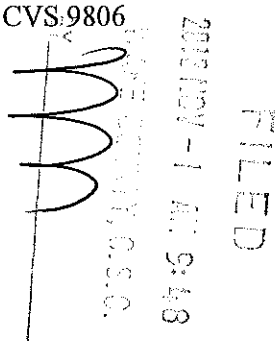
STATE OF NORTH CAROLINA

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.

BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Plaintiffs the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") and Clean Air Carolina move for summary judgment on their claim that the General Assembly lacks the authority to propose constitutional amendments. This motion presents the court with a pure question of law: does a North Carolina state legislature, whose supermajority rests on an unlawful racial gerrymander, and who

therefore, does not represent the people, have the authority to place constitutional amendments on the ballot?

The facts supporting this claim have already been determined by the federal courts or are otherwise not in dispute. The Legislative Defendants engineered one of the most widespread racial gerrymanders of a state legislature ever encountered. These unlawful districts "interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." *Covington v. North Carolina*, 270 F.Supp.3d 881 (M.D.N.C. 2017). The legislature acts "under a cloud of constitutional illegitimacy" because the vast majority of its members have been elected from districts that were affected by the segregation of African-American voters into a small number of districts. *Id.* Under their unconstitutionally drawn districts, Legislative Defendants cannot lay claim to popular sovereignty.

The fundamental principle of popular sovereignty is enshrined in the North Carolina Constitution. It is the people who "have the inherent, sole, and exclusive right of . . . altering . . . their Constitution." N.C. Const. Art. I § 3. Changing the Constitution first requires that a three-fifths supermajority of the General Assembly approve placing a proposed amendment before the voters. Following the United States Supreme Court's affirmation of the the ruling that required a majority of the districts in the General Assembly to be redrawn, the legislature does not represent the people of North Carolina, and thus cannot represent their will, as would be necessary, to propose amendments to the Constitution.

This Court should grant partial summary judgment for the NC NAACP and Clean Air Carolina.

LEGAL STANDARD

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 56(c). This rule eliminates "the necessity of a formal trial where only questions of law are involved." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704,707 (2001). Summary judgment is appropriate in declaratory judgment actions. *Meachan v. Montgomery Cty. Bd. of Ed.*, 47 N.C. App. 271, 275, 267 S.E.2d 349, 351 (1980) (citing *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972)). A plaintiff may move for summary judgment "upon all or any part" of its claims "at any time after the expiration of 30 days from the commencement of the action." N.C. R. Civ. P. 56(a).

Here, the material facts relevant to Plaintiffs' claim that the General Assembly lacked the lawful authority to propose the challenged constitutional amendments are undisputed. As discussed more fully below, the facts relating to the widespread, unconstitutional, racial gerrymander have been fully and finally determined by the federal courts and affirmed by the United States Supreme Court. The votes enacting each of the laws proposing the four challenged amendments are a matter of public record. The Court may thus resolve this claim by answering a simple legal question: may this illegitimate General Assembly, unlawfully constituted by way of racially discriminatory maps, use its ill-gotten power to amend the Constitution?

STATEMENT OF JURISDICTION

This Court has jurisdiction to rule on Plaintiffs' motion for partial summary judgment. North Carolina's Superior Courts have proper jurisdiction over all civil cases where the principal relief sought is injunctive, or which concern claims of constitutional right. N.C. Gen. Stat. § 7A-245. Plaintiffs here seek a declaratory ruling that the illegally constituted General

Assembly does not have authority to place constitutional amendments on the ballot.

After the initial hearing for a Temporary Restraining Order, the Honorable Paul Ridgeway referred Plaintiffs' case to a three-judge panel. See N.C. Gen. Stat. § 1-267.1; N.C. Gen. Stat. § 1-1A, Rule 42(b)(4).

