STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No. XXX

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 her official capacity, JAY HEMPHILL, in his official capacity, VALERIE JOHNSON, in her official capacity, and JOHN LEWIS, in his official capacity.

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

[RULE 65]

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INTRODUCTION

North Carolina's democracy is under siege. Over a year ago the United States Supreme Court determined the North Carolina legislative branch was unconstitutionally constituted by way of unlawfully racially-gerrymandered district maps. *Covington v. North Carolina ("Covington I")*, 316 F.R.D. 117, 176 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017) (per curiam). This sweeping unconstitutional racial gerrymander contaminated at least 77 out of North Carolina's 100 counties and impacted 83 percent of the state's population, resulting in the federal courts striking down 28 legislative districts. Remedying these racially discriminatory maps required that 117 districts be redrawn. Having maneuvered a veto-proof supermajority out of these now-invalidated, constitutionally-infirm legislative districts, the leadership of the North Carolina General Assembly ("N.C.G.A.") is now attempting to use its ill-gotten power to place before the voters six proposed amendments that would significantly alter the North Carolina Constitution. This is an extreme act that falls well outside the bounds of the limited actions an unconstitutionally constituted usurper legislature may possibly take. Moreover, the proposed amendments are vague and incomplete, and the language with which they will be presented to the voters is misleading. This ballot language fails to convey the full effect of the proposed changes in violation of the North Carolina Constitution.

Our state Constitution requires a three-fifths supermajority vote by both the House and the Senate to approve legislation to submit a proposed amendment to the voters. N.C. Const. art. XIII, § 4. For four out of the six proposed constitutional amendments, the vote count barely met the required supermajority threshold, clearing that hurdle by just one or two votes. Thus, these four proposed amendments are the direct result of the illegally engineered maps that targeted black voters and packed them into racially segregated districts. This court cannot allow this unconstitutionally-constituted body to use its misappropriated power to enact proposals that

amend our Constitution in ways designed to suppress African-American voters and to further entrench the usupers' political power at the expense of popular sovereignty.

The unlawfully constituted supermajority has further violated the state Constitution by failing to put forward clear proposals to the voters and instead has legislated descriptions that do not accurately communicate the effect of the proposed amendments and that will directly mislead the voters. Specifically, a proposed amendment that purports to deal with judicial appointments would, in reality, open up the possibility of myriad legislation being passed free from the check and balance of gubernatorial veto. An amendment appearing to set up a "Bipartisan Board of Ethics and Elections Enforcement" would, in fact, constitute an unprecedented power shift to the legislative branch across 350 different boards and commissions in the state. An amendment focused on photographic ID for voters is so vague and incomplete that it could quickly create significant confusion in our system of voting, and a new host of equal protection issues for voters if, absent implementing legislation, every county interprets its requirements differently. And an amendment related to the state income tax suggests that income tax rates will be immediately reduced, when in fact the change is related to the maximum allowable tax cap.

This Court must act swiftly to prevent a serious injustice from being perpetrated on the most sacred of documents—our state Constitution. "It is axiomatic under our system of government that the Constitution within its compass is supreme as the established expression of the will and purpose of the people." *In re Trusteeship of Kenan*, 261 N.C. 1, 7 (1964). To ensure this mandate "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939).

The North Carolina Supreme Court has also previously recognized the necessity for the judiciary to act in similar circumstances. In 1934, Governor J.C. Ehringhaus wrote to the Supreme Court asking for its help interpreting Article XIII § 4 of the N.C. Constitution – which governs the N.C.G.A.'s authority to submit proposed constitutional amendments to the people – noting that questions over the legality of a ballot initiative proposing a "change in the fundamental law of the State," raise matters "of too great consequence to be controlled by the interpretation" of a single branch of government. *In re Opinions of the Justices*, 207 N.C. 879 (1934). After the Supreme Court issued its opinion that the ballot initiative was not properly before the voters, it was abandoned. *See also Advisory Opinion in re Gen. Elections*, 255 N.C. 747, 750 (1961) (N.C. Supreme Court Advisory Opinion striking ballot initiative).

In the present case, an illegal usurper body seeks to use its illegitimate power to propose amendments to the state Constitution. These vague, misleading, and unlawful amendments will do untold damage. Because constitutional amendments require supermajority votes, they will be hard to undo. This Court can prevent such chaos by issuing preliminary injunctive relief to ensure that amendments are not placed on the ballot until a legally constituted body has an opportunity to deliberate and present lawful amendment proposals to the voters of North Carolina.

SUMMARY

Preliminary injunctive relief is appropriate to preserve the status quo of parties during litigation "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 759 (1983) (internal citations omitted). "The issuance of a TRO 'is a matter of discretion to be

exercised by the hearing judge after a careful balancing of the equities.'" *Nat'l Surgery Ctr. Holdings, Inc. v. Surgical Inst. of Viewmont, LLC*, No. 16 CVS 1003, 2016 WL 2757972, at *3 (N.C. Super. May 12, 2016) (quoting *A.E.P. Indus., Inc.* at 759).

Here, the Superior Court has authority to grant preliminary injunctive relief necessary to maintain the status quo and prevent the Bipartisan Board of Elections and Ethics Enforcement from placing the illegally-proposed constitutional amendments on the November ballot.

The Court should grant this relief because Plaintiffs are likely to succeed on the merits of their claims. The legislative Defendants lead an illegally constituted N.C.G.A. and lack the authority necessary to enact proposals for constitutional amendments. The currently seated N.C.G.A. is a usurper body and, to the extent that it may engage in any official acts, the only actions it may possibly take are those actions necessary to prevent the state from falling into chaos and confusion. Amending the most fundamental law in our state, the North Carolina Constitution, does not fall within this exception. Moreover, by legislating misleading ballot language for the amendments and prohibiting clarifying language from accompanying the amendment questions on the ballot, the legislative Defendants violated Article XIII, § 4's mandate that the legislature submit the proposal of any constitutional amendment to qualified voters of our state. The legislative Defendants violated this constitutional requirement when they used vague, incomplete, and misleading language in the ballot descriptions and the amendments, requiring yet-undetermined implementing legislation, before the full scope of the amendment can be known to the voters.

This Court should grant preliminary injunctive relief because Plaintiffs will be immediately and irreparably harmed if the State Board of Elections and Ethics Enforcement places the amendments onto the ballot for the 2018 general election. Plaintiffs will be forced

immediately to divert finite and limited resources, which they would otherwise spend on activities germane to their missions towards educating their members and the public about the constitutional amendments that have been unlawfully proposed by an unconstitutional usurper legislature. This harm is made all the greater and more imminent by the fact that the proposed constitutional amendments are vague, incomplete, and misleading by design. By contrast, the legislative defendants will suffer no harm if a preliminary injunction is granted because a constitutionally-constituted N.C.G.A. will reconvene in 2019 and may, at that time, propose whatever amendments it wishes, so long as it does so in a manner that otherwise complies with our state Constitution's requirements.

JURISDICTION

This Court has inherent authority to issue a Temporary Restraining Order ("TRO") and a Preliminary Injunction. North Carolina's Superior Courts have original jurisdiction over all civil actions except for certain types of cases explicitly assigned to the Supreme Court or the District Courts. N.C. Gen. Stat. § 7A-240. 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. All judges of the Superior Court have "jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings pending in their respective divisions." N.C. Gen. Stat. § 1-493. Thus, "[a]n application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division." *Boston v. Freeman*, 171 S.E.2d 206, 208 (N.C. Ct. App. 1969).

Plaintiffs here seek a declaratory ruling that the N.C.G.A. is an illegal usurper body that does not have the authority to propose constitutional amendments pursuant to N.C. Const. art. I,

§ 2, 3, 35; XIII, § 4. The constitutional question of this body's legitimacy has already been determined by the United States Supreme Court, which has judged the N.C.G.A. unconstitutionally constituted. *Covington*, 137 S. Ct. at 2211 (summarily affirming the district court's ruling that the 2011 legislative maps under which the current N.C.G.A. was elected were unconstitutionally racially gerrymandered). The federal court left the question of what actions this illegal body may take squarely in the jurisdiction of the North Carolina Courts. *Covington*, 270 F. Supp. 3d at 901 (noting that the question of the N.C.G.A.'s status of a usurper is an "unsettled question of state law" which is "more appropriately directed to North Carolina courts, the final arbiters of state law"). This question, which does not involve any facial challenge to the constitutionality of an act of the N.C.G.A., is now properly before this Court.

Plaintiffs also mount two separate "as applied" challenges to the validity of the four proposed amendments. First, Plaintiffs challenge this illegally constituted N.C.G.A.'s four amendment proposals as violations of Article XIII, § 4, because, as a usurper legislature, it did not have a legitimate three-fifths majority necessary to propose the amendments. Because, under different circumstances, a legitimate body could potentially pass the amendments lawfully, this claim is as applied, rather than facial. *See generally State v. Thompson*, 349 N.C. 483, 508 S.E. 2d 277 (1998); *State v. Whitaker*, 201 N.C. App. 190, 689 S.E. 2d 395 (2009); *Affordable Care, Inc. v. North Carolina State Bd. of Dental Examiners*, 153 N.C. App. 527, 571 S.E. 2d 52 (2002).

