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 CLEAR AIR CAROLINA,	)	
Plaintiffs-Appellees,	)	
v.	)	From Wake County No. 18 CVS 9806
TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity,	)	
Defendants-Appellants	)	

****

MOTION OF NORTH CAROLINA PROFESSORS OF CONSTITUTIONAL LAW ENRIQUE ARMIJO, JOSEPH BLOCHER, JOHN CHARLES BOGER, GUY-URIEL E. CHARLES, DONALD W. CORBETT, MICHAEL KENT CURTIS, APRIL G. DAWSON, WALTER E. DELLINGER, III, MALIK EDWARDS, SARAH LUDINGTON, WILLIAM P. MARSHALL, GENE R. NICHOL, WILSON PARKER, JEDEDIAH PURDY, & THEODORE M. SHAW AS *AMICI CURIAE*

****

The North Carolina Professors of Constitutional Law listed herein respectfully move the Court, pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, for leave to file the accompanying brief as *amici curiae* in support of Plaintiff-Appellee North Carolina State Conference of the National Association for

the Advancement of Colored People. As required by Rule 28(i)(2), *amici* are filing their proposed brief contemporaneously with this motion.

Both the motion and the brief are being filed within the time limits allowed for the plaintiff-appellee to file its brief.

In support of their motion, *amici* show the following:

NATURE OF THE INTEREST OF *AMICI CURIAE*

Movants are scholars and professors of law who have been deeply involved in issues of constitutional law for many decades. They regularly have taught basic principles of American constitutional law to first-year law students and advanced principles of constitutional law to upper level students in North Carolina and elsewhere. Many have researched and written extensively on constitutional issues. Some have written, taught, and litigated specifically on issues involving the North Carolina Constitution. They come from each of North Carolina's six public and private law schools. (See Exhibit A, listing all *amici* by school and title).

REASONS WHY AN *AMICUS CURIAE* BRIEF IS DESIRABLE

The appeal before the Court addresses core issues of constitutional law including: the proper occasions upon which the state judiciary should exercise its authority; the reasons for the constitutional decision to divide and separate legislative, executive, and judicial powers under the North Carolina constitution; the use of inter-branch checks and balances as one key constitutional limit to prevent

any abuse of separated power; the deliberately exacting process, adopted by the people of North Carolina, for making constitutional changes to their foundational document; and the limited circumstances under which disputed constitutional issues should be deemed "political questions" beyond the exercise of judicial review.

These are all matters on which the proposed *amici* are seasoned scholars, authors, teachers, and litigants. Since these are issues sharply disputed by the parties, *amici* hope they might be of assistance to a Court charged, in this appeal, with a "recurrence to fundamental principles." N.C. CONST., Art. I, § 35.

QUESTIONS OF LAW TO BE ADDRESSED IN THIS *AMICUS* BRIEF

Amici curiae will address the constitutional context in which the proposed North Carolina constitutional amendments are being challenged, including: the authority of the State judiciary to address and resolve these serious constitutional issues involving a coordinate branch of government; whether and when doing so might violate State constitutionally-ordained separation of powers; and whether the unique circumstances here justify the Court in addressing and resolving the petitioner's challenge to the 2018 submission of the proposed constitutional amendments. *Amici* will address the related question whether a political party that has been held to have illegally gerrymandered the General Assembly by race can take deliberate advantage of the resulting, temporary super-majority status to put

forward changes to the foundational legal framework of State governance that will afford it a future, entrenched electoral advantage.

THE POSITION OF *AMICI CURIAE* ON THESE QUESTIONS OF LAW

Amici will contend that the Court has State constitutional authority to resolve unclear questions of state constitutional law, even when those questions require the Court to pronounce on the powers of, or constraints upon, a coordinate branch of government. *Amici* will contend that to address such questions does not violate, but instead properly maintains, the separation of powers required by the State constitution.

Amici will finally contend that, under the unusual circumstances here, the efforts by a majority party in the General Assembly to entrench its power by using its illegally obtained, temporary, and artificially-inflated three-fifths majority status in each chamber to propose substantial constitutional modifications—just before it lost its supermajority status—violates both the core intent of, and the careful procedural safeguards provided within, the North Carolina Constitution to preserve the sovereignty of the people.

