STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18-CV-9806

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

Plaintiffs,

v.

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

Defendants.

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

Plaintiffs the North Carolina State Conference of the National Association for Colored People ("NC NAACP") and Clean Air Carolina ("CAC") reply to the Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction filed by Speaker Moore and President Pro Tem Berger (the "Legislative Defendants").

ARGUMENT

In their memorandum in opposition to Plaintiffs' motion for preliminary injunctive relief, the Legislative Defendants miscast many of Plaintiffs' arguments, misstate key facts, and fail to rebut Plaintiffs' showing that they are entitled to preliminary injunctive relief. Plaintiffs have demonstrated that: (1) they are likely to succeed on the merits of their claims; and (2) they will suffer irreparable harm if preliminary injunctive relief is not granted. Plaintiffs have also demonstrated that preliminary injunctive relief is in the public interest.

I. THE RACIALLY GERRYMANDERED GENERAL ASSEMBLY DOES NOT HAVE AUTHORITY TO PLACE CONSTITUTIONAL AMENDMENTS ON THE BALLOT

a) The *Covington* court did not endorse the sitting N.C.G.A.'s authority to pass constitutional amendments, but rather noted its intrusion on popular sovereignty.

The Legislative Defendants are wrong to suggest that the *Covington* court's reluctant decision to delay a vote under remedial districts until November 2018 gives the current N.C.G.A. unlimited authority to act. Leg. Defs.' Br. at 12. The *Covington* court was left with no choice but to put off a vote under the remedial maps because Legislative Defendants' delay tactics[1] left insufficient time to hold orderly special elections based on the new boundaries before the 2018 election. *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

[1] These delay tactics included refusing to take any steps to draw new maps, despite being under court order to do so, both while the case was pending before the U.S. Supreme Court and after the U.S. Supreme Court issued its order affirming the decision of the district court.

In coming to this decision, the court determined that nearly all the equitable factors it considered weighed in *favor* of ordering special elections to remedy the gerrymandered maps. The one exception was the potential confusion that a special election would cause North Carolina voters, given the abbreviated timeline between the court's eventual ruling on a remedial districting plan and the regular 2018 election cycle. Indeed, the court in *Covington* noted that "the widespread, serious, and longstanding nature of the constitutional violation—among the largest racial gerrymanders ever encountered by a federal court—counsels in favor of granting [a special election]." *Id.* The court went on to note that

> any intrusion on state sovereignty associated with ordering the requested elections is more than justified by the severity and scope of that violation and its adverse impact on North Carolina voters' right to choose—and hold accountable—their representatives, especially since the legislature took no action toward remedying the constitutional violation for many weeks after affirmance of this Court's order, and the Legislative Defendants have otherwise acted in ways that indicate they are more interested in delay than they are in correcting this serious constitutional violation.

Id.

Despite these "weighty" considerations, the court reluctantly concluded that a special election "would not be in the interest of Plaintiffs and the people of North Carolina." *Id.* The court explained that the "compressed and overlapping schedule such an election would entail is likely to confuse voters, raise barriers to participation, and depress turnout, and therefore would not offer the vigorously contested election needed to **return to the people of North Carolina their sovereignty**." *Id*. (emphasis added).

Legislative Defendants thus grossly mischaracterize the *Covington* court's remedial decision on remand as endorsing their authority as legitimate. While the three-judge panel reluctantly delayed elections under the new maps until 2018, the federal court did not rule one way or the other on the limits of this N.C.G.A.'s authority. If anything, the *Covington* court

expressly noted that the widespread scope of the constitutional violation is an intrusion on popular sovereignty. Under the current unconstitutional districts, the people's power and voice are not being represented. *See id*. at 897. Therefore, to the extent that the *Covington* ruling offers any language of consequence to the present case, it supports, rather than contradicts Plaintiffs' position that the current N.C.G.A. does not have the authority to amend the N.C. Constitution.

Our Constitution is clear 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. Specifically, the people of North Carolina "have the inherent, sole, and exclusive right of . . . altering or abolishing their Constitution." *Id.* § 3. As the *Covington c*ourt noted, it is only through the vote that the people can "delegate their sovereignty to elected officials." *Id*. The vote is also the only way that the people can ensure that their elected officials are regularly reminded that they are accountable to the people. *Id*. (internal citations omitted). A central aspect of popular sovereignty "is the right of the people to vote for whom they wish." *Id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820 (1995)).

> By unjustifiably relying on race to distort dozens of legislative district lines, and thereby potentially distort the outcome of elections and the composition and responsiveness of the legislature, the *districting plans interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable*.

Id. (emphasis added).

Thus, as the court explained, "the harms of the far-reaching gerrymanders . . . adversely affect <u>all</u> North Carolina citizens to the extent their representatives are elected under a districting plan that is tainted by unjustified, race-based classifications." *Covington*, 270 F. Supp. 3d at

893. The current N.C.G.A., which remains to this day a product of this illegal, race-based gerrymander, cannot be afforded the same deference as a legally constituted body. As it is unlawfully constituted, this body does not derive its power "from the people" and thus cannot be trusted to act "solely for the good of the whole." N.C. Const. art. I, § 2.

b) The extent of the illegitimate N.C.G.A.'s power is a matter of state law.

The issue before this court is whether an unconstitutionally elected body can place constitutional amendment proposals onto the ballot. The federal court in *Covington* expressly stated that any limitation of power of this unconstitutional body is an "unsettled question of state law" which is "more appropriately directed to North Carolina courts, the final arbiters of state law." *Covington*, 270 F. Supp. 3d at 901. For this reason, the federal cases cited by Legislative Defendants are irrelevant. See Leg. Defs.' Br. at 11, citing *Baker v. Carr*, 369 U.S. 186 (1962) (appeal from U.S. District Court for the Middle District of Tennessee, interpreting the 14th Amendment of the U.S. Constitution); *Ryder v. United States*, 515 U.S. 177, 183(1995) (appeal from United States Court of Military Appeals, interpreting Article 2 of the United States Constitution); *Buckley v. Valeo*, 424 U.S. 1 (1976) (appeal from U.S. Court of Appeals for the District of Columbia, interpreting Federal Election Campaign Act and various provisions of the United States Constitution); and *Martin v. Henderson*, 289 F. Supp. 411 (1967) (Habeas appeal from U.S. District Court for the Eastern District of Tennessee, discussing criminal statute), all of which are federal cases interpreting federal law rather than state cases interpreting the North Carolina Constitution.

