No. COA 19-384 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellee, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendants-Appellants.	)	From Wake 18 CVS 9806

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BRIEF OF DEMOCRACY NORTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE

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ARGUMENT

Democracy North Carolina agrees fully with the contentions of Plaintiff NC NAACP and its request that the Superior Court's Order ("the Order") be affirmed. Democracy North Carolina submits this brief to make four points: (I) the Order helps to remedy years of unconstitutional racial discrimination; (II) the Order helps to prevent political entrenchment; (III) Defendants' argument that the Order creates confusion is meritless; and (IV) amicus curiae North Carolina Values Coalition's argument that NC NAACP lacks standing is meritless.[1]

[1] No person or entity other than this amicus curiae and its counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

I. The Order Helps To Remedy Years Of Unconstitutional Racial Discrimination.

This Court should affirm the Order voiding N.C. Session Laws 2018-117 and 2018-128 because those laws capped years of General Assembly efforts to stymie judicial remedies for unconstitutional race-based voting laws. A fundamental tenet of American jurisprudence is that if there is a right, and the right is violated, the law affords a remedy. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803). The right to representation is one of the most basic rights guaranteed to Americans. *See* U.S. CONST. art. I, § 2; N.C. CONST. art. VI, § 1; 52 U.S.C. § 10301(b) (stating it is a violation of law where members of a certain race have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice). Yet, for years, North Carolina minority citizens had their right to representation harmed as a result of the unconstitutional racial gerrymandering of state districts in 2011. *See, e.g., Covington v. North Carolina*, 316 F.R.D. 117, 177 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (per curiam).

Courts have broad power to fashion remedies that assure governmental bodies meet their affirmative obligations to citizens. *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 2 (1971). For example, in 1954, the United States Supreme Court ordered public schools to cease separating students on the basis of race. *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954). After *Brown*, school boards were slow to implement the Court's general directive. *Swann*, 402 U.S. at 6. The plaintiffs in *Swann* sued the Mecklenburg County Board of Education after it failed to implement an adequate desegregation

plan. *Id.* at 1. In June 1969, fifteen years after *Brown*, two-thirds of black students in Charlotte still attended schools that were at least 90% black. *Id.* at 7. The Board of Education had failed to meet its affirmative obligation of creating a unitary school system. *Id.* The Court therefore affirmed a plan to transport students from black neighborhoods to white schools. *Id.* at 25. Despite this remedy potentially seeming "awkward, inconvenient and even bizarre," it was within the Court's broad equitable powers because of the continual failure to remedy a harm to the constitutional right of equal protection. *Id.* at 15, 28, 30.

Here, minorities in North Carolina had their constitutional right to fair and equal representation violated from 2011 through 2018. After the General Assembly redrew its districts in 2011, the districts were found unconstitutional on multiple occasions. *See Covington v. North Carolina*, 283 F. Supp. 3d 410, 430 (M.D.N.C. 2018). In fact, the General Assembly that created those districts was "among the largest racial gerrymanders ever encountered by a Federal Court." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017). Between 2011 and 2017, North Carolina conducted three primary and three general elections using racially discriminatory districting plans. *Id.* Through those years, the General Assembly "interfered with the very mechanism by which the people confer their sovereignty" on the legislature and continued to act in a way that did not accurately speak for the people it was created to represent. *Id.* at 897.

Then, as the 2018 legislative session ended, with an election implementing new district lines on the immediate horizon, the unconstitutionally-gerrymandered

legislature enacted Session Laws placing the Voter ID and tax cap amendments on the ballot. R p 184 ¶ 12. If allowed to stand, these Session Laws would allow the outgoing, unconstitutionally-gerrymandered legislature to get away with a brazen act of political entrenchment, as is discussed in part II below.

The judicial remedies that were afforded to minorities from 2011 through 2018 proved inadequate, like the remedies to the minority students of Charlotte that were proven inadequate in *Swann*. In 2016, the Middle District of North Carolina even acknowledged that its remedy might be inadequate, describing the decision not to require new districts to be enacted before the 2017 election as "regrettabl[e]" and done with "much reluctance." *Covington*, 316 F.R.D. at 177. North Carolina had an unconstitutionally-gerrymandered General Assembly for most of a decade, and that severe constitutional harm went unfixed. Thus, the trial court's Order is consistent with the broad equitable powers of our courts to fix constitutional violations. This Court should affirm the Order in part because for years other judicial remedies failed to correct the General Assembly's use of race to diminish the voting power of minorities.

II. The Order Helps To Prevent Political Entrenchment.

North Carolina is a quintessentially "purple" state that is closely divided politically.[2] Yet, despite this balance, the General Assembly has chosen to diminish

[2] For example, North Carolina is one of only 13 states in which different parties control the governorship and at least one legislative chamber. *See* National Conference of State Legislatures, State Partisan Composition (April 1, 2019), http://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx.

the voting power of those who did not elect them. As discussed below, the unconstitutionally-gerrymandered General Assembly engaged in political entrenchment when it passed N.C. Session Law 2018-128. Political entrenchment happens when the group in power tries to make its advantage permanent irrespective of the voters' will.