Following the hearing for a preliminary injunction, the three-judge panel declined to consider Plaintiffs' claim that the General Assembly lacks authority to propose constitutional amendments. Order on Inj. Relief, Aug. 21, 2018, at Para. 11. The panel ruled that the claim was not a facial challenge to the constitutionality of an act of the General Assembly, but instead "constitutes a collateral attack" and was "not within the jurisdiction" of the panel. Plaintiffs' claim is thus properly before the Wake County Superior Court.

STATEMENT OF UNDISPUTED FACTS

I) Unconsitutionally-Consitutued General Assembly

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, Exhibits 1 and 2.
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 16940 (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).

5. In August 2016, a three-judge federal district court panel in *Covington v. North Carolina* unanimously ruled for the 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 (docketed June 30, 2017).

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 116 of the 170 state House and Senate districts from the 2011 unconstitutionally racially-gerrymandered maps. *Id.* at 418.

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. *Covington v. North Carolina*, 283 F.Supp.3d 410, 447-58 (M.D.N.C. 2018). For those defective 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 almost two-thirds of the districts in both the House and Senate. *Id.*

12. In November 2018, elections for all General Assembly seats will be held based on the redrawn districts. This will be 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.

II) 2018 Constitutional Amendment Proposals

13. 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). Exhibits 3, 4, 5, 6, 7 and 8.

14. On August 6, 2018, the NC NAACP and Clean Air Carolina filed suit 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) and requesting a preliminary injunction to prevent Defendant North Carolina Bipartisan State Board of Elections and Ethics Enforcement ("State Board of Elections") from placing them on the ballot. Compl., Aug. 6, 2018.

15. 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 and Ethics Enforcement ("State Board of Elections") from placing the first Judicial Vacancies and 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.

16. In response, the General Assembly convened a special session, beginning on August 24, 2018, during which it passed two bills containing new amendment language purporting to address the deficiencies found by the court in the ballot language for the first Boards and Commissions and Judicial Vacancies amendments. The bills passed both chambers and were enacted as Session Laws 2018-132 (the second Judicial Vacancies amendment) and 2018-133 (the second Board of Elections amendment) on August 27, 2018. Exhibits 9 and 10.

17. The State Board of Elections remains enjoined from placing the constitutional amendment proposals authorized by Session Laws 2018-117 and 118 on the November 2018 ballot. Order on Inj. Relief, Aug. 21, 2018.

18. On October 11, 2018, this Court granted Plaintiffs' motion for leave to amend their Complaint, which included bringing the collateral challenge to the General Assembly's authority to propose amendments against the new Judicial Vacancies and Board of Elections amendments (Session Laws 2018-132 and 2018-133). Order on Amend. Comp. Oct. 11, 2018.

The Board of Elections Amendment

19. 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. Exhibit 10.

20. Session Law 2018-133 passed the North Carolina House of Representatives by a vote of 73-33 and passed the North Carolina Senate by a vote of 32-14. In the House, the total number of aye votes was just one vote over the three-fifths majority required for a constitutional amendment and in the Senate just two votes over the required margin. Exhibit 10.

The Judicial Vacancies Amendment

21. 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. Exhibit 9.

22. Session Law 2018-132 passed the North Carolina House of Representatives by a vote of 72-34 and passed the North Carolina 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. Exhibit 9.

The Voter ID Amendment

23. On June 28, 2018, the General Assembly passed Session Law 2018-128, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person." Exhibit 8.

24. Session Law 2018-128 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. Exhibit 8.

The Tax Cap Amendment

25. On June 28, 2018, the General Assembly 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." Exhibit 7.

26. Session Law 2018-119 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. Exhibit 7.

STANDING

Plaintiffs NC NAACP and Clean Air Carolina have standing to bring this action. To satisfy the standing requirement, a plaintiff must demonstrate: "(1) injury in fact, or injury that is concrete and particularized, and actual or imminent; (2) causation between the challenged action of the defendant and the injury; and (3) the likelihood that the injury will be redressed by a favorable decision." *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 886 (2002). North Carolina law does not require a plaintiff to sustain injury as a prerequisite for standing. It "is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate or threatened injury' will suffice for purposes of standing." *Mangum v. Raleigh Bd. Of Adjustment*, 362 N.C. 640, 642-3, 669 S.E.2d 279, 282 (2008)(quoting *River Birch Assocs.v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)). Here, Plaintiffs NC NAACP and Clean Air Carolina satisfy all three elements of standing for each of the amendments they challenge.