Moreover, the cases simply stand for the proposition that *some* acts of illegally constituted bodies *may* still be permitted to stand to avoid chaos and confusion – a proposition that is consistent with Plaintiffs' position. For example, in *Baker v. Carr*, 369 U.S. 186 (1962),

the U.S. Supreme Court, condoned the proposition that a malapportioned legislature may be permitted to act, and specifically may be permitted to reapportion itself. Plaintiffs do not disagree. As discussed in Plaintiffs' opening brief, a usurper legislature may be lawfully authorized to take certain actions to avoid chaos and confusion, including, for example, voting to pass new maps to correct illegal racial gerrymanders. Pls. TRO Br. at 31.

Similarly, because Plaintiffs are not asking the Court to invalidate any acts taken by the N.C.G.A. *before* the U.S. Supreme Court affirmed the district court's decision in *Covington*, many of the other cases cited by Legislative Defendants are irrelevant. These cases deal only with the question of whether *past* acts of a subsequently-invalidated officer are lawful. *See Buckley*, 424 U.S. at 78 (striking down appointments to the Federal Election Commission as unconstitutional but holding that "[t]he past acts of the Commission are . . . accorded de facto validity"); *Ryder*, 515 U.S. at 184 (declining to apply the *de facto* officer doctrine where the defendant challenged as unconstitutional the appointment of the judges to the Coast Guard Court of Military Review in his case). Because Plaintiffs are not challenging any of the N.C.G.A.'s acts before the U.S. Supreme Court's judgment in *Covington*, the *de facto* doctrine does not aid Legislative Defendants.

By contrast, in North Carolina, once it becomes known that a body is in office illegally, they become a usurper, with limited power. *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 reason the North Carolina Supreme Court has given for this doctrine echoes the *Covington* court: "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." *Van Amringe*, 108 N.C. at 198, 12 S.E. at 1006.

Defendants argue that they can distinguish this line of cases because "members of the General Assembly clearly occupy legitimate offices." Leg. Def. Br. at 17. But that is not so. As noted above, the *Covington* Court has made very clear that the racial gerrymander and delay in curing the districts has resulted in "legislators acting under a cloud of constitutional illegitimacy." *Covington*, 270 F. Supp. 3d at 891. Thus, while Defendants may wish that "Plaintiffs do not contend that the representative positions themselves were unlawfully created," Leg. Def. Br. at 17, that is in fact precisely what Plaintiffs do claim and what the United States Supreme Court has already adjudged and declared. *North Carolina v. Covington* ("*Covington V*"), 138 S.Ct. 2548 (2018) (per curiam).

c) Plaintiffs seek a narrow injunction to prevent the State Board of Elections and Ethics Enforcement from placing misleading constitutional amendment proposals on the November 2018 ballot.

Defendants' slippery slope arguments are misplaced. Granting Plaintiffs relief will not require the judiciary "to determine which laws are 'day to day' laws and which are not." Leg. Defs.' Br. at 14.

Plaintiffs seek only the limited relief targeted at the removal of four out of six proposed constitutional amendments from the November 2018 ballot. Granting such relief will not invalidate the other ordinary legislation that the N.C.G.A. has enacted since the U.S. Supreme Court's affirmance in *Covington*, and it will wreak no havoc on the state. To the contrary, the only havoc that imperils the people of North Carolina is the possibility that these four proposed constitutional amendments will be put before the voters, despite the illegality of the three-fifths supermajority that was required to place these amendments on the ballot.

Plaintiffs' opening memorandum explains in greater length why the alteration of the state constitution is a line this illegally elected body should not be permitted to cross. *See* Pls. TRO Br. at 28-34. The N.C.G.A. is attempting to use its ill-gotten and illegitimate power to amend our state's most foundational document when the power of such amendment is vested exclusively with the people of North Carolina. N.C. Const. art. I § 3. As previously set forth, the people's voice is not currently represented, *see Covington*, 270 F. Supp. 3d at 894.

Moreover, the illegality of the N.C.G.A.'s actions is evident from the thin margins. The four proposed amendments Plaintiffs are challenging cleared the constitutionally required supermajority by a margin of just one or two votes. Given that 117 districts—two-thirds of the total number of legislative districts—had to be redrawn to remedy the pervasive constitutional violation that infected the maps that brought the current N.C.G.A. to power, it is beyond dispute that this supermajority is intertwined with the racial gerrymander. *See, in re Gunn*, 50 Kan. 115, 32 P. 470, 480-81 (1893) (invalidating an act because if votes from illegal districts had not been counted "the act would not have received a constitutional majority of the votes of the members of the house.").

Constitutional inquiries are often matters of degree, and courts resolve them on a case by case basis by drawing lines or setting limits. For example, in Establishment Clause jurisprudence, the Supreme Court has declared that "[i]n each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed" noting that the "line between permissible relationships and those barred by the clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test." *Lynch v. Donnelly,* 465 U.S. 668, 678-79 (1984). The relief requested by Plaintiffs draws the line conservatively.

The matter before this court is straightforward: whether an illegally constituted N.C.G.A. place the four challenged amendments on the November ballot. This court need decide no more.

d) The effect of the racial gerrymander is far reaching across North Carolina.

Legislative Defendants argue that insofar as the N.C.G.A. is tainted by an unconstitutional racial gerrymander, that taint is confined only to the twenty-eight districts that the *Covington* court found to be racial gerrymanders, *see* Leg. Defs.' Br. at 16, but this argument should be rejected out of hand. The harm imposed by the unconstitutional racial gerrymander is not limited to the twenty-eight districts in which African-American voters were illegally packed to suppress their vote. Packing African Americans into a small number of districts greatly impacted the racial composition of the surrounding districts and tainted not only those 28 districts, but all of other districts that had to be redrawn because of the racial gerrymander. Thus, "citizens who were drawn <u>out</u> of districts on the basis of their race also suffer harm from the unconstitutional districting plans." *Covington*, 270 F. Supp. 3d at 893.

> And the harms of the far-reaching gerrymanders invalidated by the Court are not limited to the eight million voters in districts with lines drawn based on an unjustified consideration of race. Rather, the districting plans adversely affect <u>all</u> North Carolina citizens to the extent their representatives are elected under a districting plan that is tainted by unjustified, race-based classifications.

Id.

