STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

vs.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

DEFENDANTS BERGER AND MOORE'S RESPONSE TO *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AND DEMOCRACY NORTH CAROLINA'S AMICUS BRIEF IN SUPPORT OF PLAINTIFF

COME NOW Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, "Defendants"), and hereby respond in opposition to *Amici Curiae* The Brennan Center

for Justice at N.Y.U. School of Law and Democracy North Carolina's Amicus Brief in Support of Plaintiff (the "*Amici* Brief").

For the reasons set forth below, *Amici Curiae* fail to add anything to the arguments raised by Plaintiff to aid the Court in its consideration of the Plaintiff's challenge to Session Laws 2018-117 and 2018-118, and Plaintiff's Motions for Preliminary Injunction and Temporary Restraining Order should be denied.

ARGUMENT

A. The Ballot Language in the Session Laws is not misleading.

For virtually the same reasons argued by Plaintiff, *Amici Curiae* argue that the ballot questions in Session Laws 2018-117 and 2018-118 (the "Session Laws") are "affirmatively misleading." (*Compare* Complaint at ¶¶ 64-78 and 88-99; Plaintiff's Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 10-12; Plaintiff's Reply Brief at 3-7 with *Amici* Brief at 4; *see id.* 4-6.) *Amici Curiae* offer no standard under North Carolina law by which to judge whether ballot language is misleading. Like Plaintiff, *Amici Curiae* refer to *Armstrong v. Harris*, 773 So.2d 7 (Fla. 2000) and other cases from foreign jurisdictions (most of which have previously been distinguished by Defendants[1]) for the proposition that

[1] As noted by Defendants, unlike North Carolina, Florida has an accuracy requirement statute specific to constitutional amendments to which the courts can refer to determine whether ballot language is misleading. (*See* Defendants' Mem. in Opposition at 25.) While *Amici Curiae* would lead the court to believe that N.C. Gen. Stat. § 163A-1108 is an equivalent statutory framework to that in Florida, § 163A-1108 does not set forth requirements specific to proposed constitutional amendments like the statutes in the other jurisdictions. There simply is no set standard for the review of ballot language for proposed amendments under North Carolina law like

there is an "'implicit accuracy requirement for ballot language.'" (*Id.* at 13.) In response to Plaintiff's arguments (and the arguments of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the "Board Defendants")), Defendants have already addressed the standard by which the ballot questions should be judged (substantive due process) and why the specific language used is not misleading. (*See* Defendants' Mem. in Opposition at 18-22.) Defendants incorporate those arguments herein.

B. Amici Curiae fail to establish that the Session Laws are designed to entrench the Republican Party in power or that so-called "political entrenchment" renders the Session Laws unconstitutional.

Amici Curiae spend the majority of the *Amici* Brief arguing that the constitutional amendments proposed in the Session Laws and the General Assembly's alleged "effort to mislead voters" are designed to "entrench the Republican party in power." (*Amici* Brief at 6-12.) However, *Amici Curiae* do not provide a clear explanation of how "political entrenchment," even if believed to be the intent behind the proposed amendments, renders the Session Laws unconstitutional. While *Amici Curiae* cite cases for the proposition that there is "hostility to political entrenchment," they do not identify any specific provision of the North Carolina Constitution that is violated by the ballot language.[2] (*Id.* at 9.) Moreover, *Amici Curiae* seem to be more

there is in the foreign jurisdictions (Florida, New Jersey, Arkansas, Idaho) cited by *Amici Curiae*.

[2] *Amici Curiae* do state that the "requirement that the ballot be free from government deception is implicit in any framework requiring constitutional amendments to be

concerned about the proposed amendments than the ballot language, but it is the ballot language that is at issue in this case. (*See Amici* Brief at 9 ("Political entrenchment is the key goal and effect of the *proposed amendments*.") (emphasis added).) As evidenced by the *Amici Curiae* brief filed by Governors Martin (Republican), Hunt (Democrat), Easley (Democrat), Purdue (Democrat), and McCrory (Republican), former Governors of both political parties are also opposed to the proposed amendments.

C. The ballot language set forth in the Session Laws does not negate a fundamental right.

Amici Curiae also argue that the right to vote is a fundamental right and that the "misrepresentations" on the ballot negate this right. (*Amici* Brief at 12.) However, to be clear, what the United States Supreme Court and the North Carolina Supreme Court have held to be a fundamental right is the right to vote *on equal terms*. *See, e.g., Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) ("this Court has often noted that the Constitution 'does not confer the right of suffrage upon any one,' *Minor v. Happersett*, 21 Wall. 162, 178, 22 L.Ed. 627 (1875), and that 'the right to vote, per se, is not a constitutionally protected right,' *San Antonio Independent School*

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submitted to the people for approval." (*Amici* Brief at 3.) This argument seems to mirror Plaintiff's argument that Article XIII, Section 4 requires constitutional amendments to be submitted to the voters and that the amendments are not truly "submitted" if the ballot questions are misleading. (*See* Plaintiff's Brief at 6.) These ballot questions are not misleading. Moreover, Article XIII, Section 4's plain text gives the General Assembly—not the Governor and not the judiciary—the exclusive right to submit the proposed amendments (at a time and in a manner chosen in the General Assembly's sole discretion) to the voters. However, ultimately, it is the voters who can make constitutional change – not the General Assembly.

Dist. v. Rodriguez, 411 U.S. 1, 35, n. 78, 93 S.Ct. 1278, 1298, n. 78, 36 L.Ed.2d 16 (1973)."); *State ex rel. Martin v. Preston*, 325 N.C. 438, 455, 385 S.E.2d 473, 481 (1989) ("The right to vote per se is not a fundamental right under our Constitution; instead, once the right to vote is conferred, the equal right to vote is a fundamental right."). Given that the ballot language set forth in the Session Law will be the same language on all ballots for all voters across the State, Defendants dispute that the equal right to vote is in any way implicated by the challenged Session Laws. See, e.g., *Rodriguez*, 457 U.S. at 10 (finding that the law in question did "not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties."). Moreover, Plaintiff has not asserted any kind of equal protection violation. Thus, *Amici Curiae* do nothing to assist the Court in its analysis of the claims at issue in this action.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Memorandum in Opposition to Motions for Temporary Restraining Order and Preliminary Injunction, Plaintiff's and the Board Defendants' requests for preliminary injunctive relief should be denied.

Respectfully submitted this the 17th day of August, 2018.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982

By: _____
D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 329-3800
Facsimile: (919) 329.3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ATTORNEYS FOR DEFENDANTS PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the persons indicated below via first-class mail and electronic mail addressed as follows:

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	John R. Wester J. Dickson Phillips, III Adam K. Doerr Erik R. Zimmerman Morgan P. Abbott Robinson Bradshaw & Hinson, P.A. 101 N. Tryon Street, Suite 1900 Charlotte, NC 28246 jwester@robinsonbradshaw.com dphillips@robinsonbradshaw.com adoerr@robinsonbradshaw.com ezimmerman@robinsonbradshaw.com mabbott@robinsonbradshaw.com
Wendy R. Weiser Daniel I. Weiner Douglas E. Keith The Brennan Center for Justice at N.Y.U. Law 120 Broadway New York, NY 10271	Andrew H. Erteschik Caroline P. Mackie John Michael Durnovich Poyner Spruill LLP P.O. Box 1801 Raleigh, NC 27602-1801 aerteschik@poynerspruill.com cmackie@poynerspruill.com jdurnovich@poynerspruill.com [

This the 17th day of August, 2018.

D. Martin Warf