Second, Plaintiffs challenge both the N.C.G.A.'s use of vague and affirmatively misleading ballot language for the four proposed amendments and the incomplete language of the amendments themselves as a violation of Article XIII, § 4's requirement to submit a "proposal" of the amendments to the voters of North Carolina. This vague, incomplete, and misleading language also violates Art. I, §§ 2, 3, and 35, which place the power to govern,

including by altering the Constitution, in the hands of the people. It is possible that in different circumstances, in which both accurate ballot language and the language of the amendments themselves made the scope of the amendments clear to the voters voting on them, that the amendment proposals could be constitutionally valid, thus Plaintiffs' challenge is as applied.

Even if the Court determines, however, that segments of this case constitute a facial constitutional challenge, such that transfer of the matter to a three-judge panel is proper under N.C. Gen. Stat. § 1A-1, Rule 42(b)(4); *id.* § 1-267.1, this Court retains jurisdiction over Plaintiffs' instant application and may issue the preliminary relief requested. Jurisdiction to issue preliminary injunctive relief does not require jurisdiction to hear the merits of the case. And, indeed, Superior Courts commonly grant TROs in cases that are later assigned to different courts for determination of the merits. For example, the Wake County Superior Court issued a TRO in *Cooper v. Berger*, 16CV015636 (Wake Cty. Super. Ct., Dec. 30, 2016), before the case was transferred to the jurisdiction of a three-judge panel for further consideration on the merits. In addition, under North Carolina law, certain complex business cases must be determined on the merits in business court. N.C. Gen. Stat. § 7A-45.4. Nevertheless, Superior Courts often issue TROs in these cases before they are designated to business court. *See, e.g.*, *Bowman v. Sparrow*, No. 16 CVS 822, 2016 WL 7478661, at *3 (N.C. Super. Dec. 28, 2016) (TRO issued in superior court and later extended in business court until determination of motion for preliminary injunction); *Talisman Software, Sys. & Servs., Inc. v. Atkins*, No. 14 CVS 5834, 2016 WL 54909, at *1–2 (N.C. Super. Jan. 4, 2016) (TRO issued in superior court prior to designation to business court); *Pro-Tech Energy Sols., LLC v. Cooper*, No. 14 CVS 20452, 2015 WL 4605803, at *1 (N.C. Super. July 30, 2015) (TRO issued and extended twice in superior court, later extended in business court and ultimately canceled).

The Superior Court maintains this initial jurisdiction because "[t]he decision on the application for injunctive relief pending the litigation will have no bearing whatever on the rights of the parties when the action is tried on the merits." *Huskins v. Yancey Hosp., Inc.*, 78 S.E.2d 116, 122 (N.C. 1953). All other matters, including preliminary matters such as initial injunctive relief necessary to maintain the status quo must be heard by the Superior Court. N.C. Gen. Stat. § 1A-1, Rule 42(b)(4)*; see also* Order to Stay Proceedings and Entry of a Limited Preliminary Injunction, *Haw River Assembly v. Rao*, No. 15 CVS 000127, (Sup. Ct., Wake Cty., May 6, 2015) (noting the court's inherent authority to issue preliminary injunctive relief); *N. C. State Bd. of Educ. v. State*, 814 S.E.2d 67, 69 (N.C. 2018) (noting Superior Court issued TRO prior to transferring case to three-judge panel pursuant to N.C. Gen. Stat. 1A-1, Rule 42(b)(4) and N.C. Gen. Stat. § 1-267.1)

FACTS

I. The Unconstitutionally-Constituted North Carolina General Assembly

The N.C.G.A. comprises 50 Senate seats and 120 House of Representative seats pursuant to the Constitution of the State of North Carolina, Article II, §§ 2, 4. The current N.C.G.A. is a creature of unconstitutional racially-gerrymandered 2011 maps that impermissibly segregated black voters from white voters by packing black voters into legislative districts in concentrations not authorized or compelled under the Voting Rights Act of 1965. *See Covington*, 316 F.R.D. at 124, *aff'd*, 137 S. Ct. at 2211. In doing so, the N.C.G.A. created an extensive gerrymander through adoption of racially segregated districts that frustrated the ability of a growing multiracial fusion electorate to vote in alliance with each other, bridging racial divides and mitigating the effects of racially polarized voting. One obvious effect of packing African-American voters into a given district is to make surrounding districts more white and their elected representatives less responsive to the interests of African-American voters. The current

N.C.G.A. leadership caucus achieved a single party veto-proof supermajority only after the installation of the illegal 2011 racial gerrymander, which has governed every North Carolina legislative election since its adoption.

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

On May 19, 2015, a separate group of plaintiffs filed a parallel challenge in federal court alleging that twenty-eight districts, nine Senate districts, and nineteen House of Representative districts, were illegal racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and the Voting Rights Act. The three-judge federal district court panel unanimously ruled for plaintiffs, holding that "race was the predominant factor motivating the drawing of all challenged districts," and struck down the twenty-eight challenged districts (nine Senate districts and nineteen House districts) as the result of a racial gerrymander. *Covington I*, 316 F.R.D. at 176.

On June 5, 2017, the United States Supreme Court summarily affirmed the lower court's ruling that the twenty-eight challenged districts were the result of an unconstitutional racial gerrymander, *North Carolina v. Covington (Covington II)*, 581 U.S. ——, 137 S.Ct. 2211, (2017) (per curiam). After the Supreme Court's per curiam affirmance, Governor Cooper exercised his state constitutional authority to issue a proclamation on June 7, 2017, calling upon

the General Assembly to convene an extra session "for the purpose of enacting new House and Senate district plans for the N.C.G.A. that remedy the legislative districts ruled unconstitutional." Proclamation, "Extra Session of the North Carolina General Assembly" (June 7, 2017). The N.C.G.A., however, refused to convene for the purpose of remedying the unconstitutional maps.

On June 30, 2017, the mandate issued as to the U.S. Supreme Court's order affirming the lower court's judgment. *See* Certified Copy of U.S. Supreme Court Order, ECF No. 158, *Covington v. North Carolina*, 15-cv-03399-TDS-JEP (M.D.N.C. filed June 30, 2017). The Supreme Court, however, vacated and remanded the lower court's remedial order for a special election. *North Carolina v. Covington*, --- U.S. ---, 137 S. Ct. 1624 (2017) (per curiam).

On remand, the three-judge panel again granted the General Assembly an opportunity to propose a new redistricting plan to remedy the racial gerrymander. *Covington v. North Carolina (Covington III)*, 267 F. Supp. 3d. 664, 668 (M.D.N.C. 2017). In September 2017, the General Assembly submitted to the three-judge panel a proposed remedial map drawn by Dr. Thomas Hofeller, the same mapmaker the N.C.G.A. had hired to draw the 2011 invalidated maps that redrew a total of 117 of the 170 state House and Senate districts. *See Covington v. North Carolina (Covington IV)*, 283 F. Supp. 3d. 410, 419 (M.D.N.C. 2018). After review of the proposed remedial map submitted by the N.C.G.A., the three-judge panel expressed concern that a number of the redrawn districts were essentially continuations of the old, racially gerrymandered 2011 districts that had been previously rejected as unconstitutional and "either failed to remedy the identified constitutional violations or were otherwise legally unacceptable." *Id.* at 420. Accordingly, after giving the parties an opportunity to submit a list of qualified special masters, the district court selected one and ordered him to submit recommendations for remedying a number of districts from the state's proposed remedial plan. *Id.* at 419-20. On

January 5, 2017, the special master presented his recommended plans to the three-judge panel. *Id.* at 423.

Following hearing from all parties as to both the N.C.G.A.'s proposed remedial plans and the special master's recommendations, the three-judge panel issued a memorandum opinion holding that "the General Assembly [had] failed to enact 'a constitutionally acceptable' remedial plan," because several of the N.C.G.A.'s proposed remedial districts either failed to remedy the unconstitutional racial gerrymander or violated provisions of the North Carolina Constitution. *Id.* at 442, 447. The district court then analyzed the legality of the special master's recommendations for addressing the deficiencies in the N.C.G.A.'s remedial plan and adopted many of those recommendations. *Id.* at 447-458. The United States Supreme Court affirmed the district court's ruling, except for those remedial districts that were defective because of state constitutional infirmities, which the Supreme Court reasoned, fell under state and not federal jurisdiction. *North Carolina v. Covington ("Covington V")*, 138 S.Ct. 2548 (2018) (per curiam).

Accordingly, when the N.C.G.A. voted this summer to propose six constitutional amendments on the ballot, four of which Plaintiffs challenge in this case, more than two thirds of members in both the Senate (36 or 72%) and the House (81 or 68%) were from districts that have been redrawn to cure the unconstitutional racial gerrymander. Exhibit 5. Indeed, the November 2018 election, which will be held under the redrawn legislative districts, marks the first opportunity since 2011for North Carolina voters to choose representatives under maps that have not been unconstitutionally racially gerrymandered.

II. 2018 Proposed Constitutional Amendments

North Carolinians have lived for nearly seven years under an unconstitutionally-constituted state legislature. Yet, even after the United States Supreme Court's June 2017

judgment in *Covington*, which rendered the N.C.G.A. a usuper, the N.C.G.A. has continued to act and pass laws, including inacting the state budget, holding committee meetings, and appointing members to boards and commissions.

In the most recent regular legislative session, the leadership of the usurper N.C.G.A. went beyond its day-to-day business and passed legislation that would place before the voters six constitutional amendments. This would be the largest number of amendments that have been simultaneously proposed to the North Carolina Constitution. Exhibit 6. Disconcertingly, the amendments were passed in less than 14 days and with little deliberation. Exhibit 7.