The Legislative Defendants' argument that because the districts "were not malapportioned," and therefore "votes in North Carolina [have not been] diluted," is also patently false for the same reason. *See* Leg. Defs.' Br. at 16. Indeed, this statement only serves to demonstrate Legislative Defendants' disregard for the African-American voters who have been disenfranchised for almost eight years, and the millions of other North Carolinians whose representation has been affected by the N.C.G.A.'s calculated racial gerrymander and persistent failure to cure it.

e) Plaintiffs do not seek Quo Warranto relief but rather to enjoin acts of a body already found to be illegally constituted.

Defendants argue that Plaintiffs cannot claim that the currently seated N.C.G.A. is a usurper body because they did not initiate a *quo warranto* action. Leg. Defs.' Br. at 17. But the *quo warranto* doctrine does not apply in this case. A *quo warranto* action is mounted to test whether a person exercising power is legally entitled to do so. It also serves as a means of removing a usurper from office. Here, Plaintiffs do not seek the Court's guidance as to whether the members of the N.C.G.A. are legally entitled to their seats. The U.S. Supreme Court settled that matter when it held that more than two-thirds of those seats are tainted by an unconstitutional racial gerrymander.

A *quo warranto* action is thus not appropriate here. Plaintiffs' claims do not rest on whether or not this is an illegally constituted body. Instead, Plaintiffs ask the court to address the extent of this illegal body's power. North Carolina courts have been clear that when a plaintiff is seeking a remedy other than removing an official from public office, the plaintiff is not restrained by the *quo warranto* doctrine. *See Newsome v. N.C. State Bd. of Elections*, 105

N.C.App. 499, 505 415 S.E.2d 201, 204 (1992) (rejecting the defendants' argument that the challenge must be brought pursuant to the *quo warranto* doctrine, noting that the plaintiffs were not challenging the election or its results, but rather the authority of the Board of Elections to call the election.); *Comer v. Ammons*, 135 N.C. App. 531, 537, 522 S.E. 2d 77, 81 (1999) (holding that a *quo warranto* action was not necessary because the plaintiff was not directly challenging the election of the results, but was arguing that the election statute was unconstitutional); *Starbuck v. Town of Havelock*, 252 N.C. 176, 113 S.E. 2d 278 (1960) (holding that the *quo warranto* statute did not apply, noting that the action was not to determine the right to a public office, but to determine whether a municipal corporation had been created).

f) Plaintiffs' Claims are not barred by laches

Plaintiffs are not barred by the doctrine of laches from bringing this action. Leg. Defs.' Br. at 20. Plaintiffs' standing is grounded in concerns about immediately shifting significant resources to explain these misleading amendments to their members and to the public.[2] Although the legislation containing the ballot language was passed by the N.C.G.A. on June 28, 2018, it was not until the passage of House Bill 3 ("HB 3") on July 24, 2018 that it became clear that the ballot would not contain a caption explaining each amendment to the voters, and this omission was not a certainty until the Governor's veto of HB 3 was overridden on August 4, 2018, a mere two days before this action was filed. S.L. 2018-131.

Any time sensitivity stemming from the constitutional amendment proposals has been created solely by the N.C.G.A. itself. The 2017-2018 biennium commenced January 11, 2017, and the long session lasted until June 30, 2017. Three additional special sessions were held between this time and when the short session

[2] It is somewhat galling for legislative Defendants to assert, on the one hand, that Plaintiffs do not have standing and their claims are not yet ripe, and yet assert on the other hand that they should properly have brought their claims at an earlier date. Leg. Def.'s Br. at 20-21.

ran until June 29, 2018. The proposed constitutional amendments at issue here were not ratified until June 28, 2018 and June 29, 2018. S.L. 2018-117, S.L. 2018-118, S.L. 2018-119, and S.L. 2018-128. The N.C.G.A. waited until the waning hours of the short session to pass these laws—over seventeen months after convening the biennium, and only five weeks before the 2018 ballots were to be finalized. Any perceived emergency could have been readily avoided by taking up the constitutional amendments earlier in the biennium.

Legislative Defendants falsely claim that Plaintiffs had knowledge of this "potential action" due to the affidavit filed by counsel for Plaintiff NC NAACP in *Dickson v. Rucho*. Not so. While it is true that Plaintiff NC NAACP signed a brief that raised concerns about the limitations of power held by this illegal body, the issue was raised merely in support of Plaintiffs' underlying argument that the case was not moot. Pls. Reply Br. on Second Remand, *Dickson v. Rucho*, 370 N.C. 204, 813 S.E.2d 230 (N.C. 2017) (No. 201PA12-4). Plaintiffs neither presented a question nor raised a claim regarding the scope of the N.C.G.A.'s power to any of the North Carolina courts that presided over the *Dickson* case, nor did any of them ever rule or even discuss the issue. *See Dickson*, 813 S.E.3d 230; Order on Pls. Emergency Mot. for Relief, *Dickson v. Rucho*, 11 CVS 16896 (Wake Cty. Super. Ct. Feb. 12, 2018); Order & J. on Remand, 11 CVS 16896 (Wake Cty. Super. Ct. Feb. 12, 2018).

Further, in deference to the principle of avoidance of chaos and confusion, Plaintiffs have been measured in asserting this claim. Although it was abundantly clear prior to August 4 that absent racial gerrymandering, this legislature could not have mustered the required three-fifths supermajority vote in both House and Senate to submit a proposed amendment to the voters, N.C. Const. art. XIII, § 4, it was not until that date, with the veto override, that it became an absolute certainty that voters would be presented *only* with the misleading descriptions contained

in the challenged legislation. At that point it became incumbent upon Plaintiffs to act in order to protect their limited resources, which they would otherwise spend on activities germane to their missions.

Thus, contrary to Legislative Defendants' claim that they engaged in "blatant gamesmanship" and unnecessary delay, Plaintiffs filed this action as soon as was feasible given the actions of the N.C.G.A.

II. Injunctive relief is appropriate because Plaintiffs will suffer irreparable harm, Defendants will suffer minimal harm and an injunction is in the public interest.

a) Plaintiffs have Standing.

Plaintiffs have standing. They will suffer immediate irreparable harm. If the amendments are included on the November ballot they will be forced to divert significant resources from their core mission toward educating their members and voters about these vague, misleading, and illegally proposed amendments. Legislative Defendants completely overlook this in their brief, rebutting instead a strawman theory of standing upon which Plaintiffs do not rely.

Under North Carolina law, organizations have standing "to bring suit either as a plaintiff, to redress injury to the organization itself, or as a representative of injured members of the organizations." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220, 225 (2001). The standing requirement for an organization to bring suit on its own behalf is minimal. *Id.* at 168. "To bring suit on its own behalf, an association need only meet the 'irreducible constitutional minimum' of a sufficient stake in a justiciable case or controversy." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). Moreover, the injury may either be "injury in fact" or "injury that is concrete and particularized, and actual or imminent."

