows:

1. Defendants admit that, through this action, Plaintiffs seek declaratory relief and injunctive relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 1 of the Complaint are denied.

2. Defendants admit that, through this action, Plaintiff seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 2 of the Complaint are denied.

3. Defendants admit that, through this action, Plaintiff seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 3 of the Complaint are denied.

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4. Defendants admit that, through this action, Plaintiffs seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 4 of the Complaint are denied.

5. Defendants admit that, through this action, Plaintiffs seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 5 of the Complaint are denied.

6. Defendants admit that, through this action, Plaintiffs seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 6 of the Complaint are denied.

7. Defendants admit that, through this action, Plaintiffs seek declaratory relief but deny that Plaintiffs are entitled to such relief. Any remaining allegations of Paragraph 7 of the Complaint are denied.

8. Upon information and belief, Defendants admit the allegations in Paragraph 8 of the Complaint.

9. Defendants deny the allegations in Paragraph 9 of the Complaint.

10. Defendants deny the allegations in Paragraph 10 of the Complaint.

11. Defendants deny the allegations in Paragraph 11 of the Complaint.

12. It is admitted that Paragraph 12 of the Complaint references the *N.C. State Conf. of N.A.A.C.P. v. McCrory*, 831 F.3d 204, (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conf. of N.A.A.C.P.*, 137 S. Ct. 1399 (2017), which opinion speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 12 inconsistent with the opinion's contents. Except as expressly admitted, the allegations of Paragraph 12 of the Complaint are denied.

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13. Defendants deny the allegations in Paragraph 13 of the Complaint.

14. Defendants deny the allegations in Paragraph 14 of the Complaint.

15. Defendants deny the allegations in Paragraph 15 of the Complaint.

16. Defendants deny the allegations in Paragraph 16 of the Complaint.

17. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the Complaint, and the same are therefore denied.

18. Defendants deny the allegations in Paragraph 18 of the Complaint.

19. Defendants deny the allegations in Paragraph 19 of the Complaint that CAC has standing to challenge what Plaintiffs refer to as the income tax cap amendment and that the reduction in the income tax cap will limit CAC's advocacy efforts. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 19 of the Complaint, and the same are therefore denied.

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20. Defendants deny the allegations in Paragraph 20 of the Complaint that CAC has standing to challenge what Plaintiffs refer to as the judicial vacancies amendment and that CAC or its members will be harmed by the amendment. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 20 of the Complaint, and the same are therefore denied.

21. It is admitted that Defendant Philip Berger is currently and was at the time of the passage of Session Laws 2018-119, 128, 132, and 133 the President Pro Tempore of the North Carolina Senate and that he has been sued in his official capacity. Except as admitted, the allegations of Paragraph 21 of the Complaint are denied.

22. It is admitted that Defendant Tim Moore is currently and was at the time of the passage of Session Laws 2018-119, 128, 132, and 133 the Speaker of the North Carolina House

and that he has been sued in his official capacity. Except as admitted, the allegations of Paragraph 22 of the Complaint are denied.

23. Defendants admit the allegations in Paragraph 23 of the Complaint.

24. Upon information and belief, Defendants admit the allegations in Paragraph 24 of the Complaint.

25. Upon information and belief, Defendants admit the allegations in Paragraph 25 of the Complaint.

26. Upon information and belief, Defendants admit the allegations in Paragraph 26 of the Complaint.

27. Upon information and belief, Defendants admit the allegations in Paragraph 27 of the Complaint.

28. Upon information and belief, Defendants admit the allegations in Paragraph 28 of the Complaint.

29. Upon information and belief, Defendants admit the allegations in Paragraph 29 of the Complaint.

30. Upon information and belief, Defendants admit the allegations in Paragraph 30 of the Complaint.

31. Upon information and belief, Defendants admit the allegations in Paragraph 31 of the Complaint.

32. Upon information and belief, Defendants admit the allegations in Paragraph 32 of the Complaint.

33. That this court has jurisdiction over the parties and the subject matter of this lawsuit is a legal conclusion to which no response is necessary. Defendants do not contest

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personal jurisdiction but do contest subject matter jurisdiction. To the extent any further response is required, the allegations of Paragraph 33 of the Complaint are denied.

34. That this court has jurisdiction over the parties and the subject matter of this lawsuit is a legal conclusion to which no response is necessary. While Defendants do not contest venue in a three-judge superior court panel for Plaintiffs' constitutional challenges, Defendants expressly deny that Plaintiffs' constitutional challenges are as-applied challenges. To the extent any further response is required, the allegations of Paragraph 34 of the Complaint are denied.

35. That Defendants lack sovereign immunity is a legal conclusion to which no response is necessary. To the extent any further response is required, the allegations of Paragraph 35 of the Complaint are denied.

36. Defendants admit the allegations of Paragraph 36 of the Complaint.

37. Defendants admit the allegations of Paragraph 37 of the Complaint.

38. Defendants deny the allegations of Paragraph 38 of the Complaint.

39. Responding to Paragraph 39, Defendants admit that the NAACP and others filed a state court action, *NC NAACP v. North Carolina*, 11 CVS 16940 (Wake Cty. Super. Ct. filed Nov. 4, 2011), that raised state and federal claims challenging legislative districts as unconstitutional, and that said case was consolidated with another pending case, *Dickson v. Rucho*. Defendants deny the validity of the claims in those actions. Any remaining allegations of Paragraph 39 of the Complaint are denied.

40. Responding to Paragraph 40, Defendants admit that Sandra Little Covington and others filed a federal court action, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), challenging certain electoral districts as unconstitutional. Except as admitted, the allegations of Paragraph 40 of the Complaint are denied.

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41. Responding to Paragraph 41, Defendants admit that a three-judge panel in *Covington v. North Carolina* issued its order and that Paragraph 41 references and purports to quote the order. The referenced order speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 41 inconsistent with the order's contents. Except as admitted, the allegations of Paragraph 41 of the Complaint are denied.

42. Responding to Paragraph 42, Defendants admit that the Supreme Court of the United States issued its order and mandate in *North Carolina v. Covington* in June 2017. The order and mandate referenced in Paragraph 42 speak for themselves and are the best evidence of their contents. Defendants deny the allegations of Paragraph 42 inconsistent with the opinion's or mandate's contents. Except as admitted, the allegations of Paragraph 42 of the Complaint are denied.

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43. Defendants admit that Paragraph 43 of the Complaint references an order of the Supreme Court, which order speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 43 inconsistent with the order's contents. Except as admitted, the allegations of Paragraph 43 of the Complaint are denied.

44. Responding to Paragraph 44, Defendants admit that the three judge-panel allowed for the drawing of new legislative maps and that, in August 2017, the North Carolina General Assembly submitted a revised legislative map drafted by, among others, Dr. Thomas Hofeller. Except as admitted, the allegations of Paragraph 44 of the Complaint are denied.

45. Paragraph 45 refers to an order of the three-judge panel and an opinion of the United States Supreme Court, which order and opinion speak for themselves and are the best evidence of their contents. Defendants deny the allegations of Paragraph 45 inconsistent with

the order's and the opinion's contents. Except as admitted, the allegations of Paragraph 45 of the Complaint are denied.

46. Responding to Paragraph 46, Defendants admit that the legislative maps were re-drawn, affecting a number of different legislative districts. Except as admitted, the allegations of Paragraph 46 of the Complaint are denied.

47. Responding to Paragraph 47, Defendants admit that the re-drawn legislative maps were used in the November 2018 elections. Except as admitted, the allegations of Paragraph 47 of the Complaint are denied.

48. Defendants admit the allegations of Paragraph 48 of the Complaint.

49. Defendants deny the allegations of Paragraph 49 and further deny that the Court has jurisdiction to entertain this political question. *See Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 324 (1939).

50. Paragraph 50 of the Complaint is not factual; rather, it appears to be a quote from *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005 (1891), to which no response is necessary. However, to the extent a response is necessary, Defendants deny that the North Carolina Supreme Court's opinion in *Van Amringe v. Taylor* applies in this case, but admit that the opinion is the best evidence of its contents. Defendants deny the allegations of Paragraph 50 inconsistent with the opinion's contents and any remaining allegations of Paragraph 50 of the Complaint.

51. The first two sentences of Paragraph 51 of the Complaint amount to legal conclusions to which no response is required, but, to the extent a response is required, Defendants deny the allegations of the first two sentences of Paragraph 51. Defendants expressly deny the allegations of the last sentence of Paragraph 51 that the General Assembly is

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a usurper legislature and further deny that the Court has jurisdiction to entertain this political question. *See Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 324 (1939). Defendants deny any remaining allegations of Paragraph 51 of the Complaint.