These proposed constitutional amendments are as follows: House Bill 913, "An Act to Amend the Constitution of North Carolina to establish a bi-partisan board of ethics and elections enforcement and to clarify board appointments" (the "Board and Commissions Amendment"); Exhibit 1; Senate Bill 814, "An Act to Amend the Constitution of North Carolina to provide for nonpartisan judicial merit commissions for the nomination and recommendation of nominees when filling vacancies in the office of justice or judge of the general court of justice and to make other conforming changes to the Constitution" (the "Judicial Vacancies Amendment"); Exhibit 2; House Bill 1092, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person" (the "Voter ID Amendment"); Exhibit 3; Senate Bill 75, "An Act to Amend the North Carolina Constitution to provide that the maximum tax rate on incomes cannot exceed seven percent" (the "Tax Cap Amendment"); Exhibit 4; and two amendments not challenged here, which propose to create new constitutional rights for victims of felonies and constitutionalize a right to hunt and fish.

Under the North Carolina Constitution, any law to put a proposal for a constitutional amendment on the ballot must be passed by a three-fifths majority of both houses of the

N.C.G.A. N.C. Const. art. XIII, § 4. All six amendment proposals were ratified by both houses of the N.C.G.A. on June 28, 2018. (2018 N.C. Sess. Laws 117; 118; 128; 119; 96; and 11.) Four out of the proposed six constitutional amendments, the four at issue in the present action, passed that margin by just one or two votes.

The proposed amendments that are at issue in the present case will be presented on the ballot with vague and misleading language and will require significant additional implementing language before their full scope and extent becomes clear:

- **House Bill 913** includes a massive shift in the power to control all state boards and commissions. The Amendment alters the N.C. Constitution such that the N.C.G.A. will control the "powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." This language is unclear on its face and as to how it will affect the more than 350 boards and commissions in North Carolina. Exhibit 1.
- **Senate Bill 814** proposes to amend the Constitution by stripping the Governor of his appointment power over judicial vacancies and shifting that power to the N.C.G.A. Despite the drastic restructuring between the branches, the amendment makes no reference to this power shift and instead reads: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections." Exhibit 2.
- **House Bill 1092** proposes a constitutional amendment requiring photo identification to vote in person. The bill does not specify what might qualify as

"photo identification." Rather, the amendment states that the N.C. General Assembly will enact general laws governing the requirement of such photographic identification, which may include exceptions." Absent any implementing legislation there will be a Photo ID requirement in the Constitution that may be interpreted differently across the state, causing mass confusion. The amendment does not specify what "exceptions" might be given, again rendering the language and the amendment's implementation unclear. Exhibit 3.

- **Senate Bill 75** proposes a constitutional amendment to reduce the maximum allowable state income tax rate. The way the amendment is presented on the ballot suggests that income tax rates will be immediately reduced, when in fact current rates are well below the new proposed cap of 7%. Exhibit 4.

Such vagueness in the text of proposed amendments to our Constitution is alarming, as most such consitutional amendments have not required additional implementing legislation at all. Since our current N.C. Constitution was adopted in 1971, it has been amended forty-five times. Only two of those amendments have required any additional implementing legislation after the amendments were voted upon by the citizens of North Carolina. *See* 1983 N.C. Sess. Laws 526 (implementing the constitutional amendment to allow the Supreme Court to review decisions of the N.C. Utilities commission), and 1998 N.C. Sess. Laws 212 § 19.4 (implementing the constitutional amendment creating rights for victims of crimes); *see also* Exhibit 6. Importantly, unlike in the instant case, this implementing legislation did not add substantively to the amendment that had been placed before the voters. Moreover, the legitimacy of the proposals was never adjudicated by any court.

III. Ballot Language for the 2018 Constitutional Amendments

Previously under North Carolina law, the Constitutional Amendments Publication Commission, which is comprised of the Secretary of State, the Attorney General, and the Legislative Operations Chief, had the authority to write the explanatory caption for any proposed constitutional amendments. 2016 N.C. Sess. Laws 109. However, shortly after the Constitutional Amendments Publication Commission announced its plan to hold meetings and receive public input in order to draft explanatory captions on the 2018 proposed constitutional amendments, the N.C.G.A. called itself back into a special legislative session on July 24, 2018. This special session was called with less than 24-hours' notice to the public.

In a July 21, 2018 letter to House Speaker Tim Moore calling for this special legislative session, Representative David Lewis asserted that he was "very concerned that the commission's schedule will allow for gamesmanship and politics" because the August 6 deadline set by the State Board of Elections to receive ballot caption language was nearing, yet "maneuverings by interested political outside groups and individuals" had delayed the commission in its work and the commission might "fall" to the pressure and politicize the title crafting process. Exhibit 8. Representative Lewis recommended calling the N.C.G.A. back into session to "pass the exact ballot caption language needed to explain the amendments and comply with the State Board's deadline." *Id.*

The N.C.G.A. returned for this special session and passed House Bill 3. House Bill 3 eliminates the authority of the Commission to draft the explanatory captions and instead requires that proposed constitutional amendments on the North Carolina ballot simply be captioned "Constitutional Amendments" and include the question presented in the legislation as drafted by the N.C.G.A. Exhibit 9.

Under this law, several of these "questions" that would appear on the ballot are incomplete and do not capture the full scope of the amendment, and all are affirmatively misleading, even to the point of being false. The only language voters will have before them in the voting booth to guide a "for" or "against" vote on these amendments is as follows:

For House Bill 913:

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

For Senate Bill 814:

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

For House Bill 1092:

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

For Senate Bill 75:

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

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

> These proposed Constitutional amendments would dramatically weaken our system of checks and balances. The proposed amendments also use misleading and deceptive terms to describe them on the ballot.
>
> This bill compounds those problems by stopping additional information that may more accurately describe the proposed amendments on the ballot. Voters should not be further misled about the sweeping changes the General Assembly wants to put in the Constitution.

Exhibit 10. Speaker Moore and President Pro Tem Berger quickly announced their intent to override the Governor's veto of House Bill 3. But—despite their previously-stated concerns about gamesmanship and the need to resolve the question of ballot language for the proposed constitutional amendments well ahead of the time needed for ballot printing—they announced that they would not reconvene immediately, and instead waited until Saturday, August 4, 2018, to override the veto. Exhibit 11.

On Tuesday, July 31, 2018, before the veto of House Bill 3 had been overridden, the Constitutional Amendments Publication Commission convened its first meeting. The Commission could not, however, take any official action because the Republican member, Legislative Services Officer ("LSO") Paul Coble, refused to attend. Exhibit 12. In an email to Attorney General Joshua Stein and Secretary of State Elaine Marshall the afternoon of Monday, July 30, 2018, LSO Coble stated that he did not want to meet before the N.C.G.A.'s expected override of Governor Cooper's veto. Exhibit 11. LSO Coble cited a desire to "further avoid politicizing the work of the Commission and to avoid additional controversy," and to "wait until the scope of the Commission's work is settled." *Id*., Exhibit 12. Secretary Marshall rejected the assertion that the meeting was politicizing the Commission's work, pointing out that LSO Coble's refusal to attend stymied the Commission's ongoing obligation at least to draft the longer descriptions. *Id.* Nevertheless, LSO Coble did not attend. *Id.*

In LSO Coble's absence, Attorney General Stein and Secretary Marshall turned the meeting into a brief "work session," during which they found that many of the ballot questions drafted by the N.C.G.A. were misleading. *Id*. Attorney General Stein noted his opinion that the language describing the judicial vacancies amendment was "the most deceptive and misleading budget caption of them all," which will have citizens "voting on saccharine sweet candy language that is not real." Exhibit 13. Attorney General Stein explained that not only would this amendment essentially give the N.C.G.A. the power to determine who may be a judge in North Carolina, but the way the language of the amendment is drafted, and will thus alter the Constitution, could create a new loophole in the law whereby the N.C.G.A. would be able to pass almost any legislation free from gubernatorial veto by slipping judicial recommendations into unrelated bills. *Id*.

Attorney General Stein noted that the Boards and Commissions question includes a misleading reference to the "Judicial branch" even as the proposed amendment has nothing to do with this part of our government. Exhibit 12. The Attorney General called the amendment itself "the most radical restructuring of our government in 150 years." *Id.* Moreover the Attorney General noted that the ballot language regarding the Sentate Bill 75 is deceptive and misleading—and will lead people to believe that it will immediately lower their current tax rate, when in reality it only reduces the maximium allowable tax rate.

Summarizing the disconnect between the two ballot questions and their actual effect, Attorney General Stein analogized to buying a birthday cake only to discover at home that it is made of "cat food." Exhibit 13. Secretary of State Marshall described the questions as "a Trojan horse or a pig in a poke." *Id.* Ultimately, the Commission was recessed until August 6. Exhibit 11.

On Saturday, August 4, 2018, the N.C.G.A. returned for a special session. Before the session commenced, several members of the N.C.G.A. leadership, including Defendant Berger, held a press conference. At this press conference Senator Berger acknowledged the ambiguity inherent in the Judicial Vacancies amendment, but stated his belief that statements at the press conference could be used by a court to infer legislative intent, and thus clarify any ambiguity. The two chambers then went into session. The Governor's veto of legislation to place caption writing in the hands of the N.C.G.A. was overridden 70-39 in the House and 28-12 in the Sentate. Exhibit 14.

STANDING

Plaintiffs NC NAACP and Clean Air Carolina ("CAC") 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. The North Carolina Supreme Court recently reaffirmed this, finding that "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 CAC 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)). In other words, 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).