To demonstrate standing, the organization itself—or at least one of its members—must be able to show that it has suffered actual or imminent, threatened harm. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990) (citing *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 342 (1977)). Organizations can establish standing in two ways. First, an organization "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."

Id. (quoting *Warth v. Seldin*, 422 U.S. 490 (1974)). Second, an organization may demonstrate standing by seeking relief on behalf of its members. *Id.* The North Carolina courts follow the three factors adopted by the United States Supreme Court to determine whether an organization has standing to sue on behalf of its members:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130 (citing *Hunt*, 432 U.S. at 343). When, as here, an organization is seeking declaratory relief rather than monetary damages, it is not necessary to show that all members of the organization would be harmed to an equal degree. *River Birch*, 326 N.C. at 130, 388 S.E.2d at 555 (citing *Warth,* 422 U.S. at 515).

The facts set forth in the Second Amended Complaint, supported by affidavits, establish standing for NC NAACP and Clean Air Carolina. Second Amended Complaint, pp. 4-10; Affidavit of Rev. Dr. T. Anthony Spearman; Affidavit of June Blotnick. Exhibits 11 and 12. As set forth in more detail in the Second Amended Complaint and supporting affidavits, both Clean Air Carolina and the NC NAACP are threatened with harm from the challenged amendments; there is a causal link between the unlawful actions of the defendants and the threatened and ongoing harm; and their injuries would be redressed by a favorable decision. NC NAACP and Clean Air Carolina have established standing in their own right and associational standing on behalf of their members.

ARGUMENT

I. The racially-gerrymandered General Assembly does not have legal authority to place constitutional amendments on the ballot.

Popular sovereignty is the cornerstone of the North Carolina Constitution. Under the

Constitution, "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. As such, there are strict parameters for how the Constitution may be amended. Specifically, 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), and that every such right "shall be exercised in pursuance of law and consistently with the Constitution of the United States." *Id.* The Constitution also provides that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." *Id.* at § 35.

Any change to the Constitution must thus be made in full compliance with both state and federal law, which first must be proposed by duly elected officials who draft, debate, and place amendments onto the ballot. Only following this process can the voters vote for or against such proposed amendments. *See* N.C. Const. Art. XIII § 4. Here, because the current General Assembly is an illegitimate body, which does not derive its power from the people of North Carolina, it does not have the authority to propose constitutional amendments to the voters of North Carolina.

A. The General Assembly does not represent the people of North Carolina and does not have authority to amend the Constitution.

In 2017, the U.S. Supreme Court affirmed the ruling by a federal district court three-judge panel that Legislative Defendants had engineered and maintained one of the "*largest racial gerrymanders ever encountered by a federal court.*" *Covington I*, 316 F.R.D. at 176, *aff'd* 137 S. Ct. at 2211 (emphasis added). The sweeping unconstitutional racial gerrymander "impact[ed] nearly 70% of the House and Senate districts, touch[ed] over 75% of the state's counties, and encompass[ed] 83% of the State's population—nearly eight million people."

Covington II, 270 F. Supp. 3d at 892. Altogether 28 districts—9 in the Senate and 19 in the House –were found to be unconstitutional racial gerrymanders, and ultimately almost two-thirds of House and Senate districts were redrawn to create new maps. *See Covington I, 316 F.R.D. at 178776; Covington v. North Carolina, 283 F. Supp. 3d 410, 419-420 (M.D.N.C. 2018), aff'd in part, rev'd in part, 138 S. Ct. 2548 (2018).* Because the racial gerrymander unconstitutionally concentrated African-American voters in 28 districts, the surrounding districts were deprived of African-American voters and thus those districts also were unconstitutionally impacted by the gerrymander. *Covington* I, 316 F.R.D. 117.