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).

Here, Plaintiffs NC NAACP and CAC are both nonpartisan, nonprofit organizations that serve members and voters across the state of North Carolina. Both organizations face imminent injury if the proposed amendments are placed on the ballot because they will be forced to divert staff time and limited resources away from activities germane to their core mission and direct them instead toward educating both their members and the communities they serve about these amendments. This concrete, particularized, and imminent injury is sufficient to establish organizational standing. *See Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982) (noting that where an organization is forced to divert resources to counteract unlawful actions, it has suffered a "concrete and demonstrable injury"); *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); *Common Cause v. Billups*, 554 F.3d 1340, 1350 (11th Cir. 2009) (holding that "an organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts").[3]

Furthermore, standing is also granted to organizations on behalf of its members when: "(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." *Creek Pointe Homeowner's Ass'n*, 146 N.C. App. at 165, 552 S.E.2d at 225 (quoting *Hunt v. Wash.*

[3] Moreover, as discussed more fully in Plaintiffs' opening brief, Plaintiffs will also suffer injury if the proposed amendments are passed. *See* Pls. TRO Br. at 20-26.

State Apple Advert. Comm'n, 432 U.S. 333 (1977)). Here, as discussed more fully in Plaintiffs' opening brief, in addition to organizational standing, Plaintiff NC NAACP also has standing on behalf of its injured members because: they would have standing to sue in their own right because they face imminent injury if the proposed amendments are passed; the interests it seeks to protect are germane to the NC NAACP's purpose; and neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. Pls. TRO Br. at 20-24.

Legislative Defendants principally rely on a North Carolina Court of Appeals case that rejected a post-election challenge to constitutional amendments brought by "a citizen and taxpayer" of the state. Leg. Defs.' Memo in Opp'n to TRO at 21-23 (citing *Green v. Eure*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975)). But in *Green*, the plaintiff made no particularized showing of how he would be injured that was different than the general public. That is simply not the case here. As set forth in detail above, Plaintiffs NC NAACP and CAC have made detailed allegations of particularized harm based on their missions and work on behalf of their members. They have not brought generalized claims as citizens and taxpayers as did the individual plaintiff in *Green* after the referendum on the constitutional amendments had occurred. And while it is true that there may be some other select groups in North Carolina that will be similarly harmed because they need to divert resources to explain these misleading amendments to their member, *see* Leg. Defs.' Br. at 23, this fact does not affect Plaintiffs' standing. Plaintiffs, as groups that engage in frequent public education about law and legislation in North Carolina, have more than "a general interest common to all members of the public." *Green*, 27 N.C. App. at 608, 220 S.E.2d at 105.

Legislative Defendants' reliance on Fourth Circuit case law fares no better. They are incorrect to suggest that, under *Bishop v. Bartlett*, 575 F.3d 419 (4th Cir. 2009), any plaintiffs challenging misleading ballot language must show that they have "actually been misled" in order to establish standing. Leg. Defs.' Memo in Opp'n to TRO at 24. In *Bishop*, plaintiffs brought a due process claim challenging misleading ballot language *after* an election in which a referendum had passed, but failed to allege in the complaint that they had, in fact, been misled by the ballot language. 575 F.3d at 424. By contrast, here, the election has not yet happened, and Plaintiffs are not claiming that their own due process rights have been violated. Instead, they are challenging the proposed amendments as unlawfully proposed by a usurper legislature and vague and misleading in violation of the state constitutional requirement that amendments proposals be submitted to the voters. Plaintiffs thus need not show in this pre-election challenge that voters have been "actually" misled by the ballot language to establish standing.

b) Plaintiffs will suffer irreparable harm

For these same reasons Plaintiffs will suffer irreparable harm. Legislative Defendants argue that "even if Plaintiffs had raised no claims regarding the constitutionality of the ballot language, they would be expending resources to educate 'their members and the North Carolina electorate more broadly about ballot initiatives that may impact the welfare of the state.'" Leg. Def. Br. at 39. But Defendants' reasoning fails. First, the very presence of constitutional amendments on the ballot from an illegally constituted N.C.G.A. causes Plaintiffs harm. If the N.C.G.A. had not exceeded its authority and proposed these amendments, Plaintiffs would have nothing to explain, and no need to divert resources. Second, if the amendments were not presented in a vague, misleading, and incomplete way then Plaintiffs would be left with much less of a task to explain them to their members. As it stands, the ballot language for the

amendments is so misleading and the amendments themselves so incomplete that the task of educating voters as to the amendments' effects is near impossible.

Moreover, despite Defendants' protestations to the contrary, "the full text of the proposed constitutional amendments" is not "easily accessible to voters." *Id.* Even if it were true that all North Carolina voters had access to such materials, that would not negate the fact that the language on the ballot itself will hold greater weight with voters, as it has the imprimatur of the government. North Carolina's Solicitor General emphasized this point on behalf of the State Bipartisan Board of Elections and Ethics Enforcement at the August 7 hearing in this matter, stating "the ballot that our voters will see in the booth has the aura that it has come from their government." Transcript of 8/7/18 Hearing in Wake County Sup. Ct., p. 113, lines 10-25, Exhibit A; N.C. Gen. Stat. § 163A-1108; *Cf.*, *Sykes v. Belk*, 278 N.C. 106, 114, 179 S.E.2d 439, 444 (1971) (rejecting claim that misleading public statements by the mayor and city council invalidated bond referendum because the official ballot was not misleading).

Legislative Defendants' cavalier suggestion that vague or misleading ballot language poses no problem because any citizen can find the full text of the session laws with ease on the legislative website is as troubling as it is unsatisfying. Importantly, not all voters who would be voting on these proposed amendments have internet access. And even if voters were able to access the amendments online, individuals without legal or legislative training are ill-placed to divine the meaning of complex amendments, which in one case would amend five parts of our current constitution. *See*, Senate Bill 814. Finally, as Plaintiffs explain more fully in their opening brief, the full text of the amendments themselves are themselves incomplete, leaving much of the true impact of the amendments to be legislated another day. Pls. TRO Br. at 14.

Thus, even if voters could access the full text of the session laws and assess their meaning as they are currently written, they still would not have sufficient information to inform their vote.