52. The first two sentences of Paragraph 52 of the Complaint amount to legal conclusions to which no response is required, but, to the extent a response is required, Defendants deny the allegations of the first two sentences of Paragraph 52. Defendants further deny any implication that the General Assembly is a usuper legislature and further deny that the Court has jurisdiction to entertain this political question. *See Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 324 (1939). The last sentence of Paragraph 53 of the Complaint purports to quote *Covington v. North Carolina*, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 52 inconsistent with the order's contents. Any remaining allegations of Paragraph 52 of the Complaint are denied.

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53. It is admitted that the United States Supreme Court has issued opinions regarding the State's legislative districts, that a general election was held in North Carolina in November 2018, and that the General Assembly composed of those individuals elected to office in November 2018 will convene in 2019. The remaining allegations of Paragraph 53 of the Complaint are not factual but, rather, are legal argument to which no response is necessary. To the extent a response is necessary, Defendants deny the remaining allegations of Paragraph 53 of the Complaint.

54. Paragraph 54 of the Complaint references and purports to quote N.C. Const. art. I, § 2, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 54 inconsistent with N.C. Const. art. I, § 2's contents. Any remaining allegations of Paragraph 54 of the Complaint are denied.

55. Paragraph 55 of the Complaint references and purports to quote N.C. Const. art. I, § 3, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 55 inconsistent with N.C. Const. art. I, § 3's contents. Any remaining allegations of Paragraph 55 of the Complaint are denied.

56. Paragraph 56 of the Complaint references and purports to quote from N.C. Const. art. I, § 35, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 56 inconsistent with N.C. Const. art. I, § 35's contents. Any remaining allegations of Paragraph 56 of the Complaint are denied.

57. Paragraph 57 of the Complaint references N.C. Const. art. XIII, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 57 inconsistent with N.C. Const. art. XIII's contents. Any remaining allegations of Paragraph 57 of the Complaint are denied.

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58. Paragraph 58 of the Complaint references N.C. Const. art. XIII, § 4, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 58 inconsistent with N.C. Const. art. XIII, § 4's contents. Any remaining allegations of Paragraph 58 of the Complaint are denied.

59. Defendants admit the allegations in Paragraph 59 of the Complaint.

60. Paragraph 60 of the Complaint references N.C. Const. art. XIII, § 4, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 60 inconsistent with N.C. Const. art. XIII, § 4's contents. Any remaining allegations of Paragraph 60 of the Complaint are denied.

61. Defendants admit that what is required to amend the Constitution is different than what is required for the General Assembly to pass legislation. Except as admitted, the allegations of Paragraph 61 of the Complaint are denied.

62. Responding to Paragraph 62, Defendants admit that courts from other jurisdictions have analyzed arguments regarding ballot language under other state constitutions but deny that decisions from foreign jurisdictions apply to or control this case or that the Court may entertain this political question. Defendants admit that Paragraph 62 references decisions from Florida and Minnesota, which decisions speak for themselves and are the best evidence of their contents. Defendants deny the allegations of Paragraph 62 inconsistent with the decisions. Defendants further deny that the referenced decisions apply to or control this case. Any remaining allegations of Paragraph 62 of the Complaint are denied.

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63. The first sentence of Paragraph 63 of the Complaint amounts to a legal conclusion to which no response is required. To the extent any response is required to the first sentence of Paragraph 63, the assertion that information on the ballot was not clear or accurate is denied, and any facts supporting Plaintiffs' conclusion are denied. The second and third sentences of Paragraph 63 of the Complaint refer to and appear to quote N.C. Gen. Stat. § 163A-1108 and *Sykes v. Belk*, 278 N.C. 106, 119, 179 S.E.2d 439, 447 (1971). The referenced statute and decision speak for themselves and are the best evidence of their contents. Defendants deny the allegations of Paragraph 63 inconsistent with the statute's and decision's contents. Any remaining allegations of Paragraph 63 of the Complaint are denied.

64. Upon information and belief, Defendants admit the allegations in Paragraph 64 of the Complaint.

65. Defendants admit that the Constitution adopted in 1971 has been amended and that legislation designed to implement the will of the people in an amendment is often required. Defendants deny the allegation or assertion that the constitutional amendments at issue in this action will involve legislation that will "add substantively" to the amendments. Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 65 of the Complaint, and the same are therefore denied.

66. Defendants note that there are two paragraphs denominated "66" in the Complaint. As to the first Paragraph 66, it is admitted that Session Law 2018-96 was ratified on June 25, 2018; Session Law 2018-110 was ratified on June 27, 2018; Session Laws 2018-117, 2018-118, and 2018-119 were ratified on June 28, 2018; and Session Law 2018-128 was ratified on June 29, 2018. It is further admitted that each of these six session laws proposed an amendment to the North Carolina Constitution to be included on the November 2018 ballot for consideration by North Carolina voters. Except as admitted, the allegations of the first Paragraph 66 of the Complaint are denied.

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67. Defendants note that there are two paragraphs denominated "67" in the Complaint. As to the first Paragraph 67, it is admitted that Plaintiffs originally filed this suit challenging the constitutionality of Session Laws 2018-117, 2018-118, 2018-119, and 2018-128 on August 6, 2018, and that Governor Roy Cooper filed an action, Wake County Superior Court Case No. 18 CVS 9805, challenging Session Laws 2018-117 and 2018-118, on August 6, 2018. Except as admitted, the allegations of the first Paragraph 67 of the Complaint are denied.

68. Defendants note that there are two paragraphs denominated "68" in the Complaint. As to the first Paragraph 68, It is admitted that, by Order entered on August 7, 2018, Judge Paul Ridgeway transferred Plaintiffs' constitutional challenge to a three-judge panel

pursuant to N.C. Gen. Stat. § 1-267.1 and that Chief Justice Mark Martin entered an Order on August 7, 2018, assigning Judges Bridges, Lock, and Carpenter to serve on the three-judge panel. It is further admitted that the three-judge panel entered its Order on Injunctive Relief on August 21, 2018, which Order speaks for itself and is the best evidence of its contents. Defendants deny the allegations of the first Paragraph 68 of the Complaint inconsistent with the Order's contents.

69. Defendants note that there are two paragraphs denominated "69" in the Complaint. As to the first Paragraph 69, it is admitted that Session Laws 2018-132 and 2018-133 were ratified by the General Assembly on August 27, 2018, at the Second Extra Session 2018. Except as admitted, the allegations of the first Paragraph 69 of the Complaint are denied.

66. Defendants note that there are two paragraphs denominated "66" in the Complaint. As to the second Paragraph 66, it is admitted that Session Law 2018-133 was ratified by the General Assembly on August 27, 2018, and that Session Law 2018-133 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of the second Paragraph 66 inconsistent with the Session Law's contents. Except as admitted, the allegations of the second Paragraph 66 are denied.

67. Defendants note that there are two paragraphs denominated "67" in the Complaint. As to the second Paragraph 67, Defendants expressly deny that the ballot language set forth in Session Law 2018-133 (and used on the November 2018 ballot) is misleading. Defendants admit that the second Paragraph 67 purports to quote Session Law 2018-133 and that Session Law 2018-133 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of the second Paragraph 67 inconsistent with the Session Law's contents. Except as admitted, the allegations of the second Paragraph 67 are denied.

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68. Defendants note that there are two paragraphs denominated "68" in the Complaint. As to the second Paragraph 68, Defendants admit that the second Paragraph 68 references and purports to quote Session Law 2018-133, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of the second Paragraph 68 inconsistent with the Session Law's contents. Except as admitted, the allegations of the second Paragraph 68 are denied.

69. Defendants note that there are two paragraphs denominated "69" in the Complaint. As to the second Paragraph 69, the allegations are denied; the constitutional amendment proposed in Session Law 2018-133 was not ratified by the voters at the November 2018 election. Except as admitted, the allegations of the second Paragraph 69 are denied.

70. It is admitted that, under the North Carolina Constitution, an amendment to the Constitution may be initiated by the General Assembly upon three-fifths of all the members of each house adopting an act to submit the proposed amendment to the voters. It is further admitted that Session Law 2018-133 satisfied this requirement. Except as admitted, the allegations of Paragraph 70 of the Complaint are denied.

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71. It is admitted that Session Law 2018-133 was ratified by the General Assembly on August 27, 2018, and that Session Law 2018-133 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 71 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 71 are denied.

72. Defendants expressly deny that the ballot language set forth in Session Law 2018-132 (and used on the November 2018 ballot) is misleading. Defendants admit that Paragraph 72 purports to quote Session Law 2018-132 and that Session Law 2018-132 speaks for itself and is

the best evidence of its contents. Defendants deny the allegations of Paragraph 72 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 72 are denied.