This unlawful segregation of voters by race "strikes at the heart of the substantive rights and privileges guaranteed by our Constitution." *Covington II*, 270 F. Supp. 3d at 890. As the *Covington* court explained, "unjustifiably drawing districts based on race encourages representatives 'to believe that their primary obligation is to represent only the members of [a particular racial] group, rather than their constituency as a whole'" — a message that is "altogether antithetical to our system of representative democracy" *Id.* at 891 (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

Legislative Defendants' unconstitutional racial gerrymander thus "interfered with the mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." *Id.* at 897. The result is that, since 2012 when legislators were first elected under the unconstitutional maps, North Carolina's "legislators [have been] acting under a cloud of constitutional illegitimacy." *Id.* at 891. This cloud will not be lifted until after the upcoming 2018 election when legislators are elected under new, remedial maps. Until that time, the General Assembly will remain an illegitimate, unconstitutional body, that does not represent the people of North Carolina.

The importance of popular sovereignty has long been enshrined in the North Carolina Constitution, which maintains that "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. As such, where an elected body or officer has obtained office through illegitimate means, that body lacks *de jure* authority to engage in official acts, unless it does so under a presumption by the public that its acts are valid, thus affording that body *de facto* lawful authority. *See Van Amringe v. Taylor,* 108 N.C. 196, 12 S.E. 1005, 1007-08 (1891) (explaining that where an elected official "takes possession without authority," his "acts are utterly void, unless he continues to act so long a time or under such circumstances as to afford presumption of his right to act").

Despite this pragmatic exception for *de facto* officers, North Carolina law maintains that once it becomes known to the public that the office holder has obtained office illegitimately, it is a usurper to the office and its acts are void *ab initio*. *See, e.g., id.* at 1007-08 (finding that a mere intruder or usurper cannot become an officer *de facto* when, without color of authority, he simply assumes to exercise authority as an officer, and the public know the fact, or reasonably ought to know, that he is a usurper, and therefore his acts are absolutely void for all purposes); *State v. Lewis*, 107 N.C. 967, 12 S.E. 457, 458 (1890) (explaining that 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) (noting that a mayor and town council lacked public presumption of authority to office, and were therefore usurpers); *see also State v. Carroll*, 38 Conn. 449, 473-74 (1871) (holding that acts of an officer elected under an unconstitutional law are only valid before the law is found to be invalid).

In an early prelude to the *Covington* court's analysis of the importance of popular sovereignty, the North Carolina Supreme Court succinctly explained the reasoning for this legal

doctrine:

> 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.

To the extent that there is any legal basis for a usurper body to engage in an official act, it is limited to those acts necessary to run the day-to-day affairs of the state, so as not to cause "chaos and confusion." *See Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963) (discussing "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). This limited exception stems from considerations of public policy with the limited purposed of preventing the chaos that can arise when certain government institutions are rendered unable to act. *See Norton v. Shelby Co.*, 118 U.S. 425, 441 (1886) (validity may be given to the acts of a *de facto* officer based on "considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby").

When the U.S. Supreme Court issued its June 2017 mandate in *Covington*, it finally adjudged that the General Assembly is illegally constituted. From that point, the General Assembly ceased to have any *de jure* or *de facto* lawful authority, and by operation of North Carolina law, became a usurper legislature. Beyond such acts necessary to avoid chaos and confusion, this usurper General Assembly, which is the product of "an election unauthorized by law," has no more exapansive power to act. *Van Amringe*, 108 N.C. at 198, The body may not take such permanent and drastic an action as modifying the Constitution.

Amending the state's most foundational document is an extraordinary act and not one necessary to avoid chaos and confusion. Legislative Defendants make no argument that any urgent state need is addressed by these proposed amendments, or that they are necessary for the ongoing orderly conduct of government.