Session Law 2018-128 was one of many attempts by the General Assembly at political entrenchment, including the prior omnibus voting law's early voting, same-day registration, and pre-registration cuts, and the attempts to statutorily and constitutionally change the form of our state elections board. *See N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Cooper v. Berger*, No. 16 CVS 15636 (Wake Cty. Sup. Ct. Mar. 17, 2017) (invalidating 2016 law changing composition of State Board of Elections); *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) (invalidating parts of subsequent 2017 law changing composition of State Board of Elections); *Cooper v. Berger*, No. 18 CVS 3348 (Wake Cty. Sup. Ct. Oct. 16, 2018) (invalidating parts of 2018 law changing composition of State Board of Elections and parts of previously existing law).

In this context, the Order below should be viewed as a proper exercise of judicial authority because it helps to prevent political entrenchment.

A. Enacting laws to disproportionately disqualify another party's voters constitutes political entrenchment.

A political party's enactment of laws that disproportionately disqualify the other party's voters constitutes political entrenchment. Amicus recognizes that political entrenchment has been a bipartisan phenomenon and that the Democratic

Party also sought to manipulate the political process to frustrate the will of North Carolina voters when it had the chance. But, "they did it too" is not a legal defense. "We the people" are entitled to a political system in which elected leaders are responsive to citizens and can be held accountable for their decisions.

Legal scholars have noted that "[t]he most straightforward [political entrenchment strategy] is simply to prevent one's opponents or their supporters from casting ballots." Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 414 (2015). By proposing the Voter ID Amendment, the legislative supermajority could disenfranchise voters of color, who tended to support their opponents. Indeed, in passing the voter identification law struck down by the Fourth Circuit, the North Carolina General Assembly requested, and used, a "breakdown by race of DMV-issued ID ownership." *McCrory*, 831 F.3d at 230. Through this data, the legislature learned the impact a voter identification law could have on Democratic voters. Similarly, proposing the Voter ID Amendment (as the 2018 legislative session ended) was another apparent attempt to entrench political power.

Political entrenchment runs contrary to Constitutional principles. The Supreme Court has noted that the Elections Clause in the United States Constitution is meant to "act as a safeguard against manipulation of electoral rules by politicians and factions in the States to entrench themselves or place their interests over those of the electorate." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n.*, 135 S. Ct. 2652, 2672 (2015). Similarly, the North Carolina

constitution calls for "Frequent elections" and provides, "For redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. CONST. art. I, § 9. Like the federal Constitution, the North Carolina Constitution requires elections of legislators every two years. *See* U.S. CONST. art. I, § 2, cl. 1; N.C. CONST. art. II, § 8. The safeguards of frequent elections are lost, however, when one political party entrenches itself in power.

Entrenchment is constitutionally unacceptable because it "freeze[s] the political status quo" and results in legislatures becoming "unresponsive and insensitive" to the people they represent. *See Jeness v. Fortson*, 403 U.S. 431, 438 (1971); *Rodgers v. Lodge*, 458 U.S. 613, 625 (1982); *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting) ("[w]here unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and . . . democratic values are dishonored"). Here, as discussed below, the Voter ID Amendment would work to "freeze the political status quo" of keeping Republicans in power by disqualifying minority and Democratic voters. *McCrory*, 831 F.3d at 225-26; *Fortson*, 403 U.S. at 438.

B. Voter identification laws disproportionately disqualify African Americans from voting.

Voter identification laws render African Americans ineligible to vote at a substantially higher rate than white Americans, as found here and throughout the country. In concluding that NC NAACP has standing in this case, the Superior Court found that "members [of the NAACP] 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 amendment will also impose substantial and undue burdens on the right to vote." R pp 187-88 ¶ 31. The court also found that the Voter ID Amendment "would have an irreparable impact on the right to vote of African Americans in North Carolina." R p 188 ¶ 33.

These findings are consistent with the negative effects of voter identification laws in other states. Numerous studies have found that disproportionate numbers of residents who lack required photo identification are African Americans. *See* Spencer Overton et al., *Response to the Report of the 2005 Commission on Federal Election Reform*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org (last visited July 1, 2019) (African Americans in Louisiana were 4 to 5 times less likely than white citizens to have sufficient photo identification); Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 193 (2009) (racial minority voter turnout decreased between 6% and 10% percent in states requiring photo identification); John Pawasarat, THE DRIVER LICENSE STATUS OF THE VOTING AGE POPULATION IN WISCONSIN 1 (2005), http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf (only 47% of African Americans in Milwaukee County had a sufficient photo ID, compared to 85% of white residents, and 74% percent of African Americans between ages eighteen and twenty-four did not have a valid driver license, compared to 29% of white residents that age).