73. Defendants admit that Paragraph 73 references and purports to quote Session Law 2018-132, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 73 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 73 are denied.

74. The allegations of Paragraph 74 of the Complaint are denied; the constitutional amendment proposed in Session Law 2018-132 was not ratified by the voters at the November 2018 election. Except as admitted, the allegations of Paragraph 74 are denied.

75. It is admitted that, under the North Carolina Constitution, an amendment to the Constitution may be initiated by the General Assembly upon three-fifths of all the members of each house adopting an act to submit the proposed amendment to the voters. It is further admitted that Session Law 2018-132 satisfied this requirement. Except as admitted, the allegations of Paragraph 75 of the Complaint are denied.

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76. It is admitted that Session Law 2018-128 was ratified by the General Assembly on June 29, 2018, and that Session Law 2018-128 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 76 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 76 are denied.

77. Defendants expressly deny that the ballot language set forth in Session Law 2018-128 (and used on the November 2018 ballot) is misleading. Defendants admit that Paragraph 77 purports to quote Session Law 2018-128 and that Session Law 2018-128 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 77 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 77 are denied.

78. Defendants admit that Paragraph 78 purports to quote Session Law 2018-128 and that Session Law 2018-128 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 78 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 78 are denied.

79. It is admitted that, under the North Carolina Constitution, an amendment to the Constitution may be initiated by the General Assembly upon three-fifths of all the members of each house adopting an act to submit the proposed amendment to the voters. It is further admitted that Session Law 2018-128 satisfied this requirement. Except as admitted, the allegations of Paragraph 79 of the Complaint are denied.

80. It is admitted that Session Law 2018-119 was ratified by the General Assembly on June 28, 2018, and that Session Law 2018-119 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of the second Paragraph 80 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 80 are denied.

81. Defendants expressly deny that the ballot language set forth in Session Law 2018-119 (and used on the November 2018 ballot) is misleading. Defendants admit that Paragraph 81 purports to quote Session Law 2018-119 and that Session Law 2018-119 speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 81 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 81 are denied.

82. Defendants admit that Paragraph 82 of the Complaint references Session Law 2018-119, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 82 inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 82 are denied.

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83. It is admitted that, under the North Carolina Constitution, an amendment to the Constitution may be initiated by the General Assembly upon three-fifths of all the members of each house adopting an act to submit the proposed amendment to the voters. It is further admitted that Session Law 2018-119 satisfied this requirement. Except as admitted, the allegations of Paragraph 83 of the Complaint are denied.

84. Defendants admit that, pursuant to N.C. Gen. Stat. § 147-54.8(b), the Constitutional Amendments Publication Commission consists of the Secretary of State, the Attorney General, and the Legislative Services Officer. Defendants further admit that Paragraph 84 of the Complaint references Session Law 2016-109, which speaks for itself and is the best evidence of its contents. Defendants deny the allegations of Paragraph 84 of the Complaint inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 84 of the Complaint are denied.

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85. It is admitted that, on or about July 24, 2018, the General Assembly convened for the 2018 First Extra Session. Except as admitted, the allegations of Paragraph 85 of the Complaint are denied.

86. It is admitted that, on or about July 24, 2018, the General Assembly convened for the 2018 First Extra Session with the purpose to debate and pass legislation. It is further admitted that, on July 24, 2018, during this session, Session Law 2018-131, regarding designations on the ballot for constitutional amendments, was ratified by the General Assembly. Except as admitted, the allegations of Paragraph 86 of the Complaint are denied.

87. It is admitted that House Bill 3 (which became Session Law 2018-131) was ratified by the General Assembly on July 24, 2018, and became law over the Governor's veto on August 4, 2018. Session Law 2018-131 speaks for itself and is the best evidence of its contents.

Defendants deny the allegations of Paragraph 87 of the Complaint inconsistent with the Session Law's contents. Except as admitted, the allegations of Paragraph 87 of the Complaint are denied.

88. It is admitted that Governor Cooper vetoed House Bill 3. It is further admitted that Paragraph 88 of the Complaint references and purports to quote Governor Cooper's veto message, which speaks for itself and is the best evidence of its contents. Defendants expressly deny the accuracy of Governor Cooper's veto message, that the proposed amendments that appeared on the November 2018 ballot would weaken the State's system of checks and balances, or that the ballot language was misleading or deceptive. Except as admitted, the allegations of Paragraph 88 of the Complaint are denied.

89. It is admitted that the General Assembly was in session on August 4, 2018. It is further admitted that President Pro Tempore Berger spoke at a press conference on or about August 4, 2018, at which the amendment set forth in Session Law 2018-118 was discussed. It is expressly denied that President Pro Tempore Berger acknowledged any ambiguity in the proposed amendment. Except as admitted, the allegations of Paragraph 89 of the Complaint are denied.

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90. It is admitted that House Bill 3 (which became Session Law 2018-131) was ratified by the General Assembly on July 24, 2018, and became law over the Governor's veto on August 4, 2018. Except as admitted, the allegations of Paragraph 90 of the Complaint are denied.

91. Defendants note that there is no Paragraph 91 in the Complaint.

92. In response to Paragraph 92 of the Complaint, Defendants restate and incorporate by reference the preceding paragraphs of their Answer to the Complaint as if fully set forth herein.

93. Defendants admit that Plaintiffs allege that the General Assembly is an unconstitutional usurper legislature. Defendants deny such allegation. Whether the difference of opinion is sufficient to provide the basis for a declaratory judgment action is a legal question to which no factual response is required. To the extent a response is necessary, Defendants deny the remaining allegations of Paragraph 93 of the Complaint.

94. Defendants admit that Plaintiffs seek a declaratory judgment as to the status of the General Assembly but deny that Plaintiffs are entitled to a judgment in their favor. Defendants expressly deny that the General Assembly is an unconstitutional usurper legislature that lacks authority, has limited authority to act, or cannot take steps to amend the North Carolina Constitution. Except as admitted, the allegations of Paragraph 94 of the Complaint are denied.

95. Defendants admit that Plaintiffs seek a declaratory judgment that the General Assembly was without authority to pass Session Laws 2018-119, 2018-128, 2018-132, and 2018-133 but deny that Plaintiffs are entitled to a judgment in their favor. Defendants expressly deny the allegations in Paragraph 95, subparts a through d, that Session Laws 2018-119, 2018-128, 2018-132, and 2018-133 were passed by illegal acts of usurpers and are void *ab initio*. Except as admitted, the allegations of Paragraph 95 of the Complaint are denied.

96. Defendants admit that Plaintiffs have challenged the constitutionality of the actions of the General Assembly with respect to the passage of Session Laws 2018-119, 2018-128, 2018-132, and 2018-133. Defendants deny that the actions of the General Assembly with respect to the passage of Session Laws 2018-119, 2018-128, 2018-132, and 2018-133 are

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unconstitutional. Whether the difference of opinion is sufficient to provide the basis for a declaratory judgment action is a legal question to which no factual response is required. To the extent a response is necessary, Defendants deny the remaining allegations of Paragraph 96 of the Complaint.

97. Defendants admit that Plaintiffs seek a declaratory judgment that the General Assembly has violated the North Carolina Constitution because the ballot language proposed in Session Laws 2018-119, 2018-128, 2018-132, and 2018-133 does not satisfy constitutional requirements. Defendants deny that the General Assembly has violated the Constitution, deny that the ballot language does not satisfy constitutional requirements, and deny that Plaintiffs are entitled to a judgment in their favor. Except as admitted, the allegations of Paragraph 97 of the Complaint, including subparts a through c, are denied.

98. Defendants admit that Plaintiffs seek a declaratory judgment that the General Assembly has violated the North Carolina Constitution because the ballot language proposed in Session Laws 2018-119, 2018-128, 2018-132, and 2018-133 does not satisfy constitutional requirements. Defendants deny that the General Assembly has violated the Constitution, deny that the ballot language does not satisfy constitutional requirements, and deny that Plaintiffs are entitled to a judgment in their favor. Except as admitted, the allegations of Paragraph 98 of the Complaint, including subparts a through c, are denied.

Defendants deny all allegations of the Complaint not specifically admitted herein. Defendants further deny that Plaintiffs are entitled to the prayers for relief they seek.

FOURTH DEFENSE
(Affirmative)

Without implying that Defendants have the burden to prove such, Plaintiffs' claims and requests for relief are non-justiciable political questions.

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RESERVATION OF RIGHTS

Defendants expressly reserve the right to respond further to Plaintiffs' allegations and to amend their Answer to assert other affirmative defenses.