I. <u>NC NAACP's Standing</u>

NC NAACP has standing to challenge the Voter ID Amendment (House Bill 1092) both on its own behalf and on behalf of its members. The NC NAACP has standing to challenge the proposed Voter ID amendment on its own behalf because since its founding, the enduring priority of the NC NAACP has been to protect and expand hard-won voting rights, including by opposing voter ID laws and other barriers to the ballot and to advocate for a more open and democratic voting system. The NC NAACP was the lead plaintiff in *NC NAACP v. McCrory*, which successfully challenged racially discriminatory restrictions on voting—including a voter ID requirement, which the N.C.G.A. enacted in 2013. In ruling for plaintiffs, the U.S. Court of Appeals for the Fourth Circuit found that this photo identification provision and other challenged

provisions were passed with racially discriminatory intent and unlawfully targeted African-American voters "with almost surgical precision." *N.C. State Conf. of N.A.A.C.P. v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N.C. State Conf. of N.A.A.C.P.*, 137 S. Ct. 1399 (2017) (striking down provisions in 2013 N.C. Sess. Laws 381).

If passed, the Voter ID Amendment will injure the NC NAACPs ability to pursue its mission and gut the NC NAACP's hard-fought legal victory against a racially discriminatory voter ID requirement and would again require voters to present photo identification in order to access the ballot. Such a law would have an irreparable impact on the right to vote of African Americans in North Carolina. The proposed amendment further harms the NC NAACP because the proposed amendment and its ballot description is vague and misleading. Moreover, the amendment is incomplete, such that the true effects of the amendment cannot be known to voters until subsequent implementing legislation is passed by the N.C.G.A.

In addition, there is a possibility that the amendment could be ratified by the voters but the N.C.G.A. may never enact implementing legislation that creates uniform standards or exceptions regarding the types of photo IDs that voters may use. Failure to enact such legislation creates the risk that each precinct is left to determine its own standards for what counts as a photo ID before allowing voters to cast their ballots. It will thus be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away ffrom its core activities to educate voters about the proposed amendment before the 2018 election. This court can remedy Plaintiff NC NAACP's injury by blocking the State Board of Elections and Ethics Enforcement from placing the proposed photo ID amendment on the November 2018 general election ballot.

NC NAACP also has standing to challenge the Voter ID Amendment on behalf of its members because, if passed, the Voter ID Amendment will have an irreparable harmful impact on the right to vote of NC NAACP members. (Spearman Affidavit, Exhibit 15, ¶ 22). Specifically, members of the NC NAACP, who include African-American and Latino voters in North Carolina will effectively be denied the right to vote, face unreasonable impediments to vote, or otherwise deprived of meaningful access to the political process as a result of the proposed voter ID requirement. If passed, the proposed voter ID amendment will also impose costs and substantial and undue burdens on the right to vote for those and other members.

As discussed above, protecting its members from this harm is germane to the NC NAACP's purpose, and neither the claims asserted nor the declaratory and injunctive relief requested in this case requires the participation of the individual members in the lawsuit.

The NC NAACP has standing on its own behalf and on behalf of its members to challenge the Judicial Vacancies Amendment (Senate Bill 814) because litigating to vindicate the civil and political rights of its members is germane to its mission, and it therefore has an interest in a fair and impartial judiciary. (Exhibit 15, ¶ 25). Because the proposed Judicial Vacancies Amendment would further politicize the judiciary, it harms the NC NAACP's ability to seek relief on its own behalf and on behalf of its members for racial discrimination and other unconstitutional and unlawful acts. (Exhibit 15, ¶¶ 25-27) Additionally, a critical component of the NC NAACP's mission is promoting racial diversity in the North Carolina state courts. This amendment will harm the NC NAACP by endangering the progress that has been made in diversifying the judicial branch. (Exhibit 15 ¶¶ 26-27).

The proposed amendment further harms the NC NAACP because the proposed amendment contains vague and misleading language, such that the true effects of the amendment

cannot be known to voters including NC NAACP members until subsequent implementing legislation is passed by the General Assembly. It will thus be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to educate voters about the proposed amendment before the 2018 election. This court can remedy Plaintiff NAACP's injury by blocking the Bipartisan State Board of Elections and Ethics Enforcement from placing the proposed amendments from Senate Bill 814 on the November ballot.

The NC NAACP has standing on its own behalf and on behalf of its members to challenge the Boards and Commissions Amendment (House Bill 913) because the NC NAACP regularly advocates on its own behalf and on behalf of its members – and its members regularly advocate – before various state boards and commissions, including the Bipartisan State Board of Elections & Ethics Enforcement. (Exhibit 15, ¶¶ 30-32). By making dramatic changes to the structure of power and control over these state boards and commissions, the amendment will make those state boards and commissions less independent and less able to conduct their missions and administrative, advisory, and regulatory functions in an impartial way. (Exhibit 15, ¶¶ 32-33).

The proposed amendment further harms the NC NAACP because the proposed amendment contains vague language, such that the true effects of the amendment cannot be known to voters including members of the NC NAACP until subsequent implementing legislation is passed by the General Assembly. It will be difficult, if not impossible, for the NC NAACP to inform its members and voters about the likely impact of the proposed amendment, and the NC NAACP will be forced to divert significant resources away from its core activities to

educate voters about the proposed amendment before the 2018 election. This court can remedy Plaintiff NAACP's injury by blocking the Bipartisan State Board of Elections and Ethics Enforcement from placing the proposed amendments from House Bill 913 on the November ballot.

NC NAACP has standing on its own behalf and on behalf of its members to challenge the Income Tax Cap Amendment (Senate Bill 75) because the proposed constitutional amendment that lowers the income tax cap from 10% to 7% harms the NC NAACP, its members and the communities it serves, and its ability to advocate for its mission. Because the proposed constitutional amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. This amendment harms the NC NAACP because it will disproportionately negatively impact NC NAACP members and the communities and people that it serves. (Exhibit 15, ¶¶ 35-36). Moreover, if placed on the ballot, NAACP will be forced to explain to its members the impact of this amendment. Where it may appear to voters to lower current income rates, in actuality the 7% cap is higher than the current rate of 5.5% and instead represents a substantial decrease from the 10% constitutional cap. This court can remedy Plaintiff NAACP's injury by declaring Senate Bill 75 unconstitutional and blocking it from being placed on the ballot

II. <u>Clean Air Carolina's Standing</u>

Plaintiff CAC will be harmed by the Judicial Vacancies Amendment (Senate Bill 814) shifting control of judicial vacancies from the Governor to the N.C. General Assembly because it

is concerned that such an extreme shift is likely to make the judiciary less impartial and more political. (Blotnick Affidavit, Exhibit 16, ¶ ¶15-16) (Orr Affidavit, Exhibit 17, ¶ 21.) This injury is directly attributable to the N.C.G.A.'s passage of Senate Bill 814. This court can remedy Plaintiff CAC's injury by declaring Senate Bill 814 unconstitutional and blocking it from being placed on the ballot.

Plaintiff CAC will be injured by the Boards and Commissions Appointment Amendment (House Bill 913) because the amendment will make state boards and commissions before which it advocates less independent and less able to conduct their missions and administrative, advisory, and regulatory functions in an impartial, scientific way, as they will be less independent and more political. (Exhibit 16, ¶ 14.) (Exhibit 17, ¶ 23.) This injury is directly attributable to the N.C.G.A.'s passage of House Bill 913. This court can remedy Plaintiff CAC's injury by declaring House Bill 913 unconstitutional and blocking it from being placed on the ballot.

Plaintiff CAC will be injured by the Income Tax Cap Amendment (Senate Bill 75) because its ability to advocate for its priority issues, including but not limited to environmental protection, non-highway transportation solutions including bike and pedestrian improvements, buses, light, commuter, and heavy rail will be limited, as the North Carolina Department of Environmental Quality ("DEQ") is already severely underfunded and CAC is fearful that reducing the amount of state taxes collected will diminish DEQ's budget even more. (Exhibit 16, ¶¶ 6, 8) (Exhibit 17, ¶17.) Further, CAC believes that the N.C. Department of Transportation already spends too little on non-highway projects and a smaller future tax base could reduce that spending even more. Such injury is directly attributable to the N.C.G.A.'s

passage of Senate Bill 75. This court can remedy Plaintiff CAC's injury by declaring Senate Bill 75 unconstitutional and blocking it from being placed on the ballot.

Finally, because these amendments contain vague and misleading language, Plaintiffs NAACP and CAC will have to immediately divert staff time and resources away from other important activities and reallocate that time and those resources to educating its members via phone calls, newsletters and action alerts about the negative impacts of these amendments, between now and November 6, 2018. (Exhibit 15, ¶¶ 23, 28, 34)(Exhibit 16, ¶¶ 9, 14 and 16). The U.S. Supreme Court established that a diversion of institutional resources to counter the challenged conduct constitutes an injury in fact. *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982)(noting when an organization has to divert resources to counteract a defendant's unlawful actions, the organization has suffered a "concrete and demonstrable injury"). *See also*, *Nat'l Council of La Raza v. Cegavske*, 800 F. 3d 1032, 1040-41 (9th Cir. 2015)(reversing dismissal for lack of standing where organizational plaintiffs alleged that but for defendants' violations of the National Voting Rights Act, they would have allocated resources to other activities central to their mission beyond voter registration, and holding such allegations were "concrete and particular"). Both NAACP and CAC show that they have suffered or will imminently suffer an injury in fact because they will have to divert time and resources to address the unconstitutional amendments. (Exhibit 15, ¶¶ 23, 28, 34)(Exhibit 16, ¶¶ 9, 14 and 16). This injury to Plaintiffs is directly attributable to the N.C.G.A.'s passage of these bills proposing the amendments. This Court can remedy Plaintiffs' injuries by declaring House Bills 1092, 913, and Senate Bills 75, 814 unconstitutional and keeping them off of the ballot.