CONCLUSION

For these reasons, *amici curiae* respectfully request that the Court allow this motion and accept for filing the conditionally filed *amicus* brief, attached to this motion as Exhibit B, in support of petitioners.

Respectfully submitted this 12th day of July 2019

/s/ Robert F. Orr
Robert F. Orr
Attorney at Law PLLC
N.C. Bar No. 6798
3434 Edward Mill Road, Suite 112-372
Raleigh, NC. 27612
Tel. No. 919-962-8513
Fax No. 919-962-1277
rforr1946@gmail.com
Attorney for *Amici Curiae/Movants*

CERTIFICATE OF SERVICE

I certify that a copy of this **Motion for Leave to File *AMICUS CURIAE* BRIEF** was served this day upon all parties to this appeal, via U.S. Mail, postage prepaid, addressed to the following:

D. Martin Warf
Noah H. Huffstetler
Nelson Mullins Riley & Scarborough, LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Attorney for Defendant-Appellants

Irving Joyner
P.O. Box 374
Cary, NC 27512
Attorneys for Plaintiff-Appellee NC NAACP

David Neal
Kimberly Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Attorneys for Plaintiff-Appellee NC NAACP

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
Attorneys for Plaintiff-Appellee NC NAACP

B. Tyler Brooks
B. Tyler Brooks, PLLC
4050 Yellowfield Way
Cary, NC 27518
Counsel for Amicus Curiae
North Carolina Values Coalition

This the 12th day of July 2019.

/s/ Robert F. Orr
Robert F. Orr

EXHIBIT A

LIST OF *AMICI*

Enrique Armijo
Elon University School of Law
Associate Dean for Academic Affairs & Associate Professor

Joseph Blocher
Duke University School of Law
Lanty L. Smith '67 Professor of Law

John Charles Boger
University of North Carolina at Chapel Hill School of Law
Wade Edwards Distinguished Professor of Law Emeritus

Guy-Uriel E. Charles
Duke University School of Law
Edward & Ellen Schwarzmann Professor of Law

Donald W. Corbett
North Carolina Central University School of Law
Associate Dean for Academic Affairs and Professor of Law

Michael Curtis
Wake Forest University School of Law
Judge Donald L. Smith Professor of Constitutional Law

April G. Dawson
North Carolina Central University School of Law
Professor of Law

Walter E. Dellinger III
Duke University School of Law
Douglas B. Maggs Professor of Law

Malik Edwards
North Carolina Central University School of Law
Associate Professor of Law

Sarah Ludington
Campbell University
Norman Adrian Wiggins School of Law
Associate Dean of Academic Affairs

William P. Marshall
University of North Carolina at Chapel Hill School of Law
William Rand Kenan, Jr. Distinguished Professor of Law

Gene R. Nichol
University of North Carolina at Chapel Hill School of Law
Boyd Tinsley Distinguished Professor of Law

Wilson Parker
Wake Forest University School of Law
Professor of Law

Jedediah S. Purdy
Duke University School of Law
Professor of Law, Columbia Law School
Former Robinson O. Everett Professor at Duke

Theodore M. Shaw
University of North Carolina at Chapel Hill School of Law
Julius L. Chambers Distinguished Professor of Law

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 Plaintiffs-Appellee, v. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendants-Appellants.	)	From Wake County 18-CVS-9806

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BRIEF OF NORTH CAROLINA PROFESSORS OF CONSTITUTIONAL LAW ENRIQUE ARMIJO, JOSEPH BLOCHER, JOHN CHARLES BOGER, GUY-URIEL E. CHARLES, DONALD W. CORBETT, MICHAEL KENT CURTIS, APRIL G. DAWSON, WALTER E. DELLINGER, III, MALIK EDWARDS, SARAH LUDINGTON, WILLIAM P. MARSHALL, GENE R. NICHOL, WILSON PARKER, JEDEDIAH PURDY, & THEODORE M. SHAW AS *AMICI CURIAE*