Addressing a similar voter identification law in North Carolina, the Fourth Circuit noted that the "data revealed that African Americans . . . disproportionately

lacked DMV-issued ID." *McCrory*, 831 F.3d at 230. The Court further stated, "[t]he law required in-person voters to show certain photo IDs . . . which African Americans disproportionately lacked, and eliminated or reduced registration and voting access tools that African Americans disproportionately used." *Id.* at 216. Thus, voter identification laws disproportionately disqualify African Americans.

C. <u>African Americans tend to vote for Democratic candidates.</u>

A large portion of the African American population votes for Democratic candidates. A recent Pew Research Center study found that, nationally, 84% of African American voters identify or lean Democratic. *Trends in Party Affiliation Among Demographic Groups*, PEW RESEARCH CTR. (Mar. 20, 2018), https://www.people-press.org/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups/. The Fourth Circuit concluded in *McCrory* that "much of the recent success of Democratic candidates in North Carolina resulted from African American voters." 831 F.3d at 225-26. The Fourth Circuit cited statistics in the record that "in North Carolina, 85% of African American voters voted for John Kerry in 2004, and 95% voted for President Obama in 2008." *Id.* at 225. An expert in the case admitted that "'African American race is a better predictor for voting Democratic than party registration.'" *Id.* (citing *N.C. NAACP v. McCrory*, 182 F. Supp. 3d 320 (M.D.N.C. 2016)). Accordingly, there is no doubt that laws that disproportionately disqualify African Americans also disproportionately disqualify Democratic voters.

In short, passing laws to disproportionately disqualify another party's voters constitutes political entrenchment. Therefore, another reason the Order should be affirmed is because it helps to prevents political entrenchment.

III. Defendants' "Confusion" Argument Is Meritless.

Defendants argue that the Order somehow creates confusion as to which other laws passed before 2018 might be invalid. *See* Moore/Berger Brief at 30, 33. Defendants' argument is meritless for multiple reasons, including: (1) the Order is clearly limited to the General Assembly's authority to propose constitutional amendments in Session Laws 2018-119 and 2018-128; (2) any other law would have to be separately challenged and would be defended; (3) the effect of any other law declared unconstitutional would be based on reasonableness and good faith; and (4) the defense of laches could apply to any challenge, unlike NC NAACP's, that is not made promptly.

First, to state the obvious, the Order concludes that only Session Laws 2018-119 and 2018-128 and the ensuing constitutional amendments are void. R p 192 ¶ 11. The breadth of the Order is clear. Plaintiffs dismissed their claims as to two other constitutional amendments as moot after the voters rejected them. R pp 178-79. This Court's review is similarly limited to those two Session Laws. R p 225.

Second, any other law passed by the unconstitutionally-gerrymandered General Assembly would have to be separately challenged and could be defended by the General Assembly. The Order concerns only Session Laws 2018-119 and 2018-128 and granted Plaintiffs' motion for partial summary judgment only on their

claim that the General Assembly lacked authority to propose constitutional amendments before the November 2018 election. R pp 154-55, 186 ¶ 21. Therefore, the Order would not support a challenge to anything other than constitutional amendments on the 2018 ballot. In addition, the General Assembly could defend any other laws that are challenged. So far, the Order has not led to a single other challenge to a General Assembly act, much less a floodgate of litigation.

Third, even if another law passed by the unconstitutionally-gerrymandered General Assembly were successfully challenged, that law would not be a nullity if anybody had relied on it. It is well-settled that when parties rely on a law later declared unconstitutional, the retroactive effect of the declaration is based on a test of reasonableness and good faith. *See American Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 147-50, 271 S.E.2d 46, 51-52 (1980); *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 442-43, 450 S.E.2d 735, 742-43 (1994). Here, in contrast, no one has relied on the affected Session Laws.

Finally, any future challenge to another law passed by the unconstitutionally-gerrymandered General Assembly could also be subject to laches. Laches is an affirmative defense frequently raised at summary judgment in response to declarative relief actions. *See, e.g.*, *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). If, unlike NC NAACP, a party did not promptly challenge an act of the unconstitutionally-gerrymandered General Assembly, laches could bar the action. *See id.* at 621-26, 227 S.E.2d at 584-86 (plaintiffs' delay of two years and twenty-two days from adoption of rezoning

ordinance constituted laches barring the action); *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88-91, 712 S.E.2d 221, 230-32 (2011) (affirming summary judgment based on laches); *Farley v. Holler*, 185 N.C. App. 130, 132-35, 647 S.E.2d 675, 677-79 (2007) (affirming summary judgment based on laches).

For all these reasons, Defendants' bogeyman of chaos and confusion does not withstand scrutiny.