WHEREFORE, Defendants pray that the Court:

1. Grant Defendants' Motion to Dismiss Plaintiffs' claims for lack of subject matter jurisdiction;
2. Grant Defendants' Motion to Dismiss Plaintiffs' claims for failure to state a claim on which relief can be granted;
3. Deny and dismiss all of Plaintiffs' claims in this action with prejudice;
4. Tax all costs of this action, including any attorneys' fees as allowed by law, against Plaintiffs; and
5. Grant such other and further relief as the Court deems just and proper.

This the 13th day of November, 2018.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9806

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

Plaintiffs,

v.

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

Defendants.

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BY

NOTICE OF VOLUNTARY PARTIAL DISMISSAL (RULE 41(a)(1))

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Plaintiffs the North Carolina NAACP and Clean Air Carolina hereby give notice of dismissal of the following claims in the above captioned case pursuant to N.C. Rule of Civ. Pro 41 (a)(1).

1) Plaintiffs voluntarily dismiss without prejudice all claims against the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, Andrew Penry, in his official capacity, Joshua Malcolm, in his official capacity, Ken Raymond, in his official capacity, Stella Anderson, in her official capacity, Damon Circosta, in his official

capacity, Stacy Eggers IV, in his official capacity, Jay Hemphill, in his official capacity, Valarie Johnson in her official capacity, and John Lewis, in his official capacity.

2) Plaintiffs' claims related to the constitutional amendment proposals passed in session laws 2018-132 (the Judicial Vacancies amendment) and 2018-133 (the State Board of Elections amendment) are now moot. Plaintiffs therefore voluntarily dismiss without prejudice those claims against House Speaker Tim Moore and Senate Pro Tem Phil Berger.

3) Plaintiffs do not dismiss their claims related to constitutional amendment proposals passed in session laws 2018- 128 (the Voter ID amendment) and 2018-119 (the Tax Cap amendment).

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Respectfully submitted, this the 28th day of December 2018.

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STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

18 CVS 9806

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

Plaintiffs,

v.

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

Defendants.

ORDER

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THIS MATTER came to be heard and was heard by the undersigned Judge of Superior Court of Wake County pursuant to Plaintiffs' Motion for Partial Summary Judgment filed by the North Carolina State Conference of the NAACP ("NC NAACP") and Clean Air Carolina ("CAC") and Defendants' Motion to Dismiss filed by Defendants Tim Moore and Philip Berger. Based upon the complaint, the motions, the memoranda in support with affidavits and attachments, the Court makes the following:

FINDINGS OF FACT

1. In 2011, following the decennial census, the General Assembly redrew the legislative districts for both the North Carolina Senate and House of Representatives. These new districts were enacted in July 2011. 2011 N.C. Sess. L. 402 and 2011 N.C. Sess. L. 404.

2. The General Assembly unconstitutionally and impermissibly considered race in drawing the 2011 legislative maps. *See Covington v. North Carolina*, 316 F.R.D. 117, 124, 176 (M.D.N.C. 2016), aff'd, 581 U.S. ---, 137 S.Ct. 2211 (2017) (per curiam).

3. On November 4, 2011, the NC NAACP, joined by three organizations and forty-six individual plaintiffs, filed a state court action, *NC NAACP v. North Carolina*, 11 CVS 1 6940 (Wake Cty. Super. Ct. filed Nov. 4, 2011), that raised state and federal claims challenging the districts as unconstitutional based on race. That case was consolidated for all purposes with *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.), *remanded to* 781 S.E.2d 404 (N.C. 2015); *vacated and remanded*, 198 L. Ed. 2d 252 (U.S. 2017) (mem.), *remanded* 813 S.E.3d 230 (N.C. 2017).

4. On May 19, 2015, plaintiffs Sandra Little Covington and others filed a parallel challenge in federal court alleging that twenty-eight districts, nine Senate districts and nineteen House of Representatives districts were unlawful racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), aff'd, 581 U.S. ---, 137 S.Ct. 2211 (2017) (per curiam).

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

6. On June 5, 2017, the United States Supreme Court summarily affirmed the Lower court's ruling that the twenty-eight challenged districts were the result of an unconstitutional racial gerrymander. *Covington v. North Carolina*, 581 U.S. ——, 137 S.Ct. 2211 (2017) (per curiam).

7. On June 30, 2017, mandate issued as to the U.S. Supreme Court's order affirming the lower court's judgment. *Covington v. North Carolina*, 15-cv-03399-TDS-JEP.

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

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

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

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districts, the three-judge panel adopted remedial districts proposed by a court-appointed special master. *Id.* at 447-58.

11. The U.S. Supreme Court affirmed the districts adopted by the three-judge panel, except for those districts in Wake and Mecklenburg Counties that had not been found to be tainted by racial gerrymanders, but rather were alleged to have been drawn in violation of the state constitutional prohibition against mid-decade redistricting. *North Carolina v. Covington*, 138 S. Ct. 2548 (2018). The remedial maps that were adopted to cure the 2011 unconstitutional racial gerrymander contained 117 redrawn legislative districts, more than two-thirds of the districts in both the House (81 or 68%) and Senate (36 or 72%).

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2018 Constitutional Amendment Proposals

12. In the final two days of the 2018 regular legislative session, the General Assembly passed six bills that would place six constitutional amendments before the voters: Session Laws 2018-96 (Right to Hunt and Fish Amendment), 110 (Victim's Rights amendment), 117 (First Board of Elections Amendment), 118 (First Judicial Vacancies Amendment), 119 (Tax Cap Amendment), and 128 (Voter ID amendment).

13. Session Law 2018-128 (Voter ID amendment) passed the North Carolina House of Representatives by a vote of 74–43 and the North Carolina Senate by a vote of 33-12. In the House, the total number of aye votes was just two votes over three-fifths majority required for a constitutional amendment, and in the Senate the number was just three votes over the required margin.

14. Session Law 2018-119 (Tax Cap amendment) passed the North Carolina Senate by a vote of 34–13 and passed the North Carolina House of Representatives by a vote of 73–45. In the House, the number was just one vote over the three-fifths majority required for a

constitutional amendment, and in the Senate the number was just four votes over the required margin.

15. On August 6, 2018, the NC NAACP and CAC filed suit against the leadership of the North Carolina General Assembly in their official capacities ("Legislative Defendants") and the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and all Board members in their official capacities ("State Board of Elections") challenging four of the amendment proposals: the First Board of Elections Amendment, the First Judicial Vacancies Amendment, the Tax Cap Amendment, and the Voter ID Amendment. Plaintiffs simultaneously moved for preliminary injunctive relief to prevent Defendant State Board of Elections from placing the challenged amendments on the ballot. Compl., Aug. 6, 2018; Mot. for T.R.O. & Prelim. Inj., Aug. 6, 2018.

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16. On August 13, 2018, Legislative Defendants moved to dismiss Plaintiffs' complaint on the basis, among other grounds, that NC NAACP and CAC lacked standing.

17. On August 21, 2018, a three-judge panel of the Wake County Superior Court partially granted Plaintiffs' motion for preliminary injunction and enjoined Defendant State Board of Elections from placing the First Judicial Vacancies and First Boards and Commissions Amendments on the November 2018 ballot, finding that key elements of those ballot questions would either mislead or not sufficiently inform voters about the proposed amendments. Order on Inj. Relief, Aug. 21, 2018. After the preliminary injunction ruling, the General Assembly convened to rewrite these amendments, which they enacted as Session Laws 2018-132 (Second Judicial Vacancies Amendment) and 2018-133 (Second Board of Elections Amendment).

18. In its preliminary injunction ruling, the three-judge panel ruled that it did not have jurisdiction to hear Plaintiffs' claim that an unlawfully constituted General Assembly cannot place constitutional amendments on the ballot.

19. The three-judge panel partially granted Defendants' motion to dismiss, concluding that CAC did not have standing to bring its claims.

20. On October 11, 2018, this Court granted Plaintiffs' motion for leave to amend their Complaint, accepting as filed Plaintiffs' Second Amended Complaint, which was amended to include a challenge to the two new amendments and to add allegations related to CAC's standing.

21. On November 2, 2018, Plaintiffs filed a motion for partial summary judgment only as to their claim that the illegally-constituted General Assembly lacks the authority to propose constitutional amendments.

22. On November 6, 2018, an election was held in North Carolina, and the four constitutional amendments challenged in the Second Amended Complaint were on the ballot.

23. The Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133, did not attain the required majority of votes to pass into law.

24. The Voter ID amendment, proposed in Session Law 2018-128, passed.

25. The Tax Cap amendment, proposed in Session Law 2018-119, passed.

26. The November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 458 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (U.S. 2018).