ARGUMENT

I. Preliminary Injunctive Relief

A court will grant a motion for preliminary injunction when the plaintiff shows that (1) it is likely to be successful on the merits of the underlying case, and (2) it is likely "to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. at 401, 302 S.E.2d at 759-60. Meeting this standard "does not require a showing that the injury is beyond repair, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict." *Wrightsville Winds Townhouses Homeowners' Ass'n. v. Miller*, 100 N.C. App. 531, 535, 397 S.E. 2d 345, 347 (1990). Plaintiffs meet this standard, as described fully below.

A ruling on a motion for preliminary injunction is addressed to the sound discretion of the trial judge, to be exercised after a balancing of the equities. *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. at 400, 302 S.E.2d at 759 (considering conveniences and inconveniences of plaintiff and defendants of the issuance of the preliminary injunction.) When considering whether a plaintiff is likely to suffer irreparable loss absent an injunction, a court "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v. Greene*, 36 N.C. App. 80, 86 (1978).

As with a preliminary injunction, movants are entitled to a TRO when they show a "likelihood of success on the merits" and that they are "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. at 400, 302 S.E.2d at 759-60 (citation omitted). "The issuance of a TRO 'is a matter of discretion

to be exercised by the hearing judge after a careful balancing of the equities.'" *Nat'l Surgery Ctr. Holdings, Inc. v. Surgical Inst. of Viewmont, LLC*, No. 16 CVS 1003, 2016 WL 2757972, at *3 (N.C. Super. May 12, 2016) (quoting *A.E.P. Indust., Inc.* at 759).

Granting an injunction at this time in this case would be just, while the harm to the Defendants here is negligible. In a matter of a few short months, after elections based on legal district lines, the N.C.G.A. will be free to place even these same constitutional amendments on the ballot, so long as they present a full and clear proposal to the public as they are constitutionally required to do. Moreover, none of the proposed amendments address any compelling or urgent need. By contrast, the harm to Plaintiffs will be immediate and irreparable as they will have to shift resources away from their core mission and activities toward explaining the vague, ambiguous proposals with misleading captions to their members and to the people and communities they serve. To ensure that absentee voters can proceed as planned on September 7, 2018, ballots must be printed well before that date. Thus, the need for relief is immediate.

A. Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs are likely to succeed on the merits of their claims. The proposal by an illegally constituted usurper legislature to place vague constitutional amendments on the November ballot with misleading captions is a violation of N.C. Const. art. I, §§ 2, 3, 35 and Art XIII § 4.

1. The Usurper N.C.G.A. does not have legal authority to place constitutional amendments on the ballot.

The North Carolina Constitution sets out strict parameters for how it may be amended. Under the Constitution, "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I § 2. Accordingly, the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be

necessary to their safety and happiness; but *every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States*." *Id.* § 3 (emphasis added). The Constitution also provides that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35. It is thus manifest that any change to the Constitution must be made in the full compliance with both state and federal law, and with the full and legal blessing of North Carolina voters first through their duly elected officials who draft, debate, and place amendments onto the ballot, and then through a final ratification of qualified voters.

North Carolina law has long recognized that once a public official or public body has been adjudged to have obtained office by illegal means, it is a usurper. *See Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005, 1007-08 (1891) (holding that once it becomes known that an officer is in his position illegally that officer ceases to have de facto status, but is a usurper to the office); *State v. 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 adjudged as such).

The Supreme Court has carefully explained the reason for this 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.

The doctrine is further buoyed by the consitutional provision that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I § 2. An illegally elected officier or public body does not derive its power "from the people" and thus cannot be trusted to act "solely for the good of the whole." Moreover, the consitutional mandate that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty" augurs towards placing limitations on those in office in violation of the fundamental princples our State is built upon. N.C. Const. art. I § 35.

Here, the N.C.G.A. has been illegally constituted since 2011 when the leadership unlawfully used race to construct racially segregated districts that resulted in an unaccountable and unconstitutional supermajority in the state legislature. This sweeping unconstitutional racial gerrymander contaminated at least 77 out of North Carolina's 100 counties and impacted 83 percent of the state's population. Pls.' Statement at 5-6, ECF No. 156, *Covington v. North Carolina*, 15-cv-03399-TDS-JEP (M.D.N.C. filed June 15, 2017) (citing Decl. of Thomas Hofeller, Oct. 28, 2016, ECF No. 136-1). Altogether 28 districts, 9 in the Senate and 19 in the House, were found to be unconstitutional racial gerrymanders and ultimately 117 districts were redrawn to create a new constitutional map. *See Covington I*, 316 F.R.D. at 1776, *aff'd* 137 S.Ct. at 2211; *Covington IV*, 283 F. Supp. 3d. at 419. Thus, when the Supreme Court issued its mandate in *Covington* in June 2017, and it was adjudged and declared to the people of North

Carolina that the N.C.G.A. was illegally constituted, the body ceased even to have "de facto" status. Rather, once the ruling was made and known, the N.C.G.A. became a usurper body.

To the extent that the law recognizes that a usurper legislator has any authority to engage in official acts, it is limited only to those acts as 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) ("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 rests on considerations of public policy, and for the protection of the public and individuals whose interests may be affected thereby. *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 pulic and individuals whose interests may be affected thereby").

Thus, even if North Carolina courts were to recognize such an exception, it cannot extend beyond those acts necessary for the running of government. Beyond such minimal acts necessary to prevent chaos and confusion, the usurper N.C.G.A.—the product of an election unauthorized by law" and thus "wholly without legal force or effect"—has no legitimate power to act at all. *Van Amringe*, 108 N.C. at 198. Certainly, the usurper body may not take such permanent and drastic an action as to modify a constitution that the N.C.G.A. itself violates. The illegality of such an act is all the more certain in this case, given that under North Carolina law, a

supermajority is required in both houses to put a constitutional amendment on the ballot, and the current supermajorities in both the N.C.G.A. Senate and House were illegally obtained using racially discriminatory now-invalidated maps. The judiciary must step in to prevent this unconstitutionally-constituted usurper body from such illegal acts. To do otherwise would be to allow chaos and confusion to reign as an undemocratically elected body enacts proposed amendments to the most fundamental law of the state in order to further entrench its own power, and to further disenfranchise its minority citizens.

Importantly, no urgent state need is addressed by these amendments. The state has thrived to date without these amendments and they are not necessary for the ongoing orderly conduct of state government. To the contrary, instead of *preventing* chaos and confusion, these proposed constitutional amendments will in fact *create* chaos and confusion if they are placed on the ballot this November due to the misleading descriptions mandated by the legislature. To the extent that any of these amendments serves any state need at all, all of the amendments could easily be placed onto the ballot at a later time by a constitutional N.C.G.A. without any harm to our state.

Moreover, the very nature of the Constitution and the amendment process dictate that this is a line the usurper legislature must not be permitted to cross. While statutes and legislative appointments can and do change with shifting legislative majorities and priorities, the North Carolina Constitution is a comparatively static document. North Carolinians have amended their Constitution only six times in the past fifteen years. Exhibit 6. The usurper legislature seeks to realize a sea change in our state's foundational document through proposed amendments described in misleading terms, all put forward in a rush at the end of one legislative session.

This is a drastic measure, and unlike legislation, these constitutional amendments will be difficult to undo because reversing their effect would require another constitutional amendment.

The manner in which constitutional amendments must be put forth, adds further weight to the inescapable conclusion that the usurper legislature cannot be permitted to take these actions. Unlike the usual passage of legislation which requires ratification by both the legislature and the executive branch the power to propose constitutional amendments rests exclusively in the hands of the N.C.G.A., with no role for the Governor. N.C. Const. art. XIII, §§ 2, 4. In other words, this usurper N.C.G.A., which came to supermajority power by way of an unconstitutional racial gerrymander that disenfranchised hundreds of thousands of North Carolinians, particularly African American voters, has unlawfully used its illegitimate power to engage in drastic, unilateral action that is immune from the usual check of the executive veto by the Governor, whose office is elected statewide and therefore not susceptible to unlawful gerrymandering. Even more alarming, the N.C.G.A.'s drastic, unilateral use of its illegally-obtained authority has been geared toward further consolidating power for itself in what the N.C. Attorney General has called "the most radical restructuring of our government in 150 years." Exhibit 11.

Amending the Constitution is so drastic and so outside the scope of a legislature's day-to-day functions that, in order to place a proposed constitutional amendment on the ballot, the Constitution requires a three-fifths majority of both houses of the legislature, as opposed to the usual simple majority required for regular legislation. This heightened requirement reflects the gravitas with which constitutional amendments must be viewed. Proposing constitutional amendments is the only legislative action that requires a supermajority vote to be iniatiated. This reflects the public will, embodied in the Constitution, that more than a simple majority of elected representatives must agree on such a substantial action.

Here, each of the four challenged proposed amendments passed this high bar by just one or two votes. Exhibits 1-4. Given the scale of the unconstitutional racial gerrymander that infected the maps under which this usurper N.C.G.A., and the fact that 117 seats had to be redrawn to remedy its taint, it is clear that the proposed amendments, complete with misleading language, would be extremely unlikely to have passed the necessary three-fifths majority if the districts had been legally drawn. The sweeping amendments to North Carolina's most fundamental law would thus be a direct result of the unconstitutional way in which the N.C.G.A. is constituted, with no legitimate legal foundation. The illegal usurper N.C.G.A. cannot be permitted to take such extreme steps and the amendments authorized by Senate Bills 814, 75 and House Bills 913 and 1092 should be declared void *ab initio*.