Indeed, Legislative Defendants themselves have suggested that Plaintiffs have a role in explaining these amendments to the public. In the August 7, 2018 hearing before Judge Ridgeway, Legislative Defendants argued that voters can learn about the amendments from the Governor, Twitter, or even from Plaintiff NAACP. "In the democratic process of public debate, I can look at what the Governor says, I can look at what the Commission says, I can look at what the NAACP says, I can look at what anybody says on Twitter or anything else." Exhibit A, p.53 lines 10-14.

The fact that Plaintiffs' harm starts today, when the two groups will be forced to start educating voters, also undercuts Defendants' claim that harm is not irreparable because votes may simply not be counted. Leg. Def. Br. at 19. If the misleading, vague and incomplete amendments stay on the ballot, then Plaintiffs will still suffer harm for each day until the election regardless of whether the votes are ultimately counted.

c) Defendants will suffer minimal harm if an injunction issues

Defendants cite to *Maryland v. King* for the proposition that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of the people, it suffers a form of irreparable injury." 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). As Plaintiffs have already discussed at length, however, the current N.C.G.A. is not representative of the people. The current N.C.G.A. is, in fact, an affront to popular sovereignty and the people of North Carolina will be well served to wait for a legally constituted body that is more representative of North Carolinians to take office and place constitutional amendment on

the ballot next year. *See supra* discussion of *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017).

d) An injunction is in the public interest

Legislative Defendants suggest that the "voters of North Carolina" will be harmed because they will be "denied the opportunity to consider the Proposed Amendments." Leg. Def. Br. at 19. But the harm to the voters of North Carolina will only occur if these misleading, vague, and incomplete proposals remain on the ballot. No urgent state need is addressed by the proposed amendments. These amendments 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 *create* chaos and confusion. If they are placed on the ballot this November, the misleading descriptions and the lack of implementing legislation and the likelihood of extensive litigation. Pls. TRO Br. at 50.

For example, the State Board of Elections and Ethics Enforcement has now taken the position that it may not legally place at least two of the misleading amendments on the ballot in light of its responsibilities pursuant to N.C. Gen. Stat. § 163A-1108. "[The Board and Chairman Penry] also seek a declaratory judgment that requiring them to present the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to North Carolina voters in the November 2018 general election requires the Board and Chairman Penry to violate their duties under N.C. Gen. Stat. § 163A-1108." Answer and Cross Claim of Defendant State Bipartisan Board of Elections and Ethics Enforcement, Exhibit B. And at oral argument, the Solicitor General of North Carolina, Matt Sawchak, representing the Board, noted that the two other constitutional amendments challenged by Plaintiffs suffer from similar flaws and that Plaintiffs' arguments "have currency." Exhibit A, p.94 lines 3-4.

Thus, if the amendments are now placed on the ballot, it seems likely that North Carolinians subsequently impacted by any of the 350 state boards and commissions affected by this amendment may sue the State Board for violating its legal authority. Similarly, the "blank check" the N.C.G.A. seeks with respect to photographic voter identification will inevitably lead to legal disputes as this vague language is enshrined into our state's most foundational document without further explanation.

To the extent that any of these amendments serve any state need at all, each could easily be placed onto the ballot at a later time by a constitutional N.C.G.A. without any harm to our state or its voters. Moreover, as noted by Solicitor General Sawchak at oral argument, there is a strong public interest in judicial intervention before the ballots are distributed to voters "to prevent that extreme challenge of having to try to put the toothpaste back in the tube and figure out how much of the substance in front of the court actually was toothpaste." Exhibit A, p.113 lines 20-24.

III. THE AMENDMENTS ARE VAGUE AND INCOMPLETE AND WILL BE PRESENTED ON THE BALLOT WITH VAGUE MISLEADING LANGUAGE IN VIOLATION OF THE NC CONSTITION

Defendants present a potpourri of different arguments to respond to Plaintiffs' claim that the N.C.G.A.'s placement of vague and incomplete amendments on the ballot with vague and misleading language is a violation of N.C. Const. art XIII § 4's requirement to submit a proposal to the voters of North Carolina. First, Legislative Defendants argue that they have carte blanche to present whatever amendments they wish, and can use misleading language if they so desire because there is no role for the courts to adjudicate such a matter. Second, Legislative Defendants argue that even if there were a role for the court, the amendments and ballot

language are clear. Finally, Legislative Defendants present a series of strawman arguments that Plaintiffs never raised. All of these arguments fail.

a) Compliance with N.C. Const. art XIII § IV is not a political question

Defendants attempt to recast Plaintiffs' constitutional challenge as a nonjusticiable political question. But here, Plaintiffs have not raised any challenge to the substance of the amendments – to the extent that the Plaintiffs or anyone else are in a position to understand the substance of these vague and incomplete amendments. The political question doctrine extends to those controversies that "revolve around *policy choices* and *value determinations*," not to the interpretation of the Constitution itself. *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)) (emphasis supplied). Here, Plaintiffs raise constitutional challenges to the N.C.G.A.'s authority to propose the amendments and to the manner in which the amendments will be presented to voters. This question is justiciable and can be heard by North Carolina courts.

The Legislative Defendants also argue that the N.C.G.A. has authority to manipulate ballot questions for constitutional amendments as it sees fit, unreviewable by state courts. Leg. Defs. Br. at 28 ("[B]ecause the Constitution recognizes the right of the General Assembly to propose amendments 'at the time and in the manner prescribed by the General Assembly,' . . . there is no constitutional controversy for this Court to decide.") But this argument ignores the long-standing role North Carolina courts have played in interpreting the state Constitution and enforcing its provisions. The judiciary has an essential role in protecting the integrity of our state Constitution: "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939). The

North Carolina Supreme Court has declared that it "is the ultimate interpreter of our state Constitution." *Corum v. Univ. of N.C. Bd. of Gov'rs*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). The proper meaning, construction, and application of the state constitutional provisions regulating the amendment process can only be answered with finality by the state Supreme Court. *See*, *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 372, 384 (2002) quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989); *see also State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984). This judicial role is enshrined in the constitutional provision that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, §35.

Nor is it true, as Legislative Defendants suggest, that Plaintiffs have no recourse to the judiciary because the Constitution does not provide explicit standards by which to adjudge whether the challenged amendments have been adequately put before voters. Leg. Defs. Br. at 29.

"It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) (internal citations omitted). In *Leandro*, the Supreme Court ruled that the state Constitution's guarantee of a sound, basic education is justiciable. Even though the Constitution gives the General Assembly the duty to provide for "a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students," the state Supreme Court nevertheless found that it could interpret that provision and rule on a challenge to how that mandate was being carried out. *Leandro* at 348, 488 S.E.2d at 255 (quoting N.C. CONST. art. IX, § 2(1)).