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****

BRIEF OF NORTH CAROLINA PROFESSORS OF CONSTITUTIONAL LAW AS *AMICI CURIAE*

INTRODUCTION

We are North Carolina professors of constitutional law, and we offer this brief as *amici curiae* to assist the Court in its consideration of the important constitutional issues presented in this appeal.[1] We take no position on the merits of any of these amendments. Indeed, our consideration of those merits might well reveal differences among us. Yet we agree unanimously that the procedures that brought these amendments to the people in November of 2018 were fatally flawed. The February 22, 2019 order of the Superior Court was correct to examine those flaws and to assess their necessary legal consequences. In our considered view, that order should be affirmed in its entirety.

The North Carolina Constitution contains a variety of structural procedures meant to protect the sovereignty of the people while assuring against legislative or other abuse. The regrettable pattern of legislative misconduct by the defendants here—uncovered and thoroughly assessed by multiple federal courts and North Carolina state courts over the past eight years—fatally tainted not only the post-2011 State House and Senate membership but also the 2018 amendment process under challenge. If the policies of the challenged amendments remain worthy, then a

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

properly constituted legislature can resubmit them, through appropriate processes, for the people's approval. If the amendments' adoption is the mere product of legislative legerdemain, however, they deserve no place among the constitutional rights and structural protections in which the people of North Carolina have placed their trust.

I. This Court is Plainly Authorized to Assure Full Legislative Compliance with the Special Requirements Prescribed by the North Carolina Constitution Before Submitting Constitutional Amendments to a Vote by the People

Since the Revolution of 1776, American law at both state and federal levels has drawn distinctions between 'ordinary' legislation and the 'higher law' reflected in the people's constitutions. Framers of state constitutions in North Carolina and of the federal Constitution in 1787 were determined to replace the absolute sovereignty that they associated with the British Crown-in-Parliament with new governments, operating under written instruments, that would repose sovereignty in the people of the United States and of each separate state. Nothing quite like these experiments in self-governance had ever before been devised. *See generally*, BERNARD BAILYN, Ch. 5, *Transformation*, *in* THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160-227 (1992 ed.). Suspicious and resentful of the absolute power they had experienced under King George, drafters drew upon Enlightenment thought to frame governments under which ultimate authority would lie with the people themselves, with practical daily authority allocated among chosen legislative, executive, and

judicial actors. *See* N.C. CONST. OF 1776, DECLARATION OF RIGHTS §§ 1, 2 & 4. As a further check on the reemergence of tyranny, these documents afforded each branch structural aids to guard against any attempt by a co-equal branch to exceed its designated role. The legislative branch was of course authorized to draft, debate, and pass legislation. Yet judicial review of that legislation to enforce constitutional demands was authorized as just such a check, and the North Carolina judiciary, writing in *Bayard v. Singleton*, 1 N.C. 5 (1787), first asserted its judicial authority to invalidate an unconstitutional legislative act some sixteen years before Chief Justice John Marshall's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Though the Framers in North Carolina and elsewhere wisely reposed sovereignty in the people, they recognized the potential for demagogic excess that had troubled earlier democracies. James Madison famously named this problem "faction" in FEDERALIST 10 (1787) and identified representative assemblies as a check against hasty and unwise action.

A second check against rash choices was the creation of special procedures to be followed in amending the written constitutions. The North Carolina Constitution of 1776 originally designated no such procedures, because it initially made no provision for amendments at all. JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA CONSTITUTION 13 (2d ed. 2013). Yet in the 1830s, when the state's

robust population growth in Piedmont counties and other economic changes prompted citizens to demand adjustments to the original document, delegates from across the State gathered in Raleigh in 1835 to adopt a series of changes to the 1776 instrument. *Id*.

Among those changes was, for the first time, a set of provisions specifying how future amendments might be added to the constitutional text. To safeguard the people's 'higher law' from unreflective and precipitous modification, the delegates opted to erect high walls and sturdy checks: under a new Article IV, § 1, cl. 2.1 & 2, constitutional amendments could be brought forward *either* through future conventions—to be authorized only after two-thirds of each house had voted to convene them—or *alternatively*, through specific amendments that could be "proposed to the voters by the General Assembly [only] if adopted at two successive sessions, with an intervening election, by majorities [in the General Assembly] of three-fifths and two-thirds, respectively." ORTH & NEWBY, *supra*, at 15-16. Both methods imposed extraordinarily high prerequisites.