2. The N.C.G.A. violated its constitutional duty to submit a "proposal" to qualified voters because both the ballot language and the amendments are vague, incomplete, and/or misleading.

As noted above under the Constitution, the people of North Carolina "have the inherent, sole, and exclusive right" "of altering or abolishing their Constitution" as "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I §§ 2, 3. N.C. C. art. XIII, § 4 sets out the procedures by which the N.C.G.A. may initiate amendments to the Constitution, mandating that a "proposal" of an "amendment or amendments" to the Constitution may be initiated by the N.C.G.A. and that the "proposal" must then be submitted to the qualified voters of the state.

Courts in other jurisdictions have interpreted similar requirements to submit a "proposal" to the voters to mean that the proposal must be fairly and accurately reflected on the ballot. *See, e.g., Armstrong v. Harris*, 773 So.2d 7, 12 (Fla. 2000) (requiring accuracy for a Florida ballot based on a substantively identical provision in the Florida Constitution); *Breza v. Kiffmeyer*, 723

N.W.2d 633, 636 (Minn. 2006) (requiring accuracy for a Minnesota ballot provision to amend that state's Constitution based a substantively identical provision).

Such an interpretation makes sense given both the significance of amending a constitution and the fundamental nature of the right to vote. Indeed, it is well established under North Carolina law that voters must be presented with clear, accurate information on all ballot items. For example, N.C. Gen. Stat. § 163A-1108 requires the State Elections and Ethics Board to ensure that official ballots, among other things are "readily understandable by voters" and "[p]resent all candidates and questions in a fair and nondiscriminatory manner." N.C. Gen. Stat. § 163A-1108(1)-(2). *See also Sykes v. Belk*, 278 N.C. 106, 119, 179 S.E.2d 439, 447 (1971) (noting that a ballot may be invalidated if it contains a "misleading statement or misrepresentation.")

As the Florida Supreme Court has noted, unclear amendments beget considerable harm because "if such proposed amendment[s] were adopted by the people at the General Election and if the Legislature at its next session should fail to submit further amendments to revise and clarify the numerous inconsistencies and conflicts which would result . . . simple chaos would prevail in the government of this State. . . ." *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970).

The vague, misleading, and incomplete proposals violate the Constitution's mandate that the people of North Carolina "have the inherent, sole, and exclusive right of regulating the internal government . . . and of altering or abolishing their Constitution." N.C. Const. art. I § 3. An uninformed and misled public cannot be said to be excercizing that exlcusive right. Similarly, the misleading nature of the amendments, which are designed to benefit the N.C.G.A., and not the populous, violates Article I § 2 of the Constitution, which provides that "all

government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I § 2.

Here, the N.C.G.A. has failed to comply with the requirement to place a clear, accurate "proposal" before qualified voters in two ways. First, the four challenged amendments will be submitted to the voters with misleading language, and thus is not the clear and accurate "proposal" the Constitution requires. Second, three of the four challenged amendments include vague and incomplete language that will require further implementing legislation before the full scope and extent of the amendments are known. As such, the full "proposal" has not been submitted to qualified voters. Plaintiffs address each in turn below.

a) Ballot Language

The vague, misleading, and incomplete way that the constitutional amendments will be presented to voters on the ballot violates the legal requirement to "submit the proposal to the qualified voters of North Carolina." N.C. Const. art. XXIII, § 4.

After rushing the six proposed constitutional amendments through the legislative process during the regular legislative session, the leadership of the N.C.G.A. reconvened a last-minute, surprise special session on July 24, 2018, to pass House Bill 3, which strips the Constitutional Amendments Publication Commission (comprised of the Secretary of State, the Attorney General, and the Legislative Operations Chief) of its authority to draft the explanatory ballot language for proposed constitutional amendments. The special session bill instead mandates that the proposed amendments appear on the ballot with the caption "Constitutional Amendments" accompanied by the question text drafted by the N.C.G.A..[1] Exhibit 9. Thus, through much

[1] As discussed above in the Facts section, House Bill 3 was vetoed by Governor Cooper on July 27, 2018. Exhibit 10. The NCGA reconvened to override the veto on August 4, 2018. *See* Exhibit 14.

legislative maneuvering, the N.C.G.A. has ensured that no explanatory captions will be included on the ballot to help clarify for the voters the actual effect of each amendment. As a result, the questions will be presented in an extremely misleading way that fails to provide voters with the "proposal," in violation of Article XIII, § 4 of the North Carolina Constitution.

(1) The Boards and Elections Amendment

House Bill 913 will appear on the ballot simply as "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority." This ballot language is intentionally misleading in several ways.

First, this limited language suggests that the main purpose of the amendment is to establish the Board of Elections and Ethics Enforcement—which already exists— when, in fact, the proposed amendment would result in an unmentioned, massive shift of power from the executive branch to the legislative branch. Currently, all boards and commissions in the state are under the authority of the executive branch. *See State v. Berger*, 368 N.C. 633, 636, 781 S.E.2d 248, 250 (2016) (holding that "legislative branch has exerted too much control over commissions that have final executive authority," and consequently, the legislative branch "has prevented the Governor from performing his express constitutional duty to take care that the laws are faithfully executed"). The change proposed by House Bill 913 includes that "[t]he legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." 2018 N.C. Sess. Laws 117, Sec. 2. The ballot language to be presented to voters remains silent as to this unprecedented power shift between branches of government.

Second, while the ballot language states that a "bipartisan" Board is to be established by the amendment, no part of the proposed amendment is, in fact, designed to ensure that the Board of Elections & Ethics Enforcement would be "bipartisan" as that term is commonly understood. For example, the current Board is statutorily required to be comprised of no more than four members can be from a single party, meaning the Board could be comprised of four Republicans, a member of the Constitution Party, two Libertarians, and a single Democrat. The proposed amendment does nothing to change this to ensure bipartisanship.

Third, although the ballot question states that it will "*clarify* the appointment authority of the Legislative and Judicial Branches," (Exhibit 1, emphasis added) it will in fact radically *alter* the appointment authority of those branches, as well as severely diminish the appointment authority of the Executive Branch. Additionally, the question text's suggestion that the only issue being "clarified" is "appointment authority" is misleading and vague, as the amendment goes far beyond "appointment authority" alone to include structural changes to the state Constitution's separation of powers. Specifically, the amendment gives the N.C.G.A. control over appointments, as well as over the "powers, duties, responsibilities, and terms of office" of all 350 boards and commissions in the state – all powers that currently belong to the Governor. Finally, despite the ballot language suggesting that it "clarif[ies]" "appointment authority" of the judicial branch, the amendment will, in fact, have no effect on "appointment authority" of the judicial branch. The N.C.G.A. has thus not met its obligation to submit a clear and accurate proposal to the voters as required under the state Constitution.

(2) The Judicial Vacancies Amendment

Senate Bill 814 will appear on the ballot as "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political

influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections." This ballot language is also affirmatively misleading.

First, the language of the question implies that the newly proposed method of appointing judicial vacancies will be free of political influence, and that the current method does not rely on professional qualifications. To the contrary, the current method does, in fact, rely on professional qualifications, and the proposed method is not "non-partisan" or free of political influence.

Second, the ballot language again fails to disclose the enormous power shift inherent in the amendment. Currently, judicial vacancies are filled by the Governor, typically chosen from a short list provided by members of the Bar from the district in question, who have knowledge of each candidate's qualifications. If this amendment were to pass, a nine-member commission would submit names to the Governor, who would be required to choose one of the names submitted within 10 days or cede that final determination to the N.C.G.A. The ballot language thus does not give an honest depiction of the current or planned appointment process.

Worse, the plain language on the ballot fails to give any notice to voters that the amendment contained in Senate Bill 814 could create an opportunity for the N.C.G.A. to pass almost any legislation free from the possibility of gubernatorial veto. Currently, Art. II Section 22, subsection 5 of the Constitution contains the exhaustive list of bills that are not subject to executive veto. As currently written, each of the four veto-proof bills that are on this list is accompanied by language mandating that the bill cannot include any "other matter." For example, bills in which the General Assembly make appointments cannot be vetoed, so long as such a bill "contains no other matter." Art. II Section 22, subsection 5(a). Senate Bill 814, however, proposes two new additions to this list of veto-proof bills, neither of which is

accompanied by the limiting language mandating that the bill may "contain[] no other matter." Thus, disconcertingly, as noted by the Attorney General at the July 31, 2018 meeting of the N.C. Constitutional Amendments Publication Commission, this new amendment could create a loophole that allows the N.C.G.A. to smuggle unrelated matters into these two newly proposed "veto-proof" bills and legislate with immunity from a veto in ways not contemplated by the Constitution. *See also*, Exhibit 18.

The amendment that the N.C.G.A. seeks to make to the N.C. Constitution is significantly more broad than the misleading question that will appear on the ballot. The proposed amendment has thus not been properly submitted to the voters and violates Article XIII, § 4.

(3) The Voter ID Amendment

House Bill 1092 will appear on the ballot as "Constitutional amendment to require voters to provide photo identification before voting in person." Importantly, the ballot language misleads the voters by failing to define "photo identification" and failing to make clear to the voter that implementing legislation will be required to delineate which photo IDs would be sufficient for purposes of voting. As discussed in greater detail below, the last attempt by this legislature to alter voting laws, including requiring photo identification, was struck down by the U.S. Court of Appeals for the Fourth Circuit for targeting African-American voters. The amendment does not specify the scope of the photo identification requirement or potential exceptions, which means that voters do not know what will result if the amendment passes.