This principle is "just as well established and fundamental to the operation of our government as the doctrine of separation of powers." *News & Observer Pub. Co.*, 182 N.C. App. at 19, 641 S.E.2d at 702. Courts interpret our Constitution according to familiar principles. *See id.* at 22 (explaining that constitutional provisions are to be read in context and according to plain meaning, and interpreting N.C. Const. art. III, § 5(6) as a question of first impression). In fact, the courts have a long-history of developing workable standards to determine the meaning and requirements of constitutional provisions. *See N.C. State Bd. of Educ. v. State*, 814 S.E.2d 67, 75 (N.C. 2018) (determining authority of Board from "plain meaning" of N.C. Const. art. IX, § 5); *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (interpreting the words "shall never be restrained" in N.C. Const. art. I, § 14 to convey "a direct personal guarantee" of freedom of speech); *State v. Garner*, 331 N.C. 491, 506, 417 S.E.2d 502, 510 (1992) (interpreting text of N.C. Const. art. I, § 20 to require no broader protecting than federal Fourth Amendment and adopting "inevitable discovery" exception to exclusionary rule); *Mason v. Dwinnell*, 190 N.C. App. 209, 230, 660 S.E.2d 58, 71 (2008) (determining whether parent acted inconsistently with her state and federal constitutional right to control child's upbringing, under standards set by state Supreme Court for case-by-case determinations). Furthermore, our courts are perfectly well equipped to determine whether language is misleading or deceptive. *See, e.g.*, *Hardy v. Toler*, 288 N.C. 303, 311, 218 S.E.2d 342, 347 (1975) (holding that the jury determines the facts and the court then determines as a matter of law whether the defendant engaged in unfair or deceptive acts or practices, and that on the stipulated facts the defendant did so); *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 32, 568 S.E.2d 893, 899 (2002) (holding that statements in political advertisement were defamatory *per se*), *writ denied, review denied, appeal dismissed*, 357 N.C. 163, 580 S.E.2d 361

(2003); *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 400, 248 S.E.2d 739, 744 (1978) (construing false statement in advertisement as mere puffery). Here, the courts likewise have a role to play in interpreting and enforcing the language of Article I and Article XIII of the state Constitution.

The Legislative Defendants' incorrect suggestion that the separation of powers precludes any judicial review of their misleading, vague, and incomplete amendments and ballot questions, is particularly misplaced given the facts of this case. Leg. Defs. at 29 ("If the courts attempt to decide the challenge alleged by Plaintiffs, the courts would be creating a separation of powers violation . . . ."). Two of the challenged-amendments are vague and misleading in large measure because, while the amendments contemplate a significant erosion of the Constitution's existing separation of powers, the anodyne ballot questions written by the N.C.G.A. mask this significant change to the structure of our Constitution. It is beyond dispute that both the boards and commissions amendment and the judicial vacancies amendment would shift unprecedented power to the N.C.G.A. It is equally beyond dispute that the ballot questions engineered by the Legislative Defendants obscures, rather than informs, the voters about this sweeping change. These proposed changes are vague, misleading, and incomplete beyond the obscuring ballot language. Absent any implementing legislation, it will not be clear to members of NC NAACP, CAC, or the public at large how extensive these changes will be. Thus, although Legislative Defendants seek to immunize the challenged amendments from judicial review under the shield of a separation of powers argument, their own actions seek to mislead voters into cracking that very shield.

Legislative Defendants' position that there can be no judicial review of the way the N.C.G.A. presents proposed constitutional amendments on the ballot is so meritless that it

appears Legislative Defendants themselves do not believe it. In fact, Legislative Defendants took a contrary position on the justiciability question in its defense to concurrent litigation initiated by the North Carolina Governor in *Cooper v. Berger*, 18 CVS 9805 (Wake County). This inconsistency is particularly troubling, given that counsel for the Legislative Defendants have expressly incorporated the arguments raised in its memorandum in opposition to Governor Cooper's lawsuit in the present case. Leg. Def. Br., p. 2, FN 1. In their filings in the *Cooper* case, Legislative Defendants do not deny the important role the judiciary plays in controversies such as the one in *Cooper* and in the present case. Instead, Legislative Defendant said that the judicial branch should not intervene "save but with the greatest deference." Leg. Def. Memo in Opp to Governor's TRO at 2. Moreover, Legislative Defendants themselves suggested a judicial standard by which a court might evaluate the challenged ballot questions. *See* Leg. Defs' Memo in Opp to Governor's TRO in *Cooper v. Berger*, p. 18 ("The Court can, nonetheless, be guided by cases interpreting what constitutional amendment ballot language is required.")

The issues before this Court are not political questions. North Carolina courts are fully equipped to interpret the state Constitution and evaluate whether the proffered amendments and ballot questions are impermissibly vague, incomplete, and misleading. Plaintiffs' claims are justiciable.

b) Defendants fail to demonstrate that the amendments are not vague, misleading and incomplete.

Legislative Defendants make an unpersuasive attempt to explain why the ballot language is not vague, misleading, and incomplete. Legislative Defendants' primary argument appears to be that because the ballot language includes some of the same words that will be in the

amendment, it is not misleading. *See* Leg. Def. Memo in Opp to Governor's TRO, pp. 32-33, *see also* Leg. Def. Memo in Opp. to Governor's TRO, pp. 20-21.[4]

In support of this assertion, Defendants provide the Court with diagrams of "the text of the ballot questions . . . against the text of the proposed amendments." Leg. Def. Memo in Opp to Governor's TRO at 21, Exhibit E. But these diagrams do not aid the Legislative Defendants' case. The misleading nature of the ballot language stems primarily from what is *omitted*, rather than what is *included*. Thus, while it is true that some of the words present in the amendments are also featured in the ballot language, this does nothing to address the fact that large swaths of the amendments and pertinent details as to their impact are absent from the ballot language altogether. Without this information, voters cannot be said to have been presented with full proposals pursuant to the requirements of Article XIII, § 4.