IV. NC NAACP Has Standing To Challenge Acts Of The Racially-Gerrymandered Legislature.

Article 1, Section 18 of the North Carolina Constitution generally confers standing on parties who suffer harm. *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 556, 809 S.E.2d 558, 561 (2018). The "gist" of standing is whether the party seeking relief has such a "personal stake in the outcome . . . as to assure that concrete adverseness . . . upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 556-57, 809 S.E.2d at 561 (quoting *Stanley v. Dep't of Conserv. & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)).

An association has standing to sue when it or one of its members may suffer immediate or threatened injury. *Id.* at 557, 809 S.E.2d at 561. An association may sue on behalf of its members if they would have standing if suing individually, the interests it seeks to protect are "germane to the organization's purpose," and the claim and relief sought do not require individual members to participate. *Id.* (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990)).

Here, NC NAACP has standing under the North Carolina standing principles described above to challenge the two Session Laws at issue, both for itself and for its members. NC NAACP has the type of "personal stake in the outcome" required for standing, and the member interests it seeks to protect are clearly "germane to the organization's purpose." Indeed, Defendants themselves have not raised a lack of standing defense, and it has long been recognized that NAACP has standing to advocate for its members' constitutional rights. *See, e.g.*, *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) ("It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members.").

Amicus curiae North Carolina Values Coaliation ("NCVC") appears to rely on the test for federal Article III standing, which requires an injury that is (1) (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) traceable to the challenged action; and (3) likely to be redressed by a favorable decision. *See* NCVC Brief at 8-9 (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)). The Supreme Court of North Carolina has rejected this test. *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882(2006) ("This reliance [on federal standing doctrine] was misplaced. While federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine."). In *Neuse River*, the case NCVC quotes for the federal test, this Court immediately clarified that "North Carolina courts are not constrained by the 'case or controversy'

requirement of Article III of the United States Constitution." 155 N.C. App. at 114, 574 S.E.2d at 52.

Even under the federal test, NC NAACP clearly has standing. First, NC NAACP has proved a concrete and imminent harm, because the Superior Court found that NC NAACP and its members "are directly harmed" by the Voter ID amendment because they "will be effectively denied the right to vote" and the amendment "will also impose costs and substantial and undue burdens on the right to vote." R pp 187-88 ¶ 31. Similarly, the court found that the income tax amendment "will act as a tax cut only for the wealthy . . . tend[] to favor white households and disadvantage people of color, reinforc[e] the accumulation of wealth for white taxpayers and undermin[e] the financing of public structure that have the potential to benefit non-wealthy people, including people of color and the poor." R p 188 ¶ 33.

NCVC simply ignores these factual findings, and its legal arguments are frivolous. NCVC argues that, if "properly understood," NC NAACP complains only about enactments following the vote on the constitutional amendments. *See* NCVC Brief at 11. NCVC is wrong. The Superior Court "properly understood" that NC NAACP challenged the Session Laws proposing the constitutional amendments and has appropriately ruled on those laws. R p 192. NCVC also argues that harm to NC NAACP and its members is "nothing but conjecture." NCVC Brief at 13. There, NCVC overlooks the factual findings about the harms NC NAACP and its members face. Rather than being conjectural, NC NAACP's harms are akin to

those of the challengers to the United States Department of Commerce's attempt to add a citizenship question to the 2020 census. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019). The United States Supreme Court rejected the defendant's argument that the plaintiffs lacked standing because their harms were too speculative, applying the same federal test NCVC cites. *Id.* at 2565-66.

Finally, NCVC argues that NC NAACP and its members present "merely a generalized claim in common with the public at large." NCVC Brief at 15. There, NCVC forgets that the Session Laws were passed by an unconstitutionally-gerrymandered legislature, which barely mustered the three-fifths vote required to propose constitutional amendments. Without the racially-gerrymandered legislature, the Session Laws proposing the amendments that would harm NC NAACP and its members would have failed. Thus, their claim is not "merely a generalized claim in common with the public at large."

The other parts of the federal standing test (traceable and redressable harm) are obviously met, because the harms NC NAACP faces—Voter ID and tax cap amendments proposed by an unconstitutionally-gerrymandered legislature—are traceable to the challenged Session Laws and are redressed by the Order. NCVC does not even address those elements of the federal standing test. In sum, NC NAACP has standing under North Carolina or federal doctrine.

CONCLUSION

The Superior Court's Order should be affirmed.

Respectfully submitted, this the 12th day of July 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Amicus Curiae Democracy North Carolina certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, index, table of authorities, certificate of service, and this certificate of compliance), as reported by the word-processing software.

This the 12th day of July 2019.

/s/ John J. Korzen
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing motion was served upon the persons indicated below via electronic mail and United States Mail, postage prepaid, addressed as follows:

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