Moreover, the Constitution is explicit that the *people* of North Carolina have the "inherent, sole, and exclusive right . . . of altering . . . their Constitution," N.C. Const. Art. I § 3 (emphasis added), and mandates strict requirements that safeguard the amendment process, setting it apart from other legislative acts. N.C. Const. Art. XIII. Unlike the process for enacting everyday legislation, a constitutional amendment must first be adopted by a three-fifths supermajority of both houses of the General Assembly, and then the amendment proposal must be submitted to the voters of the State for ratification or rejection. *See* N.C. Const. Art. XIII § 4. The requirement for a three-fifths supermajority shows that the drafters of our Constitution intended for amendments to be difficult. Amending our Constitution should require deliberation and near consensus. As a result, the Constitution is a comparatively static document, in contrast to statutes that change with shifting legislative majorities and priorities. Enacting constitutional amendment proposals is a line this illegitimate General Assembly must not be permitted to cross.

The margins by which these four amendment proposals passed that supermajority threshold reveal that these enactments are bound up with the unconstitutional racial gerrymander. Each of these four amendment proposals passed the three-fifths supermajority hurdle by a mere one or two votes. Given that almost *two-thirds* of the legislative districts in both the House were redrawn to remedy the unconstitutional racial gerrymander that taints the current General Assembly, there is no question that a portion of the votes cast to pass these four challenged amendment proposals were cast by representatives from districts that have since been redrawn. The votes to enact these four challenged amendment proposals are thus inextricably linked to the unlawful maps that are the illegitimate source of this General Assembly's power.

As a product of a sweeping, unconstitutional racial gerrymander, this unlawfully constituted General Assembly has no legal authority to take the extreme step of proposing constitutional amendments. Allowing the challenged amendment proposals to stand would be a rebuke of the popular sovereignty upon which our democracy is based, and the guarantee that our constitution may only be amended via the will of the people. The Court should thus declare Session Laws 2018-119, 128, 132, and 133 void *ab initio* and enjoin any resulting constitutional amendment from taking effect.

B. The extent of the illegitimate General Assembly's power is a matter of state law

In its prior briefing before the three-judge panel, Legislative Defendants, relying on a handful of *federal* cases, incorrectly argued that "a legislature elected under an unconstitutional plan remains 'a legislature empower[ed] to act.'" Leg. Defs.' PI Br. at 11. But there is no such settled law at the federal level, and more importantly, Plaintiffs' claims are based on state, not federal law.

The federal court in *Covington* explained that the lawful limits of this unconstitutional

body's authority to act is an "unsettled question of state law" which is "more appropriately directed to North Carolina courts, the final arbiters of state law." *Covington*, 270 F. Supp. 3d at 901. Plaintiffs thus seek this Court's ruling on a question of first impression under North Carolina law. Specifically: whether state law permits a usurper legislature to engage in the extreme act of amending the Constitution.

For this reason, the federal cases on which Legislative Defendants have previously relied are not applicable. Leg. Defs.' PI Br. at 11. (citing *Baker v. Carr,* 369 U.S. 186 (1962) (appeal from U.S. District Court for the Middle District of Tennessee, interpreting the 14th Amendment of the U.S. Constitution); *Ryder v. United States,* 515 U.S. 177, 183(1995) (appeal from United States Court of Military Appeals, interpreting Article 2 of the United States Constitution); *Buckley v. Valeo,* 424 U.S. 1 (1976) (appeal from U.S. Court of Appeals for the District of Columbia, interpreting Federal Election Campaign Act and various provisions of the United States Constitution); and *Martin v. Henderson,* 289 F. Supp. 411 (1967) (habeas appeal from U.S. District Court for the Eastern District of Tennessee, discussing criminal statute)), as all are federal cases interpreting federal law rather than state cases interpreting the North Carolina Constitution.

Moreover, the cited cases simply stand for the proposition that *some* acts of illegally constituted bodies *may* still be permitted to stand to avoid chaos and confusion—a proposition that is consistent with Plaintiffs' position. For example, in *Baker v. Carr*, the United States Supreme Court ruled that it would be permissible for a malapportioned legislature to act, specifically to act in order to reapportion itself. 69 U.S. 186 (1962). Plaintiffs do not disagree. As noted above, a usurper legislature may be lawfully authorized to take certain actions to avoid

chaos and confusion, including, for example, voting to pass new maps to correct illegal racial gerrymanders.