Following the Civil War, and at the prompting of the federal Congress,[2] both white and newly free African American delegates assembled in Raleigh in 1868 to draft a new, Reconstruction-era constitution. ORTH & NEWBY, *supra*, at 19. Initially,

[2] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, 276-77 (1988).

no changes were made to the 1835 amendment process. *Id.* at 23. Seven years later, however, during a further state constitutional convention called in 1875 to consider thirty additional amendments to the 1868 document, a proposal was put forward that in the future, "the General Assembly by a three-fifths vote of each house could submit an amendment to the voters at the next election." *Id*. at 26 (describing what thereafter became N.C. CONST., Art. XIII). Although there was sharp disagreement and some close convention votes on whether the new super-majority threshold should be set at two-thirds (as under the 1835 constitution) or three-fifths (as was eventually agreed),[3] all delegates agreed that the amendment process deserved higher protection than that offered by a mere legislative majority.

To summarize, North Carolina's super-majority requirements reveal a people who recognized that majorities could err, either because of passion, caprice, or self-interest, or because the legislature was not truly representative of the people's judgment. Yet the drafters drew distinctions, pertinent to this appeal, about the lasting consequences of such moments. Ordinary laws, however rash, could be redressed by a simple majority vote from a succeeding legislative majority. The North Carolina constitution thus left ordinary law-making to simple majorities. By contrast, proposals to change the state's fundamental constitutional design were

[3] See JOURNAL OF CONSTITUTIONAL CONVENTION OF STATE OF NORTH CAROLINA HELD IN 1875, 185-86 (Raleigh, Josiah Turner 1875).

intended to be less frequent and more enduring. Accordingly, the people demanded more exacting structural protection against precipitous change. The people protected their ultimate sovereignty against both rash passions and unrepresentative or corrupt legislatures by requiring that constitutional amendments be proposed by super-majorities in both chambers of the General Assembly. This structural procedure stands as constitutional assurance against capricious changes to the state's constitutional design—a kind of constitutional immune system maintaining the integrity of popular sovereignty.[4]

II. The General Assembly Acted In 2011 To Create A Host of Racially Gerrymandered Legislative Districts. Once Those Districts Were Declared Unconstitutional In 2017, the Court Below Properly Concluded These Representatives Could No Longer Fairly Be Counted to Meet the Special, Super-Majority Requirement Under Article XIII, § 4 That Alone Permits The Voters to Consider Permanent Changes To the North Carolina Constitution.

This case presents a major test of North Carolina's time-honored constitutional guard against overhasty tampering with basic structures of state governance. Judge Collins accurately noted that this case is one of first impression.

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[4] In describing the analogous federal amendment process, Justice Joseph Story expressed the Framers' hope that

> the means of amendment might avert, or at least have a tendency to avert, the most serious perils, to which confederated republics are liable . . . Two thirds of congress, or of the legislatures of the states, must concur in proposing, or requiring amendments to be proposed . . Time is thus allowed, and ample time, for deliberation . . . They cannot be carried by surprise, or intrigue, or artifice.

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 959 (1833).
.

NAACP v. Moore, Order, No. 18 CVS 9806, Wake Co. Super. Ct., February 22, 2019, at 10; R. 191. Yet its difficulty is surely not commensurate with its novelty, for the constitutional issues it presents, we respectfully submit, are simple and straightforward. The true novelty is that few prior North Carolina legislatures have dared so brazenly to exploit North Carolina's system of constitutional amendment for partisan ends.