(4) The Income Tax Amendment

Senate Bill 75 will appear on the ballot as "Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%)." The phrase "reduce the income tax rate in North Carolina," suggests that the tax rate currently

applicable in the state with be reduced and thus misleads the voters. In fact, the current income tax rate is 5.5% and thus well below 7%. The amendment itself will actually lower the maximum allowable income tax cap—which is currently set at 10%.

b) Amendment Language

In a similar fashion, the vague and incomplete language of three of the N.C.G.A.'s proposed amendments means that they do not constitute a "proposal," as required by Article XIII, § 4. These constitutional amendments proposed by the N.C.G.A. would require significant additional implementing legislation even after it is made part of the state Constitution. Thus, in three of the four challenged proposed amendments in the instant case, voters cannot know what the real consequences of voting for these amendments would be before voting on the amendments in the upcoming 2018 election.

(1) The Voter ID Amendment

House Bill 1092, proposes an amendment to require photographic identification before voting in person. Critically the bill does not specify what might qualify as "photo identification." Instead, the bill expressly punts these defining criteria to another day, providing that the N.C. General Assembly "will enact general laws governing the requirement of such photographic identification, which may include exceptions."

The in-person photo ID amendment in House Bill 1092 thus lacks implementing legislation defining particular restrictions or exceptions and provides no guidance regarding the scope of those particulars. Under this amendment's broad authority, the General Assembly could enact a provision that required a citizen to possess a United States Passport before voting. Such a requirement would disenfranchise a majority of the voters in the state, and disproportionately impact people of color, but would be consistent with the as-amended state

Constitution. On the other extreme, the General Assembly might not agree on *any* implementing legislation, which would enshrine in the Constitution a vague requirement that voters must present a photo ID before voting in person, without any exceptions or defining parameters. Such a scenario would lead to mass voter confusion about which photo IDs would be accepted where across the state.

Under the current proposed constitutional amendment, and absent enabling legislation, there is a risk that local elections officials or individual precincts would be faced with determining how to enforce the provision on their own. In such a scenario, one precinct might require a DMV-issued driver's license without exception, while a neighboring precinct official might take a library card or student ID. Neighboring families might be subject to different requirements based on their precincts, exacerbating voter confusion about what photo ID is adequate in a given area. Enshrining this photo ID requirement in the state Constitution without establishing any parameters on the specific requirements thus fails the constitutional command to place the full amendment "proposal" before the voters.[2]

Importantly, this usurper N.C.G.A. has previously successfully attempted to restrict voting by passing a 2013 omnibus election law with multiple provisions specifically designed to suppress the African-American vote, including an in-person photo ID requirement as well as reduction in early voting and the elimination of same day registration. 2013 N.C. Sess. Laws

[2] That the proposed Voter ID amendment is an incomplete "proposal" is further underscored by the fact that the very lawmakers that passed the amendment did not even know what the fiscal implications would be for the amendment. Representative Lewis has acknowledged that the cost will depend entirely on the enabling legislation, which has not yet been considered or debated by the NCGA. *See* Representative David Lewis' remarks in June 21, 2018, 9:30 a.m. meeting of North Carolina Rules, Calendar and Operations of the House Committee. Rep. Lewis said at the committee hearing that "depending on what IDs will be accepted will directly affect the cost. Cost is something we need to be mindful of, but it's not something anybody can answer at this point." The lack of such details underscores how this amendment cannot constitute a "proposal" submitted to voters as required by the state constitution.

381 These discriminatory provisions of the "monster voter suppression law," as it was popularly dubbed, were struck down by the Fourth Circuit as *intentionally* racially discriminatory but only after plaintiffs including the NC NAACP spent extensive resources to protect against this unjustified restriction on the right to vote. *NC NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied sub nom.* 137 S. Ct. 1399 (2017). The Fourth Circuit specifically found that the N.C.G.A.'s voter ID law and other challenged provisions were passed with racially discriminatory intent and unlawfully targeted African-American voters with "almost surgical precision" by requiring precisely those state-issued photo IDs that African-American citizens disproportionately lacked. *Id.* at 214.

In so ruling, the Fourth Circuit considered the facts that the General Assembly specifically requested and analyzed data showing which racial groups were most likely to possess or lack certain forms of government-issued IDs, and then amended the bill to target and exclude the photo IDs used by African Americans. *Id.* at 216. Ultimately, the "monster voter suppression law" required that voters show at the polls "only the kinds of IDs that white North Carolinians were more likely to possess". *Id.* at 214. In other words, an all-white leadership caucus wrested a veto-proof legislative supermajority for itself using racially discriminatory maps of sweeping scale, and then proceeded directly and immediately to entrench the advantage it gained from such illegal districts by legislating to intentionally suppress African-American voting rights. Much of the same leadership of this usurper legislature now seeks to pass yet again another photo ID law.

Even more troubling, a number of the reasons for a photographic identification requirement amendment that were given during the legislative process for this amendment are the very reasons that were proffered in 2013 in defense of the photo ID restrictions and that have

already been found to be pretextual by the Fourth Circuit. *Id*. at 235–36. Legislators appear to believe that adding the voter ID requirement language to the Constitution will strengthen their authority to later legislate an as-yet undetermined photographic identification requirement. In response to a question, Representative Lewis said that having this amendment would provide a stronger argument that future photo ID requirements pass state constitutional muster. *See* Representative David Lewis' remarks in June 21, 2018, 9:30 a.m. meeting of North Carolina Rules, Calendar and Operations of the House Committee.

(2) The Judicial Vacancies Amendment

The proposed constitutional amendment language in Senate Bill 814, which strips the Governor of the power to fill judicial vacancies and gives it to a nine-member commission, could have the effect, in practice, of giving the N.C.G.A. nearly complete control over appointments made to fill judicial vacancies. The amendment states that the Commission shall consist of "no more than nine members," whose appointments are to be allocated between the General Assembly, Governor, and Chief Justice of the Supreme Court. The total number and terms of these members is not set forth in the text, but will be determined later by the General Assembly. The only other restriction on appointments to this "nonpartisan" commission is that none of the three bodies that appoint members can be "allocated" a majority of appointments.

Under this language, the General Assembly—currently controlled by a Republican supermajority—could assign itself four members to appoint, could assign the Chief Justice—currently a Republican—three members, and could assign the Governor—currently a Democrat—one member. Because such a seven-to-one split in the partisan affiliation of the appointers would be permitted under this proposed constitutional amendment, the amendment's promise of a "nonpartisan" commission is unclear and misleading. The General Assembly could

implement a similar scheme by designing the local commissions that would later be established under Section 1 of Senate Bill 814 for vetting nominees to superior and district court vacancies.

The amendment is also unclear as to what standards these commissions will be directed to use to make "merit nominations" from those names submitted by the public. The proposed amendment directs the selection commission to disregard partisan affiliation, and instead make nominations based on "whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law." But no qualifications are spelled out in the proposed amendment, and voters will have no way of knowing whether ideologically driven selection criteria will later be "prescribed by law" for the commission to employ in the future. As such, this proposed amendment language also cannot pass muster under the constitutional command to provide voters with a "proposal."

(3) The Boards and Commissions Amendment

Finally, House Bill 913's vague amendment language regarding state boards and commissions also fails to meet under our state Constitution's requirement that a "proposal" be placed before the voters. The amendment would dramatically change the way almost 350 state boards and commissions are run, including the State Board of Elections & Ethics Enforcement. The amendment alters the Constitution such that the N.C.G.A. will control the "powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law." However, this language is unclear as to how it will affect the approximately 350 boards and commissions in North Carolina.

This seismic power shift from the Governor to the N.C.G.A. will occur because this amendment changes the Separation of Powers clause of the N.C. Constitution. N.C. Const. art. I, § 6. Instead of Separation of Powers, this amendment will cause North Carolina to have a

consolidation of powers. Indeed, it appears to give unfettered power to the legislature to run the business of the executive branch. It is unclear, however, what exactly this change will mean for the people of North Carolina if this amendment is adopted. The "powers, duties, responsibilities, appointments, and terms of office" are different for each of the almost 350 boards potentially implicated, and, as in the case of the other amendments, significant additional implementing legislation will be required before the full extent of this legislative amendment is known.

B. Plaintiffs Will Sustain Irreparable Harm if an Injunction Does Not Issue

If these constitutional amendments are allowed to remain on the ballot, plaintiffs NC NAACP and Clean Air Carolina will suffer immediate and irreparable harm. Plaintiffs are responsible for educating their members and the general public about constitutional amendments. In the absence of an injunction, Plaintiffs will be harmed by being forced to expend their limited resources educating their members and voters across North Carolina as to proposed constitutional amendments that are the unlawful and invalid acts of a usurper legislature. This harm is compounded by the fact that this task will be resource-intensive, if not impossible, as they will be in the position of explaining vague and misleading—but very significant—amendments to North Carolina's foundational document.