Likewise, those cases in which the acts of an elected body or official are left standing because they were taken before it was determined that the elected body was illegitimate, *see, e.g.*, *Buckley*, 424 U.S. at 78 (striking down appointments to the Federal Election Commission as unconstitutional but holding that "[t]he past acts of the Commission are . . . accorded de facto validity"), pose no conflict with Plaintiffs' arguments in favor of their claims. Importantly, Plaintiffs are not asking the Court to invalidate any acts taken by the General Assembly *before* the U.S. Supreme Court affirmed the federal district court's decision in *Covington*, when the General Assembly arguably had *de facto* authority to engage lawfully in official acts. Rather, Plaintiffs challenge the General Assembly's authority, specifically its authority to take the extreme step of amending the Constitution, *after* the U.S. Supreme Court's mandate issued in *Covington*, rendering final judgment and declaration of the General Assembly's illegitimacy. *Cf. Ryder*, 515 U.S. at 184 (declining to apply the *de facto* officer doctrine where the defendant challenged as unconstitutional the appointment of the judges to the Coast Guard Court of Military Review in his case).

C. Plaintiffs seek narrow relief that is well within this court's jurisdiction

Legislative Defendants may, as they have done previously, seek to alarm this Court by asserting that to rule in Plaintiffs' favor would require the Court to sift through all other laws passed by the General Assembly since the U.S. Supreme Court's June 2017 ruling in *Covington*. But both Plaintiffs' claim and their requests for relief are limited to just the voiding of the Session Laws enacting four constitutional amendment proposals and enjoining any resulting

amendments from taking effect. Granting such relief would have no effect on the other legislation the General Assembly has enacted since June 2017.

Constitutional inquiries are often matters of degree, and courts resolve them on a case by case basis by drawing lines and setting limits. For example, in Establishment Clause jurisprudence, the Supreme Court has declared that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed" noting that the "line between permissible relationships and those barred by the clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test." *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Here, Plaintiffs have placed a narrow, straightforward question before the Court—whether an illegally constituted General Assembly can place constitutional amendments on the November ballot—and asked the Court for relief that draws the line conservatively. This Court need neither decide nor grant more.

Moreover, North Carolina courts have a longstanding role in interpreting our Constitution and enforcing its provisions. Indeed, there is no body better placed to take up the essential role of protecting the integrity of North Carolina's Constitution: "[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 Supreme Court has declared that it "is the ultimate interpreter of our state Constitution." *Corum v. Univ. of N.C. Bd. of Gov'rs*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). The proper meaning, construction, and application of the state constitutional provisions regulating the amendment process can only be answered with finality by the state Supreme Court. *See, Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 372, 384 (2002) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989)); *see*

also State v. Arrington, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). This judicial role is enshrined in the constitutional provision that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35.

CONCLUSION

For the reasons discussed, this Court should grant Plaintiffs' motion for partial summary judgment as to their claim that the unconstitutionally-constituted General Assembly lacked the lawful authority to propose the four amendment proposals challenged in this case, and grant the following relief:

1. Declare that, as of the U.S. Supreme Court's June 30, 2017, mandate in *Covington,* the General Assembly ceased to possess lawful authority to enact constitutional amendment proposals.
2. Declare that, because the General Assembly was without authority to pass Session Laws 2018-119, 128, 132, and 133, they are void *ab initio.*
3. Enjoin any constitutional amendment resulting from Session Laws 2018-119, 128, 132, and 133 from taking any effect.
4. Grant any other and further relief that the Court deems to be just and proper.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that she served a copy of the foregoing Brief in Support of Motion for Partial Summary Judgement upon the parties via e-mail and by U.S. mail to the attorneys for Defendants named below:

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This the 1st day of November, 2018.

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