(1) The Boards and Commissions Amendment

As explained in Plaintiffs' opening brief, the ballot language for the Boards and Commissions Amendment fails to mention, or even allude to, the unprecedented shift in power from the executive to the legislative branch of government that would result if the amendment passed. The limited language hides this intended outcome from the voters by instead suggesting that the main purpose of the amendment is to "establish" a Bipartisan Board of Elections and Ethics Enforcement (which in fact already exists). In an argument that borders on absurdity, Legislative Defendants suggest that by "establish" they did not mean to create, but rather to "make firm or secure" in the Constitution a Board that has been the subject of much litigation. Leg. Def. Memo in Opp to Governor's TRO, pp. 20-21. This background context does not

[4] As noted above, in an unusual step, Legislative Defendants do not respond to all Plaintiffs' arguments in their brief in opposition, but rather "incorporate by reference" their arguments in response to the Governor's motion. Plaintiffs thus cite to the arguments made in that brief as well as those made in the more directly responsive pleading.

appear on the ballot and Legislative Defendants' unusual use of the term "establish" serves only to confuse. Legislative Defendants also fail entirely to respond to Plaintiffs' concern that the claim of a "bipartisan" board is not supported by the language of the amendment. *Id*.

Moreover, Legislative Defendants make no argument to address the fact that the ballot text conceals a sweeping shift of power from the Governor to the legislature over approximately 350 boards and commissions. Legislative Defendants fail to address the fact that the amendment does not "clarify" appointment powers, as suggested by the ballot language, but drastically changes those powers. And Legislative Defendants do not answer why the Judiciary—which will be unaffected—is included whereas all reference to the Executive, whose power will be severely diminished—is not. Legislative Defendants attempt to misdirect by focusing attention on the shift of "appointment" powers, when in fact the language of the amendment is much more expansive and would move all authority for the "powers, duties, responsibilities, and terms of office" of these 350 boards from the Executive branch to the legislative. Even under Legislative Defendants' invented standard that a ballot need only "identify" the constitutional amendment, this language would fail. *Id*. at 20.

(2) Judicial Vacancies Amendment

Defendants provide no substantive response to Plaintiffs' arguments about the misleading nature of the Judicial Vacancy Amendment ballot language. *Id.* at 21. Instead, Legislative Defendants merely state that the ballot language identifies that the amendment makes changes to the process for nominating a judge for vacancies, a gross misstatement of the amendments' effect. Once again, Legislative Defendants rely on the fact that certain words and terms appear in both the ballot question and the amendment. *Id*. pp. 20-21. Legislative Defendants ignore the

fact that the larger consequences of the amendment- for example, the possibility of a veto loophole–is absent from the question presented.

3) Tax cap

Legislative Defendants' Exhibit E purports to show that the income Tax amendment is not misleading but does the reverse. Leg. Def. Memo in Opp. To TRO, Exhibit E. The exhibit highlights the words "reduce the income tax rate" in the ballot language and then pairs this with a footnoted description of the highlighted language that explains that the "rate **cap**" will be lowered from ten to seven percent. *Id.* That the Legislative Defendants' exhibit itself contains the more descriptive, arguably less misleading term "rate cap" illustrates that the current ballot language is insufficient to describe the full meaning of what the proposed amendment entails.

Bizarrely, Legislative Defendants attempt to further bolster their rebuttal by stating that Plaintiffs' argument "has no place in a facial challenge." Leg. Def. Memo in Opp to Governor's TRO at 33. But Plaintiffs did not bring a facial challenge. Instead, Plaintiffs argued in briefing and at oral argument that their claims were "as applied." Plaintiffs maintain that this is an as-applied challenge. The tax cap amendment demonstrates why the challenge is, in fact, as applied. If the current tax rate was 8%, the description on the ballot would be much less misleading, because it would properly inform voters that rates would be reduced to no higher than 7%. Where, here, we are living in a world with a 5.5% income tax rate, the ballot appears designed to mislead.

4) Voter ID

With respect to Voter ID, Plaintiffs contest that the amendment has not been properly submitted to the voters because it is incomplete. Voters do not yet know what is meant by "photographic ID" and do not know what exceptions—if any—might be allowed. The language

of both the amendment and the ballot language is thus overly vague. As it is currently worded, the proposed amendment appears to seek a "blank check" for the N.C.G.A. to enact voter ID legislation, when its previous attempt to do so was struck down by the federal courts as intentionally racially discriminatory. This radical change and intent is not made clear in the ballot text.

Legislative Defendants incorrectly assert that of the constitutional amendments passed since 1971 "only about half" have had implementing legislation. Not so. Legislative Defendants rely on a table, Exhibit F, to support this claim. But as explained by former staff attorney, Director of Bill Drafting, and Special Counsel to the N.C.G.A. Gerry Cohen, this table is incorrect and misleading. Cohen aff. at ¶¶ 12-13, Exhibit E. Many of the amendments referenced by the Legislative Defendants in their table were self-executing, moreover, several others actually did have concurrent implementing legislation. *Id*. Thus, it has in fact been the norm in recent decades to include implementing legislation alongside a constitutional amendment. *Id*.

More importantly, Plaintiffs do not take the position that a lack of implementing legislation would always be fatal to amendment proposal. Rather, Plaintiffs argue that in this instance, the absence of the any implementing legislation makes the proposal meaningless. "Photographic identification" is not, without more context, a phrase that has any useful meaning. Similarly, without more, there is no way for voters to know what is meant by "exceptions." Nor would there be any way for a reasonable voter to know the future implications of voting for this amendment in November should the General Assembly fail to ever enact enabling legislation. As set forth in Plaintiffs' initial briefing, this eventuality would lead to voter confusion and highlights the danger of advancing a vague and incomplete Amendment without implementing

legislation. Pls. TRO Br. at 42. The language is so vague that it does not constitute a "proposal."

c) There is wide consensus that the ballot language is misleading and vague

Plaintiffs are not alone in finding the ballot language misleading and vague. As this court is aware, the Governor has brought a similar challenge to two of the four amendments challenged by Plaintiffs. *Cooper v. Berger*, 18 CVS 9805 (Wake County). Additionally, the State Board of Elections, which is charged with ensuring that ballots presented to voters in this State are readily understandable by voters and present all questions in a fair and nondiscriminatory manner itself admits that at least two of the ballot questions mislead, stating: "Board Defendants admit that the General Assembly has adopted false and misleading ballot language that conceals the true nature of these proposed amendments." Board Defendants' Answer and Crossclaims, *Cooper v. Berger*, ¶ 2. Board Defendants go even further, stating that "[t]hese ballot questions, however, are misleading, difficult to understand accurately, unfair, and discriminatory. The ballot questions contain incorrect statements about the text of the amendments. The ballot questions are also misleading, unfair, and incomplete because they withhold from voters key information about the text of the amendments." *Id*. at 18.