Irreparable harm supports an injunction where the injury is "real and immediate." *Duke Power Co. v. City of High Point*, 69 N.C. App. 335, 337 (1984). An injury "is considered irreparable when money alone cannot compensate for it." *Bd. of Light & Water Comm'rs of City of Concord v. Parkwood Sanitary Dist.*, 49 N.C. App. 421, 424 (1980); *Gause v. Perkins*, 56 N.C. 177 (1857); *see also Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949) (injury also irreparable where "the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent

recurrence that no reasonable redress can be had in a court of law."). The injury must be "immediate, pressing, irreparable and clearly established," *Clinard v. Lambeth*, 234 N.C. 410, 418 (1951), and the moving party must present facts enabling the court to "decide for itself if irreparable injury will occur." *United Tel. Co. of Carolinas v. Universal Plastics, Inc.*, 287 N.C. 232, 236 (1975). And "[w]here a serious question exists" regarding the legality of a defendant's threatened action, the court "considers the relative conveniences and inconveniences of the parties in determining the propriety of a preliminary injunction and the terms thereof if granted." *Setzer v. Annas*, 286 N.C. 534, 540 (1975).

There is no question that Plaintiffs will be substantially and immediately harmed if these illegitimate amendments are allowed to appear on the ballot presented by misleading questions. Plaintiffs are responsible, as part of their missions, for educating their members and the North Carolina electorate more broadly about ballot initiatives that may impact the welfare of the state. When initiatives relating to the justice system, fair elections, voting rights, and state revenues appear on the ballot, voters look to the NC NAACP and Clean Air Carolina for information about what these initiatives are and what their effects would be. This is especially the case where, as here, the initiatives constitute amendments to the state's fundamental law, yet are phrased in vague, misleading, and confusing language. *See McCuen v. Harris*, 321 Ark. 458, 468 (1995) ("[A]mending the Constitution is a precise science which entails complete information flowing to the electorate."). Placing these amendments before the voters will therefore require Plaintiffs to immediately divert their limited resources toward educating the voters of North Carolina about an array of misleadingly phrased but highly consequential ballot items.

This injury would be irreparable, as "money alone cannot compensate for it." *See Bd. of Light & Water*, 49 N.C. App. at 424; *see also Hempfield Sch. Dist. v. Election Bd. of Lancaster*

Cty., 574 A.2d 1190, 1193 (Pa. Commw. Ct.1990) ("[U]nlawful action by the Election Board per se constitutes immediate and irreparable harm."). Indeed, money damages are not available for such an injury. And given that absentee ballots are set to be printed shortly, no later remedy could compensate for the harm to Plaintiffs and the people of North Carolina of allowing several misleading and legally invalid constitutional amendments to appear on the ballot. Indeed, the Supreme Court has found it "generally proper" to issue a preliminary injunction "when the principal relief sought is in itself an injunction" so as not to risk "depriv[ing] the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. at 409 (quoting *Cobb v. Clegg*, 137 N.C. 153, 158-59 (1904).

An equitable consideration of "the relative conveniences and inconveniences of the parties" also strongly favors an injunction here. *Setzer v. Annas*, 286 N.C. at 540. If this court allows these invalid amendments to appear on the 2018 ballot, Plaintiffs will suffer immediate and irreparable harm, as described above. In contrast, no irreparable harm will ensue from granting an injunction: once a constitutional N.C.G.A. is elected, nothing would prevent that legislature from again placing similar (but more complete, and more transparently described) constitutional amendments before the voters, if that is indeed what three-fifths of the people's representatives support. *See Otey v. Common Council of Milwaukee*, 281 F. Supp. 264, 276 (E.D. Wis. 1968) ("[T]he principle of judicial non-interference [in the legislative process] is one of prudence, not of power . . . [and] yields to an exception where . . . [constitutional rights] are sought to be invaded by an attempt to make an unconstitutional or inapplicable law operative through the means of popular election."); *Boswell v. Whatley*, 345 So. 2d 1324, 1329 (Ala. 1977) ("The general principle which militates against the issuance of injunctive relief against a

government agency cannot apply when such an agency acts outside its powers to threaten irreparable injury.").

Lastly, it would be a serious mistake to conclude that if this Court holds these proposed amendments to be unconstitutional *after* the election has taken place, irreparable harm could be avoided by issuing a judgment at that time. First, as discussed above, Plaintiffs will suffer *immediate* irreparable harm if they are forced to dedicate precious resources to educating voters about these highly confusing amendments. Second, if the electorate voted in favor of these unconstitutionally-proposed constitutional amendments, significant confusion might result in interpreting the legal status of the amendments. And lastly, allowing the people of North Carolina to vote upon amendments to our founding document, only later to adjudicate whether their vote should be given any force, would itself create irreparable harm. *See Schultz v. City of Phila.*, 122 A.2d 279, 283 (Pa. 1956) ("[I]t would seem to us to be wholly unjustified to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain."); *Tolbert v. Long*, 67 S.E. 826, 827 (Ga. 1910) ("If the legislative enactment proposed in the present case to become operative through the medium of a popular election be violative of the organic law of the land . . . [an injunction] would be more direct, and better calculated to avoid complications, than to remain passive until the law has been declared before beginning a proceeding to test its constitutionality.").

Whether North Carolina's fundamental law ought to be amended is a question that must be answered, in the first instance, by N.C.G.A. elected in accordance with the United States Constitution. Ensuring that a legally constituted legislature has the opportunity to make this

determination will harm no one. Placing vague, misleading, and illegal amendments on the 2018 ballot, by contrast, would cause immediate and irreparable harm to Plaintiffs and to the people of North Carolina. An injunction is the appropriate remedy to prevent such needless harm.

C. Preliminary Injunctive Relief is in the Public Interest

The court should also grant preliminary injunctive relief because it is in the public interest. *Huggins v. Wake County Bd. of Educ.*, 271 N.C. 33, 42, 157 S.E.2d 703, 709 (1967) (considering the disruption to the operation of a school and the interest of the children enrolled therein and the interests of the public in their education). There is a significant public interest in insuring that the voters are not presented with amendments to ratify that may later be deemed unconstitutional. Such an event would cause significant chaos, and could lead to many years of confusion while the constitutionality of the amendments and their myriad implications was determined by the judicial system. It would be far more judicious to pause at this juncture and determine the constitutionality of the amendments before they are placed on the ballot.

Courts in other states have noted this public interest augures towards caution against allowing any disputed amendments to be placed on the ballot. A court in California considering a disputed ballot initiative recently noted that

> when a substantial question has been raised regarding the proposition's validity and the 'hardships from permitting an invalid measure to remain on the ballot' outweigh the harm potentially posed by 'delaying a proposition to a future election,' it may be appropriate to review a proposed measure before it is placed on the ballot . . . Because significant questions have been raised regarding the proposition's validity, and because we conclude that the potential harm in permitting the measure to remain on the ballot outweighs the potential harm in delaying the proposition to a future election.

Planning and Conservation League v. Padilla, No. S249859 (Cal. Jul. 18, 2018). Thus, preliminary injunctive relief in this case would serve the public interest.

II. In the Circumstances of This Case, No Security Should Be Required

Plaintiffs respectfully request that, in view of the circumstances of this case, no security should be required.

Pursuant to North Carolina Rule of Civil Procedure 65(c):

> No …preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

North Carolina courts have determined that the phrase "as the judge deems proper" "means that there are some instances when it is proper for no security to be required of a party seeking injunctive relief. *Staton v. Russell*, 151 N.C. App. 1, 12-13, 565 S.E.2d 103, 110 (2002) (quoting *Keith v. Day*, 60 N.C. App. 559, 561-62, 299 S.E. 2d 296 (1983)).

In *Keith v. Day*, the Court of Appeals clarified that a court "has power not only to set the amount of security but to dispense with any security requirement whatsoever" under certain circumstances, and advised North Carolina courts to look to federal decisions interpreting the security requirement for guidance. 60 N.C. App. at 560-62, 299 S.E. 2d at 297. In cases brought by courts often "require little or no security." *Bragg v. Robertson*, 54 F. Supp. 2d 635, 652 (S.D. W. Va. 1999); *see also, W. Va. Highlands Conservancy v. Island Creek Coal Co.*, 441 F.2d 232, 236 (4th Cir. 1971) (affirming district court's requirement that a non-profit corporation post nominal $100 bond where it sought a preliminary and permanent injunction.)

Requiring little or no security is all the more appropriate where the preliminary injunction would have little impact on Defendant. *See W. Va. Highlands Conservancy, 441 F.2d at 236* (emphasizing the negligible harm to the coal company and forest supervisor that would be caused by the injunction when affirming nominal security). The public interest is another relevant consideration. *Id*. (finding the non-profit corporation's interest in preserving natural,

scenic, and historic areas aligned with the public interest). Moreover, because Plaintiffs are non-profit public interest organizations, anything more than a nominal security bond would very likely prevent them from obtaining the injunction and preserving the status quo during the required proceedings. *See Red Wolf Coal. v. N.C. Wildlife Res. Comm'n*, 2:13-CV-60-BO, 2014 WL 1922234, *10 (E.D.N.C. May 13, 2014). Accordingly, Plaintiffs request that the Court waive any security bond, or in the alternative, impose the same nominal $100 bond that courts have long recognized as appropriate in environmental cases. *See, e.g., W. Va. Highlands Conservancy*, 441 F.2d at 236; *Red Wolf Coal.*, 2014 WL 1922234 at *10.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction and enjoin the State Board of Elections from placing the constitutional amendment proposals authorized by House Bills 1092 and 913 and Senate Bills 814 and 75 onto the November ballot. Plaintiffs request that the Court order the injunction to remain in effect for the duration of this litigation.

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

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction was on all parties by depositing the same in an envelope via U.S. regular mail, postage paid, and addressed as follows:

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A courtesy copy was provided to all parties by electronic mail as well.

This the _____ day of August, 2018.

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