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27. On December 28, 2018, Plaintiffs voluntarily dismissed their claims against Defendant State Board of Elections. Plaintiffs also voluntarily dismissed as moot their claims related to the Second Judicial Vacancies Amendment, proposed in Session Law 2018-132, and the Second Board of Elections Amendment, proposed in Session Law 2018-133.

28. On January 3, 2019, Legislative Defendants filed a brief with this Court containing both a Motion to Dismiss Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(2), and their opposition to Plaintiffs' Motion for Partial Summary Judgment. Legislative Defendants moved to dismiss on the basis of standing Plaintiff CAC only, raising no challenge as to Plaintiff NC NAACP's standing.

29. On January 15, 2019, the undersigned heard oral argument on Plaintiffs' Motion for Partial Summary Judgment and Legislative Defendants' Motion to Dismiss.

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

31. Members of the NC NAACP, who include African-American and Latino voters in North Carolina, and the NAACP itself are directly harmed by the proposed Voter ID constitutional amendment. Members will be effectively denied the right to vote or otherwise deprived of meaningful access to the political process as a result of the proposed Voter ID

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requirement. The proposed Voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members.

32. The NC NAACP was the lead plaintiff in *NC NAACP v. McCrory*, which successfully challenged racially discriminatory restrictions on voting—including a voter ID requirement—enacted by the N.C.G.A. in 2013. In ruling for plaintiffs, the U.S. Court of Appeals for the Fourth Circuit found that this photo identification provision and other challenged provisions were passed with racially discriminatory intent and unlawfully targeted African-American voters "with almost surgical precision." 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub nom.* 137 S. Ct. 1399 (2017) (striking down provisions in 2013 N.C. Sess. Laws 381). The Voter ID Amendment harms the NC NAACP because it circumvents the NC NAACP's hard-fought legal victory against a racially discriminatory voter ID requirement and requires voters to present photo identification in order to access the ballot, which would have an irreparable impact on the right to vote of African Americans in North Carolina.

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33. The income tax cap constitutional amendment harms the NC NAACP, its members, and the communities it serves, and its ability to advocate for its priority issues. Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt

public schools, eliminated or significantly reduced funding for communities of color, and otherwise undermined economic opportunity for the non-wealthy.

34. Plaintiff CAC is a not-for-profit corporation founded in 2002. CAC has approximately 3,400 members in North Carolina. Its mission is to ensure cleaner air quality for all North Carolinians through education and advocacy and by working with its partners to reduce sources of pollution, including Greenhouse Gases. Its primary goal is to improve health by achieving the cleanest air possible. CAC is based in Charlotte, North Carolina and works on regional and statewide issues.

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

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36. Defendant Philip Berger is the President *Pro Tempore* of the North Carolina Senate. Defendant Berger led the North Carolina Senate in its passage of Session Laws 20 18-119, and 128.

37. Defendant Tim Moore is the Speaker of the North Carolina House of Representatives. Defendant Moore led the North Carolina House of Representatives in its passage of Session Laws 2018-119, and 128.

CONCLUSIONS OF LAW

1. Plaintiff NC NAACP has standing to bring this action and seek declaratory relief.

2. The facts set forth in the Second Amended Complaint, supported by affidavits, are not sufficient to establish the change of circumstances necessary for this Court to overrule the decision of the Three Judge Superior Court panel that has already dismissed the CAC's case for lack of standing.

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3. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law and a question of first impression for North Carolina courts.

4. Whether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is a justiciable issue and not a political question.

5. N.C. Const. art I sec. 3 states that the people of North Carolina "have the *inherent, sole, and exclusive right of regulating the internal government and . . . of altering . . . their Constitution* and form of government whenever it may be necessary to their safety and happiness" *Id.* § 3 (emphasis added). N.C. Const. art XIII mandates that this may be accomplished only when a three-fifths supermajority of both chambers of the General Assembly

vote to submit a constitutional amendment for public ratification, and the public then ratifies the amendment. The requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation. The General Assembly has the authority to submit proposed amendments to the Constitution only insofar as it has been bestowed with popular sovereignty.

6. On June 5, 2017, it was adjudged and declared by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. 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. The three-judge panel in Covington ruled that, under the illegal racial gerrymander, "a large swath of North Carolina citizens...lack a constitutionally adequate voice in the State's legislature...." *Covington v. North Carolina*, 1:15CV399, 2017 WL 44840 (M.D.N.C. Jan. 4, 2017) (order for special elections vacated and remanded, *North Carolina v. Covington*, 137 S. Ct. 1624 (June 5, 2017)).

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7. Curing this widespread and sweeping racial gerrymander required that over two-thirds of the North Carolina House and Senate districts be redrawn. Thus, the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state Constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives.

8. Accordingly, the constitutional amendments placed on the ballot on November 6, 2018 were approved by a General Assembly that did not represent the people of North Carolina. Indeed, "[b]y unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of

the legislature, the districting plans [under which that General Assembly had been elected] interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." 270 F. Supp. 3d at 897. The November 2018 general elections under remedial legislative maps were "needed to return the people of North Carolina to their sovereignty." *Id.*

9. Defendants argue that, even following the *Covington* decision, the General Assembly maintained authority to enact legislation so as to avoid "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). It 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*.

10. An illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution.

11. N.C. Session Laws 2018-119 and 2018-128, and the ensuing constitutional amendments, are therefore void *ab initio*.

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THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiff NC NAACP's motion for partial summary judgment is granted.

2. Defendants' Motion to Dismiss for lack of subject matter jurisdiction is denied.

3. Defendants' Motion to Dismiss as to CAC for lack of standing is allowed.

4. N.C. Session Laws 2018-119 and 2018-128 are void *ab initio*.

5. The amendments to the N.C. Constitution effectuated by N.C. Session Laws 2018-117 and 2018-128 are hereby void.

This the 22nd day of February, 2019.

Honorable G. Bryan Collins, Jr.
Resident Superior Court Judge Presiding

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

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WAKE CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

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

Plaintiffs,

vs.

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

Defendants.

NOTICE OF APPEAL

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Defendants 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 (collectively, "Defendants"), hereby give notice of appeal to the North Carolina Court of Appeals from the Order and Judgment entered by the Honorable G. Bryan Collins, Jr. in the above-captioned cause in the General Court of Justice, Superior Court Division of Wake County, on 22 February 2019.

This the 28th day of February, 2019.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ***Notice of Appeal*** was served upon the persons indicated below via electronic mail and U.S. Mail addressed as follows:

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This the 25th day of February, 2019.

D. Martin Warf

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

FILED
2019 FEB 26 P 12:37
WAKE CO., C.S.C.
BY

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

Plaintiffs,

vs.

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

Defendants.

MOTION TO STAY 22 FEBRUARY 2019 ORDER

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COME NOW Defendants 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 (collectively, the "Defendants"), by and through the undersigned counsel and pursuant to N.C. Gen. Stat. §§ 1-294 and 1A-1, Rule 62 and Appellate Rule 8, and hereby move for entry of an order staying this Court's 22 February 2019 Order while it is on appeal. In support of this motion, Defendants show the Court as follows:

1. On 22 February 2019, this Court held that the North Carolina General Assembly "lost its claim to popular sovereignty" as of 5 June 2017, and because of that, lacked the power to propose constitutional amendments to the people of North Carolina. (22 February 2019 Order, p.11) This Court characterized the issue as "an

unsettled question of state law and a question of first impression for North Carolina courts." (22 February 2019 Order, p.10) Defendants request that this Court stay its 22 February 2019 Order while the matter is appealed.

2. The purpose of staying this Court's order is to preserve the status quo while the order is on appeal. *See, e.g., Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (point of an injunction is to preserve the status quo of the parties during litigation). The status quo of the jurisprudence known to Plaintiffs, Defendants, and the court in *Covington v. North Carolina*, 270 F. Supp. 3d 881, 901 (M.D.N.C. 2017), prior to 22 February 2019 was that no court—trial or appellate, federal or state—had ever held that a state legislature lacked the ability to make laws due to malapportionment or ill-fated districting. Further, the status quo since 6 November 2018 is that over 2 million North Carolina voters approved a constitutional amendment to reduce the state income tax cap (Session Law 2018-119) and just as many approved an amendment to provide for voter identification (Session Law 2018-128). The amendments were certified as required by law.

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3. In considering whether to stay an order and preserve the status quo pending appeal, our appellate courts have adopted a standard similar to that used for preliminary injunctions that preserve the status quo pending trial; courts consider the likelihood of success on appeal and the possibility of irreparable harm or injury without a stay. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981) ("There was some likelihood that plaintiffs would have prevailed on appeal and thus have been irreparably injured. Consequently, we find no abuse of

discretion in the judge's decision to stay the judgment pending appeal."); *N. Iredell Neighbors for Rural Life v. Iredell Cty.*, 196 N.C. App. 68, 79, 674 S.E.2d 436, 443 (2009) ("While no North Carolina court appears to have articulated the standard which a trial court should use when ruling on a Rule 62(c) motion, we hold the two-pronged test articulated by our Supreme Court in *Berry* [discussing the standard for a preliminary injunction] to be applicable.").