The relevant facts began when North Carolina's newly elected legislative majority in 2011 undertook the state's required decennial legislative redistricting. 2011 N.C. Sess. L. 402 and Sess. L. 404. The General Assembly majority chose to carry out those responsibilities in what has since been adjudicated to be a grossly unconstitutional manner. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 581 U.S. __, 137 U.S. 2211 (2017) (per curiam); *see also Covington v. North Carolina*, 283 F. Supp.3d 410, 447-58 (M.D.N.C. 2018), *aff'd sub nom. North Carolina v. Covington*, 585 U.S. __, 138 S.Ct. 2548 (2018). The General Assembly first drew and then approved boundary lines for state senate and state house districts that created a broad pattern of racial gerrymanders, directly affecting at least 28 of North Carolina's state districts, and requiring a "remedial map to cure the 2011 unconstitutional racial gerrymander [that] contained 117 redrawn legislative districts, more than two-thirds of the districts in both the House (81, or 68%) and

Senate (36, or 72%)," as a three-judge federal district court panel eventually found. *NAACP v. Moore*, Order, *supra*, at 4 (R. 184).

The federal court described this pattern of redistricting misconduct as "among the largest racial gerrymandering ever considered by a federal court." *Covington*, 270 F. Supp.3d at 884. The Supreme Court of the United States agreed with those conclusions in 2017 and 2018 and upheld the principal factual findings and legal conclusions of the district court. *North Carolina v. Covington*, *supra,* 138 S.Ct. 2548 (2018). It then ordered the General Assembly to redraw the lines in a constitutionally permissible fashion.

The General Assembly, however, delayed providing a constitutionally sufficient response.[5] Yet it did more than simply delay. In the closing hours of the

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[5] One plaintiff advocacy group, Common Cause, charged in court filings in early June of 2019 that certain documents, recovered from the hard drive of a deceased, former expert for the defendants, Thomas Hofeller,

> include new evidence showing how North Carolina Republicans misled a federal court to prolong the life of their map of state legislative districts, which had been ruled unconstitutional. The Republicans told the federal court hearing the map case that they would not be able to draw new legislative districts and hold public hearings on them in time for a proposed special election in late 2017 or early 2018. In fact, Common Cause said, Hofeller's files show that almost all the work was already done: proposed new boundaries had been drawn for more than 97% of the state's proposed Senate districts and 90% of House districts. The federal court's decision not to call a special election left the existing legislative gerrymander — and a veto-proof Republican majority in both the state House and Senate — in place for roughly an additional year."

See Michael Wines, *Deceased strategist's files detail Republican gerrymandering in NC, advocates say,* NEWS & OBSERVER, June 6, 2019 at: https://www.newsobserver.com/news/politics-government/article231260798.html. The defendants have strongly denied those allegations. *Id*.

2018 legislative term, it set out deliberately to capitalize on its condemned-but-still-artificially-elevated electoral numbers. Relying on strict party discipline, the leadership pushed forward a series of six hastily announced amendment proposals. *See NAACP v. Moore*, Order, at 4 (R. 184). Among them was one that would impose new photo-identification requirements on all future voters. N.C. SESSION LAWS 2018-128. Another set a cap on the maximum income tax that could be adopted. N.C. SESSION LAWS 2018-119.

Even with the advantage of a legislative majority illegally augmented through racial gerrymanders, the defendants barely managed to secure the constitutionally-required 60 percent vote totals necessary to place the proposed amendments before the people. In the North Carolina State House, the voter ID amendment prevailed only by two votes, and in the Senate, only by three. *NAACP v. Moore*, Order at 4 (R. 184). Without the votes of illegally selected representatives, no new amendments could have been placed on the November 2018 ballot; the high threshold so carefully established by NORTH CAROLINA CONST. Art. XIII, § 2, would not have been met.

As noted, this bold plan was conceived and executed as a last-minute gambit; it went forward under a heavy legal cloud of already-adjudicated unconstitutionality and despite widespread public objection and condemnation. Yet the defendants now insist, the deed done, that they should be home free, and that no other branch of North Carolina government possesses any authority to review their behavior, assess

its constitutional propriety, or redress whatever lasting constitutional damage it may have inflicted. They are mistaken.

III. The 'Political Question Doctrine' Does Not Forbid the Judiciary To Perform Its Customary Role of Assuring Compliance by the Political Branches with the Constraints Imposed by The People's Constitution.