On August 13, 2018, all five living former North Carolina Governors held a press conference noting the misleading nature of the amendments related to Boards and Commissions and Judicial Vacancies. Former Governor Martin called the amendments "devious and mischievous"—saying voters will have no idea what changes will take place if they approve the amendments. Exhibit F. Former Governor McCrory went further, saying, "Don't hijack our constitution, especially through two deceitful and misleading amendments that will be on the

ballot which attempt to fool the citizens of our great state." *Id.* All Governors signed a letter noting the misleading nature of the Amendments. Exhibit D

Similarly, Gerry F. Cohen, who as former Director of Bill Drafting and Special Counsel to the N.C.G.A. is one of the most knowledgeable people in North Carolina about constitutional amendments and bill drafting explains that "[s]everal of the proposed constitutional amendments will be placed on the ballot with misleading information." (Exhibit E, Cohen Aff, Para. 22). Specifically, Mr. Cohen observes that the "ballot question, which focuses primarily on the Bipartisan Election Board, obscures the larger more significant changes to separation of powers," (Exhibit E, Para. 25) and that the ballot question, in its second clause, states that its purpose is to "clarify the appointment authority of the Executive and Judicial branches." This is misleading, as it actually makes a momentous change in the separation of powers rather than simply "clarifying." *Id*. Cohen also attests that the maximum allowable income tax rate amendment "will be presented on the ballot in a misleading way" and that "[a] voter who thinks that the amendment will reduce their tax rate will be misled." (Exhibit E, Para. 23). In addition, Mr. Cohen expresses concern about the proffered photo identification Amendment, given that a photo identification amendment "was required by legislation enacted in the 2013 session, but was struck down in federal court." (Ex. E, Para. 21, citing *North Carolina State Conference of N.A.A.C.P. v. McCrory*, 831 F.3d 204 (2016)). Based on the ballot question alone, voters would not know that they are being asked to vote for or against an Amendment that has been the subject of extensive recent litigation.

Other statements noting the misleading nature of the amendments have been made by the North Carolina Attorney General and the Secretary of State, as noted in Plaintiffs' opening brief. Pls. TRO Br. at 18.

d) Defendants present straw man arguments

Legislative Defendants make a series of additional points that are not germane to the issues in this case. For example, in their Memorandum in Opposition to the Governor's motion, which is incorporated by reference to their response to NC NAACP and CAC, the Legislative Defendants take up five pages responding to federal substantive due process claims that neither the Governor, nor NC NAACP and CAC have brought. Leg. Defs. Memo in Opp to Governor's TRO, Section II B. Having set up the strawman, Legislative Defendants attempt argue that they satisfy the federal substantive due process standard, which requires only that they "identify" the proposed amendments on the ballot by briefly summarizing this text. *Id.* Federal courts are, of course, hesitant to interfere in matters of state sovereignty and thus largely defer to state courts to intervene in such matters, limiting their own intervention to only the most extreme of circumstances. This standard and the federal cases discussing it are not relevant here, where Plaintiffs are asking North Carolina Courts, which are not so limited by federalism concerns, to interpret what the state Constitution requires for constitutional amendments. Nor can the state courts be so circumspect given their fundamental responsibility to safeguard North Carolina's Constitution. *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1939) ("[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."). Plaintiffs have not brought substantive due process claims in federal court, but rather look to their own state court system to protect their fundamental rights. Legislative Defendants' borrowed standard should thus be rejected.

Similarly, Legislative Defendants spend considerable time reciting their opinion that N.C. Gen. Stat. § 163A-1108 does not create an independent cause of action. While Plaintiffs do not concede the point, it is irrelevant. Plaintiffs have not brought suit pursuant to N.C. Gen. Stat. §

163A-1108. Instead, their claims are brought under the North Carolina Constitution. Plaintiffs reference N.C. Gen. Stat. § 163A-1108 in their papers because the statutory provision is relevant in that it reinforces the obligation[5] placed on the State Board of Elections and Ethics Enforcement to ensure that North Carolinians are presented with ballots that are "readily understandable" and ballot questions that are presented "in a fair and nondiscriminatory manner." *Id*.

CONCLUSION

Defendants protest heavily about the limited case law regarding the powers of an illegally constituted N.C.G.A., and the requirements of Art. XIII § 4. But this sparse history is unsurprising. We are living through unprecedented and extraordinary times. The current N.C.G.A. is notorious, not only for enacting one of the largest, unconstitutional racial gerrymanders ever encountered by the federal courts, but also for its persistent delays and procedural maneuvers to put off any remedy. Now this body which the U.S. Supreme Court has adjudged inadequately representative of the people of North Carolina is poised to place a large swath of amendments on the ballot all aimed at further augmenting its power. And it will do so by perpetuating a fraud on the people of North Carolina. It is at this key juncture in our state's history that Plaintiffs seek relief from this court asking only that the status quo might be preserved and chaos avoided.

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

[5] As State Board Defendants have acknowledged, this obligation puts the State Board in a bind. The Legislative Defendants' directive to the State Board that it place misleading constitutional amendments onto the ballot puts the Board into direct conflict with its statutory obligation.

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 14th day of August 2018.

Kimberley Hunter
N.C. Bar No. 41333
David Neal
N.C. Bar No. 27992
Mary Maclean Asbill
N.C. Bar No. 38936
Brooks Rainey Pearson
N.C. Bar No. 41513
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org
dneal@selcnc.org
mmasbill@selcnc.org
bpearson@selcnc.org

Attorneys for Plaintiffs NC NAACP and Clean Air Carolina

s/ Irving Joyner

Irving Joyner
N.C. Bar No. 7830
P.O. Box 374
Cary, NC 27512
Telephone: (919) 319-8353
Facsimile: (919) 530-6339

Attorney for Plaintiff NC NAACP

s/ Daryl V. Atkinson

Daryl V. Atkinson
N.C. Bar No. 39030
Leah J. Kang
N.C. Bar No. 51735
FORWARD JUSTICE
400 W. Main Street, Suite 203
Durham, NC 27701
Telephone: (919) 323-3889

Attorneys for Plaintiff NC NAACP

CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the foregoing Reply in Support of Plaintiffs Motion for Temporary Restraining Order and Preliminary Injunction upon the parties via e-mail and by U.S. mail to the attorneys for Defendants named below:

Martin E. Warf, Esq.
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

This the 14th day of August, 2018.

_____

Kimberley Hunter
N.C. Bar No. 41333

Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
Phone: (919) 967-1450
Fax: (919) 929-9421
khunter@selcnc.org

Attorney for Plaintiffs NC NAACP and Clean Air Carolina