4. Defendants submit that there is a likelihood of success on appeal. This Court, like Plaintiffs, looked to the decisions in *Covington, infra,* for guidance. The *Covington* federal district court found that 2011 majority black legislative districts constituted racial gerrymanders but did not prohibit the use of those districts for the 2016 election. *Covington v. North Carolina*, 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The United States Supreme Court affirmed this finding of the district court but vacated the district court's requirement for a special election. *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 2211 (2017); *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 1624, 1626 (2017). By vacating the district court's requirement for a special election, the United States Supreme Court must have acknowledged that the General Assembly would continue to be able to act until the next election.

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5. On remand, the district court denied the request for a special election due to likely confusion. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017). The district court specifically declined to rule on the issue of whether improper redistricting would invalidate laws passed by the North Carolina

General Assembly, and none of the decisions in the *Covington* cases suggest that the North Carolina Legislature could not act.

6. Other courts have held that, under similar circumstances, the legislature can act. At least one North Carolina court has found that a collateral attack on a law based on the validity of the state legislature that passed it to be a political question. *See Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 319 (1939); *see also People v. Clardy*, 165 N.E. 638, 640–41 (Ill. 1929); *Territory v. Tam*, 36 Haw. 32 (1942).

7. Other appellate courts, including the United States Supreme Court on multiple occasions, have explicitly rejected the argument, *see, e.g., Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J., concurring) ("a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act."); *Ryder v. United States*, 15 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 (holding legislative acts performed by legislators elected in accordance with unconstitutional apportionment plan are given de-facto validity); *Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963) ("Nothing in *Baker v. Carr*, 369 U.S. 186, intimates that a legislature elected from districts that are invidiously discriminatory in violation of the Fourteenth Amendment is without power to act."); *Dawson v. Bomar*, 322 F.2d 445, 446 (6th Cir. 1963); *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (holding malapportioned legislature is nonetheless still empowered to act); *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F. 246,

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252 (S.D. Fla. 1918), *State v. Latham & York,* 190 Kan. 411, 426, 375 P.2d 788 (1962), *cert. denied,* 373 U.S. 919 (1963) ("the fact that a legislature has not reapportioned in accordance with the state constitution does not preclude it from making any law or doing any act within the legislative competence.... Any other conclusion would result in the destruction of state government."). Thus, looking beyond *Covington,* it is likely that an appellate court will disagree with this Court's conclusion that the General Assembly lacked the ability to pass laws.[1]

8. Without a stay, the status quo that has existed for some time changes overnight, as the parties (and all of North Carolina) await final appellate action on the issue. The votes in favor of the two amendments (2,094,924 in favor of the income tax amendment and 2,049,121 in favor of the voter identification amendment) are cast aside. And the precedent created by this decision casts doubt on even more laws and sows public confusion. For instance, *Independent Weekly* has already noted that "the logic [of the Court's opinion] would seem to apply to the two others that passed—Marsy's Law and the amendment guaranteeing the right to hunt and fish—should anyone challenge them." https://bit.ly/2IBLHRW. Counsel for Plaintiffs practically conceded as much when questioned on that topic by this Court. (*See* 15 January 2019 Transcript of Oral Argument, p. 44.)

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[1] In fact, the three-judge superior court panel that also reviewed this argument as a part of Plaintiffs' direct attack on the amendments at issue unanimously noted that, if it did have jurisdiction over Plaintiffs' usurper argument, it would reject it. *See* August 21, 2018 Order on Injunctive Relief.

9. Moreover, the Court's rationale is not limited to constitutional amendments. This Court concluded that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution." (22 February 2019 Order, p. 12.) The North Carolina Constitution allows the General Assembly to initiate constitutional amendment "only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." N.C. Const. art. XIII, § 4. A three-fifths majority is also required to override a gubernatorial veto. N.C. Const. art. II, § 22. The General Assembly has overridden numerous gubernatorial vetoes since 5 June 2017 (when the Supreme Court affirmed the finding of racial gerrymandering) including the following:

- Session Law 2017-57 (enacting the present state budget);
- Session Law 2018-146 (establishing the current State Board of Elections, which, as of 21 February 2019, has ordered a new election in the 9th congressional district); and
- Session Law 2018-2 (establishing the State Board of Elections and Ethics Enforcement, which certified all other races and referenda in the November 2018 election).

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The Court's order opens up these laws (and others[2]) to similar arguments of impropriety and collateral attacks, and creates confusion that could lead to increased (and unnecessary) litigation over laws, judicial decisions, and regulatory appointments.

10. The practical realities of this Court's decision are not just limited to the past. The Court's order noted that "[t]he November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander." (22 February 2019 Order, p. 12.) Plaintiffs had similarly described the 2018 election as "the first opportunity that voters have had since before 2011 to choose representatives based on legislative maps that have not been found to be the product of an unconstitutional racial gerrymander." (Plaintiffs' Brief at 7.) However, the NAACP and other plaintiffs continue to challenge North Carolina's legislative districts for mid-decade redistricting and as political gerrymanders. In *NAACP v. Lewis*, Wake County Superior Court Case No. 18 CVS 2322, a three-judge panel found that the redrawing of four Wake County districts was not necessary to comply with federal law and violated the State Constitution's prohibition on mid-decade redistricting. The three-judge panel's 2 November 2018 order, issued just four days before the 2018 general election, allowed the General Assembly "a period of time to remedy the defects in the Wake County House Districts," requiring new districts for use in the 2020 general election.

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[2] Indeed, because the challenged districts were drawn in 2011, the rationale of the Court's order calls into question all acts of the General Assembly after legislators enacted pursuant to the challenged districts were seated in January of 2013.

11. Similarly, in *Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), the federal district court's holding that the state's redistricting plan constituted partisan gerrymandering is currently on appeal, and a suit was filed in November 2018 alleging that maps drawn in 2017 violate the North Carolina Constitution due to partisan gerrymandering, *see Common Cause v. Lewis*, Wake County Superior Court Case No. 18 CVS 14001.

12. Given the final mandate that four Wake County districts are defective and the challenges to other districts, the rationale set forth in this Court's 22 February 2019 Order could open the door for challenges to legislation passed by the current General Assembly.

13. Confusion regarding whether a law of the General Assembly is valid; constant questions regarding the far-reaching implications of this Court's order; and, the likely increase in legal challenges are each irreparable harms to the people of North Carolina that cannot be recouped and are each instantly tempered by staying the 22 February 2019 Order through appeal. Finality of a constitutional question under North Carolina law comes from our appellate courts. Staying this Court's 22 February 2019 Order allows our appellate courts to weigh this Court's order under the same status quo this Court and the people of North Carolina enjoyed as recently as last week.

WHEREFORE, Defendants respectfully pray that this Court grant Defendants' Motion to Stay this Court's 22 February 2019 Order while on appeal and until further order of this Court or an appellate court.

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This the 26th day of February, 2019.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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2019 FEB 28 PM 1:16
WAKE COUNTY, C.S.C.
BY

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18-CVS-9806
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, v. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendants.	**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY**

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Plaintiff the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") files this response in opposition to the Motion for Stay filed by Defendants Tim Moore and Philip Berger, (collectively "Defendants"). For the reasons set out below this Court should deny Defendants' Motion.

Defendants Fail to Meet the Standard for a Temporary Stay

A temporary stay is an "extraordinary measure." *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Here, Defendants fail to articulate—much less meet—the high burden required to prevail on a motion filed under North Carolina Rule of Civil Procedure 62(c) or Rule of Appellate Procedure 8(a).

Defendants acknowledge that the standard for a Rule 62(c) motion is the same two-pronged approach used for a preliminary injunction. Def. Motion for Stay at ¶ 3. *See N. Iredell Neighbors for Rural Life v. Iredell Co.*, 196 N.C. App. 68, 78-79, 674 S.E.2d 436, 443 (2009). A motion will be granted only if the movant "is able to show *likelihood* of success on the merits . . .

and if a [movant] is likely to sustain irreparable loss unless the injunction is issued." *Id.* (emphasis in original) (internal citations omitted). Defendants meet neither prong of the standard.

Defendants are not Likely to Succeed on the Merits

Defendants make no showing they are likely to succeed on the merits. Nor can they. After briefing by all parties and oral arguments, this Court granted Plaintiff's Motion for Partial Summary Judgment and denied Defendants' Motion to Dismiss Plaintiff's claims. (February 22, 2019 Order).