Defendants have invoked the 'political question doctrine' in defense of their position. Yet that doctrine, upon careful examination, has no application here. None of its underlying principles inhibit the state judiciary from enforcing the essential constitutional requirements of North Carolina's constitutional amendment process. In so doing, the courts are undertaking no more than the ordinary judicial work textually committed to them by the North Carolina Constitution.

The most influential modern statement on the reach of the political question doctrine appears in Justice Brennan's opinion for the Court in *Baker v. Carr*, 369 U.S. 186 (1962), which proposes a series of overlapping 'tests' often cited and relied upon by North Carolina courts as well[6]:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

[6] *See, e.g.*, *Cooper v. Berger*, 370 N.C. 392, 407-08, 809 S.E. 2d 98, 107 (2018).

> potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.[7]

While the text of N.C. CONST. Art. XIII, § 4 does 'demonstrably commit' to the General Assembly the *political* task of marshaling at least a three-fifths vote in each chamber for any proposed amendment, it does not commit to that body the discretionary and unreviewable assessment of whether the constitutional obligation has been met. A thought experiment: were the State Senate ever to assert that a vote by 25 of its 45 members (55.5%) was "close enough" to meet the North Carolina constitutional threshold, would that assertion be judicially reviewable? The answer, we believe, is clear: "Of course it would." Checks and balances surely forbid the legislature from serving as the sole judge of its own compliance with constitutional standards.[8] Instead, that "'delicate exercise in constitutional interpretation . . . is a

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[7] The Supreme Court's recent invocation of the political question doctrine to dismiss the plaintiffs' claims in *Rucho v. Common Cause*, No. 18-422 (June 27, 2019) has no bearing on this appeal. In *Rucho*, a majority of the Court held that partisan gerrymanders were not justiciable because of a perceived lack of judicially manageable standards for discerning which gerrymanders were "too partisan." The Chief Justice twice took pains, however, to distinguish partisan gerrymander claims, which the majority deemed *nonjusticiable*, from racial gerrymander claims and one-person-one-vote claims, which the Court has long held *are* justiciable and do *not* to raise political questions. Opinion at 21, 22–23.

[8] As Alexander Hamilton explained:

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption . . . *It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order . . to keep the latter within the limits assigned to their authority.*

FEDERALIST 78 at 485 (1787) (emphasis added).

responsibility of [the judicial branch] as ultimate interpreter of the Constitution.'" *Cooper v. Berger, supra,* 370 N.C. at __, 809 S.E. 2d at __ (2018) (quoting *Baker v. Carr*, 369 U.S. at 211).

Nor does this case require resort to any undiscoverable or unmanageable standards. Though the defendants' brief would have it otherwise, the court below carefully avoided announcing a boundless, sweeping principle. Instead, it limited its decision to the legal consequences that flow from a final adjudication

> by the United States Supreme Court that the General Assembly was an illegally gerrymandered body. *At that time*, . . . the General Assembly lost its claim to popular sovereignty . . 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.

Order at 11 (R. 191) (emphasis added).

The defendants have raised the specter that this decision might somehow call into question prior North Carolina amendments approved years or even decades ago during the pendency of earlier redistricting legislation. *See* Def. Br. at 28-29. Yet the court below never purported to extend its narrow holding (1) to invalidate ordinary legislation, even laws enacted by a racially gerrymandered legislature;[9] (2) to bring

[9] The defendants point to an unsuccessful challenge in the 1930s by an earlier generation of litigants to a state sales tax, in which the parties unsuccessfully invoked a claim that the legislature that imposed the tax had itself been malapportioned, *Leonard v. Maxwell*, 261 N.C. 89, 3 S.E.2d 316

into question constitutional amendments proposed by a gerrymandered legislature and adopted by the people *before* final adjudication of a redistricting challenge; (3) or to void constitutional amendments, put forward by a legislature adjudicated as gerrymandered, that do not involve "widespread and sweeping racial gerrymandering . . . [affecting] over two-thirds of the North Carolina House and Senate districts. . . ." The standard affirmed by the court in this case is, in sum, exceedingly narrow and easily managed in practice.[10]

Nor did the judicial branch take a position on policy choices reflected in the proposed amendments, which are properly left to the political branches and to the people. The defendants work hard to conjure up an aura of 'judicial policy-making' by stressing that only the voter identification and tax cap amendments were invalidated below, leaving undisturbed the hunting and fishing amendment and the victims' rights amendment. (Def. Br. at 20 & n. 6).

Did the court somehow pick and choose among those amendments struck down? It did not; it would have been judicial abuse had the court reached out to address amendments that the present plaintiffs chose not to challenge. The court below exercised only the traditional 'policy choice' not to anticipate or decide future

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(1939); *see* Def. Br. at 14-15. The difference between that challenge to a state law change and the present challenge to the state constitution is clear cut and decisive.

[10] In another strained attack on the decision below, defendants assert (Def. Br. 18-19) and proffer certain documents (Appendix 6-7, 19) to demonstrate, that plaintiffs and their counsel below had earlier argued that their 'usurper' claims should reach both ordinary legislation as well as constitutional changes. The court, of course, did *not adopt* that broader rule, and its present relevance to this appeal is nil.

constitutional issues that were not raised by the parties below nor necessary for resolution of the case. *See generally TVA v. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341-45 (1936) (Brandeis, J., concurring).

Finally, to draw on the last strand of the political question doctrine, if there is any "potential for embarrassment" here it is only that the judiciary was obliged to weigh the extraordinary extent to which certain North Carolina legislators exceeded their lawful powers and distorted trust placed in them by the North Carolina Constitution. They attempted short-cuts which the Constitution does not permit; they cannot now credibly object that they are 'embarrassed' when denied the forbidden fruits of their misconduct.

CONCLUSION

The amendments under challenge here should never have been placed on the ballot in November of 2018 because, as the Court below properly concluded, the General Assembly's widespread, adjudicated racial gerrymanders broke "the requisite chain of popular sovereignty between North Carolina citizens and their representatives." Order, *supra,* at 11 (R. 191). This appeal comes to the Court before any irrevocable actions have been undertaken to implement these void amendments. As *amici*, we urge the Court to assume the responsibility it has exercised since 1787 in *Bayard v. Singleton* and affirm the order of the court below.

Respectfully submitted this 12th day of July, 2019.

/s/ Robert F. Orr
Robert F. Orr
Attorney at Law PLLC
N.C. Bar No. 6798
3434 Edward Mill Road, Suite 112-372
Raleigh, NC. 27612
Tel. No. 919-962-8513
Fax No. 919-962-1277
rforr1946@gmail.com
Attorney for *Amici Curiae/Movants*

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Defendants-Appellants.	)	

WORD COUNT CERTIFICATION

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, I hereby certify that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indices, tables of authorities, appendices, certificates of service, and this certificate of compliance) as reported by the word-processing software.

This the 12th day of July 2019.

/s/ Robert F. Orr
Robert F. Orr
Attorney at Law PLLC
N.C. Bar No. 6798
3434 Edward Mill Road, Suite 112-372
Raleigh, NC. 27612
Tel. No. 919-962-8513
Fax No. 919-962-1277
rforr1946@gmail.com
Attorney for *Amici Curiae/Movants*

CERTIFICATE OF SERVICE

I certify that a copy of this ***AMICUS CURIAE*** **BRIEF OF THE NORTH CAROLINA PROFESSORS OF CONSTITUTIONAL LAW** was served this day upon all parties to this appeal, via U.S. Mail, postage prepaid, addressed to the following:

D. Martin Warf
Noah H. Huffstetler
Nelson Mullins Riley & Scarborough, LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Attorney for Defendant-Appellants

Irving Joyner
P.O. Box 374
Cary, NC 27512
Attorneys for Plaintiff-Appellee NC NAACP

David Neal
Kimberly Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Attorneys for Plaintiff-Appellee NC NAACP

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
Attorneys for Plaintiff-Appellee NC NAACP

B. Tyler Brooks
B. Tyler Brooks, PLLC
4050 Yellowfield Way
Cary, NC 27518
Counsel for Amicus Curiae
North Carolina Values Coalition

This the 12th day of July 2019.

/s/ Robert F. Orr
Robert F. Orr