The Court's Order is based squarely on the North Carolina Constitution, which makes the fundamental principle of popular sovereignty its cornerstone. Our Constitution is clear that, when it comes to amending that foundational document, it is the *people* of North Carolina that "have the *inherent, sole and exclusive right* of regulating the internal government and . . . of altering . . . their Constitution." N.C. Const. art. I, § 2. To guard this fundamental principle, our Constitution thus maintains strict parameters for how it may be amended that set constitutional amendments apart from any other legislative act: the state's duly elected officials must draft, debate, and vote *by a three-fifths majority* to place an amendment proposal on the ballot for ratification by the people. *Id.* art. XIII § 4. Those duly elected officials are also responsible for drafting the language used to present the amendments to the people.

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Here, however, as the *Covington* court reasoned, Defendants' sweeping unconstitutional racial gerrymander, one of the "largest . . . ever encountered by a federal court," "interfered with the very mechanism by which the people confer their sovereignty on the General Assembly." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884, 897 (M.D.N.C. 2017). Indeed, the racially discriminatory maps, which unconstitutionally packed African-American voters into

segregated districts, infected nearly 70% of the House and Senate districts, such that almost two-thirds of those districts had to be redrawn to create remedial maps. *Id.* at 892; *Covington v. North Carolina*, 283 F. Supp. 3d 410, 419-20 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018). Given the vast scope of the gerrymander, Defendants could not reach the constitutionally required three-fifths majority without drawing on votes from tainted districts. This Court thus correctly concluded that, whatever authority such an illegally constituted legislature may have to act in order to avoid "chaos and confusion," *see Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963), that authority was superseded here. (February 22, 2019 Order, at ¶ 9). The unconstitutionally-seated supermajority of the General Assembly used its illegally-gained power to amend the state's Constitution without the will of the people. *Id.*

Defendants' arguments to the contrary have already been made and rejected by this Court. Def. Motion for Stay at ¶¶ 5-7. This Court has already rejected Defendants' suggestion that Plaintiff's claims pose a non-justiciable political question. (February 22, 2019 Order, at ¶ 4). This Court was not persuaded by Defendants' reliance on federal cases with different factual circumstances and inapplicable legal standards. *Id.*

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Nor is this Court's ruling, as Defendants suggest, at odds with the *Covington* court's remedial orders, which found North Carolina's legislative districts to be invalid because of a widespread unconstitutional racial gerrymander, but reluctantly permitted a delay before new elections. The *Covington* court wrestled with striking the same balance between the fundamental importance of popular sovereignty and the need for orderly government, as this Court applied in the present case. The *Covington* court noted that while new elections under remedial districts were needed to restore representative democracy to North Carolina, ultimately, there was too much risk that rushed early elections would not succeed in returning sovereignty to the people of

the state. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017). More importantly, the court explicitly left open the question[1] of the extent of the illegally constituted legislature's authority to act in the interim, placing that question squarely in the purview of the state courts. *Id.* at 901.

Because this is a case of first impression, Defendants cannot demonstrate likelihood of success on the merits. This is an open question for our appellate courts and Defendants point to no relevant case law that would suggest the probability of a different result on appeal.

Defendants will Not Suffer Irreparable Harm

Having failed to meet the first prong required for a temporary stay, Defendants do not even allege that they meet the second. Movants for a stay must demonstrate that they will suffer irreparable harm that is "real and immediate," not merely speculative. *See, e.g., DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586, 561 S.E.2d 276, 286 (2002) (internal citations omitted) (denying a preliminary injunction motion because the movant would not suffer a "sufficiently substantial" injury to support the injunction). And Defendants must "set out with particularity facts supporting" a showing of such harm. *United Tel. Co. v. Universal Plastics, Inc.* 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975) (vacating a preliminary injunction granted by the trial court because the movant did not show a "reasonable probability of substantial injury").

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Here, Defendants fail to show that they will suffer irreparable harm. Indeed, the only time the phrase "irreparable harm" is invoked is to make the erroneous argument that the Court's ruling would result in public confusion and the potential for additional legal challenges, which they vaguely say will harm "the people of North Carolina." Def. Motion for Stay at ¶ 13. But Defendants are incorrect that the people of North Carolina will suffer harm absent a stay.

[1] Defendants were thus aware that this question remained an open one and still assumed the risk that they could be checked by a coequal branch of government when they made their rushed changes to the state Constitution just before losing their ill-gotten supermajority.

Moreover, the State and the people, are not the Defendants in this case. Defendants have made no effort to show that they themselves, Tim Moore and Philip Berger, would suffer irreparable harm in their official capacities.

Rather than address the standard required to obtain a stay pending appeal, Defendants instead emphasize the importance of the issues raised by this case. Plaintiff does not disagree that this case raises fundamental questions. Whether an unconstitutionally racially-gerrymandered General Assembly can use its ill-gotten supermajority to initiate changes to the state's Constitution is important. This Court's ruling, however, upheld fundamental principles that underlie our representative democracy and recognized the magnitude of the harms of disenfranchisement visited upon the African-American community and the people of North Carolina. Such a ruling does not constitute irreparable harm.

Rather than allege irreparable harm, let alone set it out "with particularity" and supporting facts, *United Tel. Co.*, 287 N.C. at 236, Defendants list a series of speculative eventualities. Def. Motion for Stay at ¶ 8-13.

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Defendants' speculations fall short. First, this Court's February 22, 2019 Order was narrowly tailored to the two constitutional amendments that are at issue in this case. This Court's finding that voided the legislation that allowed those two amendments to be placed on the ballot noted that such a ruling would not cause "chaos and confusion." (February 22, 2019 Order at ¶ 9). The Order applies only to those two amendments. Defendants' Pandora's Box concern was raised both in briefing and at oral argument, and has already been fully addressed by Plaintiffs and squarely rejected by this Court. *Id.*

Defendants' argument is essentially that they would be harmed because someone *might* challenge *other* legislation following this court's ruling. This open speculation falls short of the

requirement to allege particular, irreparable harm. Just as important, Defendants do not explain how their fears of future legal claims would be lessened by a temporary stay. And they cannot. One has nothing to do with the other. Whether or not a stay is granted has no logical relationship to Defendants' speculative concerns. That Defendants can imagine additional potential legal claims exist does not constitute irreparable harm for purposes of determining whether a stay is appropriate here. Whether additional legal questions may arise in the future is simply not a colorable harm, and Defendants have not identified any law that suggests it is.

Moreover, as Defendants admit, "finality of a constitutional question under North Carolina law comes from our appellate courts." Def. Motion for Stay at ¶ 13. Thus, until the North Carolina Supreme Court has ruled on the issue, any such speculative questions will persist regardless of whether this Court's order is stayed during the appeal.

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Defendants do not discuss the one result they might accomplish with a stay: The state income tax cap would again be lowered to 7% and there would be a constitutional requirement for a photo voter ID. But these two changes would not alleviate any harm to Defendants, irreparable or otherwise. Nor would they restore the status quo. The un-amended Constitution is the status quo. Defendants sought to change this with their illegally created amendments. There is no reason, legal or practical, to give effect to those amendments until the appellate courts have had the opportunity to review this issue. The Constitution should be left unchanged unless and until it can be established that it was legally amended.

Defendants' status quo argument is also directly at odds with the position they took in this same lawsuit in their opposition to Plaintiff's Motion for a Preliminary Injunction, when they argued:

> If the court denies Plaintiffs' request for injunctive relief, the Proposed Amendments will appear on the ballot while this action

> proceeds in due course. Should Plaintiffs prevail on their challenge before the November election, then any votes cast for the challenged amendment simply would not count. And, if this lawsuit is not resolved before the November election and the Proposed Amendments are adopted by North Carolina voters, the Proposed Amendments could be deemed invalid. In either case, if Plaintiffs are correct that their challenge is meritorious—which the Defendants deny—they will suffer no irreparable harm.

Defs.' Mem. in Opp. to Mots. for TRO and Prelim. Inj. (filed Aug. 13, 2018) at p. 19. Defendants cannot now argue that it is essential to issue a stay *because* of the election results, having already told this Court that there would be no harm to Plaintiff if its claims were not heard until after the election.

Plaintiff made every effort to resolve this previously unsettled question of state law before the November 2018 election. Given Defendants' position that there could be no harm to Plaintiff if the election went forward with the disputed constitutional amendment questions on the ballot, those same Defendants cannot now use the election as the reason to delay this Court's remedy.

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CONCLUSION

Defendants have failed to meet the high bar necessary to obtain a temporary stay. Defendants are unlikely to succeed on the merits and have made no showing of irreparable harm. In light of the foregoing, this Court should deny Defendants' Motion for Stay.

Respectfully submitted, this the 28th day of February, 2019.

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N.C. Bar No. 41333
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N.C. Bar No. 27992
Southern Environmental Law Center

w/express permission by MMOH

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

FILED
2019 MAR -1 A 10:36
WAKE COUNTY, C.S.C.

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

Plaintiff,

vs.

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

Defendants.

ORDER DENYING MOTION TO STAY

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THIS MATTER came before the undersigned superior court judge during the February 25, 2019 session of Wake County Superior Court upon a Motion to Stay this Court's prior February 22, 2019 Order, filed by Defendants 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 ("Defendants"), and pursuant to N.C. Gen. Stat. §§ 1-294 and 1A-1, Rule 62 and Appellate Rule 8. Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (the "NAACP") has responded. At the agreement of the parties, this matter was considered without oral argument and on the filed papers and record. The Court, having considered the motion, Plaintiff's response, and the authorities cited, hereby denies Defendants' Motion to Stay.

SO ORDERED, this the 1st day of March, 2019.

The Honorable G. Bryan Collins, Jr.

FILED
2019 MAR 4 PM
WAKE COUNTY, C.S.C.
BY

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

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

Plaintiff,

vs.

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

Defendants.

AFFFIDAVIT OF SERVICE ON DEFENDANTS TIM MOORE AND PHILIP BERGER

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Mary Maclean Asbill, being first duly sworn, deposes and says:

1. On August 6, 2018, Plaintiffs filed a Complaint and Civil Summonses directed to Defendants Moore and Berger (and State Board Defendants).

2. On August 6, 2018, the Summonses were issued and the Complaint and Summons were served on Defendant Tim Moore and Defendant Philip Berger by delivering the same in person to Defendants' counsel, D. Martin Warf.

3. D. Martin Warf acknowledged that he was authorized to accept and did accept service of the Complaint and Summons (18 CVS 9806) on behalf of Defendant Moore and Defendant Berger, in their official capacities, without waiving any defenses except as to the sufficiency of service thereof, as evidenced by the Acceptance of Service dated August 28, 2108, attached hereto as Attachment A.

Further the affiant sayeth not.

This the 4th day of March, 2019.

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Attorney for Plaintiff

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ORANGE COUNTY, NORTH CAROLINA

Sworn to and subscribed before me this 4th day of March, 2019.

Lauren Fry, Notary Public
My commission expires:

LAUREN G FRY
NOTARY PUBLIC
ORANGE COUNTY
STATE OF NORTH CAROLINA
MY COMMISSION EXPIRES 03-25-2023

FILED
2019 MAR 29 P 2:04
WAKE COUNTY, C.S.C.
BY

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18-CVS-9806
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; Plaintiff, v. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendants.	**UNOPPOSED MOTION TO CORRECT A CLERICAL ERROR**

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Pursuant to N.C. R. Civ. P. 60(a), Plaintiff the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") moves this Court to correct a clerical error in this Court's February 22, 2019 Order ("the Order") in the above captioned matter. Defendants have relayed to Plaintiff's attorney that they do not oppose this motion.

The Order granted the relief sought by Plaintiff in its Motion for Partial Summary Judgment, rendering the Tax Cap Amendment, N.C. Session Law 2018-119, and the Voter ID amendment, N.C. Session Law 2018-128, void *ab initio*. This Court correctly identifies the Tax Cap Amendment as N.C. Session Law 2018-119 throughout the Order up to and until the final paragraph. That paragraph erroneously identifies the Tax Cap Amendment as N.C. Session Law 2018-117 instead of N.C. Session Law 2018-119, stating "The amendments to the N.C. Constitution effectuated by *N.C. Session Laws 2018-117* and 2018-128 are hereby void." (February 22, 2019 Order, emphasis added).

Courts have both the power and the duty to correct judgments that contain clerical errors or mistakes. *American Trucking Ass'ns, Inc. v. Frisco Transp. Co.*, 358 U.S. 133 (1958). This is specifically recognized in Rule 60(a) of the North Carolina Rules of Civil Procedure, which states, "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders." N.C. Gen. Stat. § 1A-1, Rule 60(a) (2018).

Although the filing of an appeal would, in most cases, divest the court of jurisdiction, Rule 60(a) bestows the court with the authority to correct clerical errors until the appeal is docketed with the court of appeals, which has not yet occurred in this case. N.C. Gen. Stat. § 1A-1, Rule 60(a) (2018).

For these reasons, Plaintiff respectfully requests this Court to grant the motion and correct the final paragraph of the February 22, 2019 Order.

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Respectfully submitted, this the 25th day of March, 2019.

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Attorneys for Plaintiff NC NAACP

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STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 9806

FILED
2019 APR -9 A 11:50
WAKE COUNTY, C.S.C.

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

Plaintiff,

vs.

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

Defendants.

ORDER GRANTING UNOPPOSED MOTION TO CORRECT A CLERICAL ERROR

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THIS MATTER came before the undersigned superior court judge upon a Motion to Correct a Clerical Error in this Court's February 22, 2019 Order, filed by Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (the "NAACP") and unopposed by Defendants 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 ("Defendants"), and pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a). The Court, having considered the motion, hereby grants Plaintiff's Unopposed Motion to Correct a Clerical Error, and substitutes "The amendments to the N.C. Constitution effectuated by N.C. Session Laws 2018-119 and 2018-128 are hereby void" for "The amendments to the N.C. Constitution effectuated by N.C. Session Laws 2018-117 and 2018-128 are hereby void" in the final paragraph of the February 22, 2-2019 Order.

SO ORDERED, this the 9th day of April, 2019.

The Honorable G. Bryan Collins, Jr.

STATEMENT OF RULE 9(d)(2) MATERIALS

In accordance with North Carolina Rules of Appellate Procedure 9(d)(2), three copies of the following materials are being filed contemporaneously herewith as the "Rule 9(d)(2) Materials," consisting of 299 pages and numbered 1 through 299, and are part of the Record on Appeal:

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The Rule 9(d)(s) materials will be referenced as "(R 9 p ___).

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STIPULATIONS AND SETTLEMENT OF RECORD

Counsel for Legislative Defendants and Plaintiff stipulate and agree as follows:

1. Legislative Defendants timely served the Proposed Record on Appeal on 21 March 2019. The certificate showing service of the Proposed Record on Appeal may be omitted from the Record on Appeal. The Proposed Record on Appeal was served in electronic form and by United States Mail.

2. Plaintiff timely served a Response to the Proposed Record on Appeal on 12 April 2019. The parties were able to reach agreement regarding the items to be included in the Record. Pursuant to North Carolina Rule of Appellate Procedure 11(c), the Record on Appeal was deemed settled on 25 April 2019.

3. The exhibits to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Request for an Expedited Hearing are not included in the Record of Appeal as the exhibits are not necessary for an understanding of the issues presented on appeal.

4. The parties stipulate that the following documents constitute the agreed-upon and settled Record on Appeal in this matter to be filed with the Clerk of the North Carolina Court of Appeals:

(a) This printed Record on Appeal, consisting of pages 1 through 228;

(b) Rule 9(d)(2) Supplement, consisting of pages 1 through 299; and

(c) The transcript (to be filed by the Court Reporter in electronic form).

5. All captions, signatures, headings of papers, certificates of service, and documents filed with the Superior Court of Wake County in this matter that are not necessary for an understanding of Legislative Defendants' appeal are omitted from the record, except as required by Rule 9 of the Rules of Appellate Procedure.

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This the 25 day of April, 2019.

For Legislative Defendants Berger and Moore:

D. Martin Warf

For Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People:

Kimberley Hunter

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LEGISLATIVE DEFENDANTS' PROPOSED ISSUES ON APPEAL

Pursuant to North Carolina Rule of Appellate Procedure 10, Legislative Defendants intend to present the following proposed issues on appeal:

1. Did the trial court err in granting Plaintiff's motion for partial summary judgment?

2. Did the trial court err in denying Legislative Defendants' motion to dismiss?

3. Alternatively, did the trial court err in failing to grant partial summary judgment in favor of Defendants under N.C. Gen. Stat. § 1A-1, Rule 56(c).

4. Did the trial court err in voiding N.C. Session Laws 2018-119 and 2018-128?

5. Did the trial court err in voiding the amendments to the N.C. Constitution effectuated by N.C. Session Laws 2018-119 and 2018-128 and the affirmative votes by a majority of North Carolina citizens as to each amendment?

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IDENTIFICATION OF COUNSEL

Counsel for Legislative Defendants 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

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CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel has this day served the foregoing Record on Appeal in the above-captioned action on all parties to this cause by depositing the original and/or copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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This the 26th day of April, 2019.

D. Martin Warf