NO._____ TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff, 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.	)	From Wake County 18 CVS 9806

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NC NAACP'S MOTION TO BYPASS COURT OF APPEALS, PETITION FOR WRIT OF SUPERSEDEAS, AND MOTION FOR TEMPORARY STAY

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NC NAACP'S MOTION TO BYPASS COURT OF APPEALS, PETITION FOR WRIT OF SUPERSEDEAS, AND MOTION FOR TEMPORARY STAY.

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Pursuant to Article IV, Section 12(1) of the North Carolina Constitution, N.C. Gen. Stat. § 7A-31(b), and North Carolina Rules of Appellate Procedure 2, 8, and 23, Plaintiff-Petitioner the North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") respectfully petitions this Court to review and partially vacate the order issued on August 21, 2018 by a three-judge panel of the Superior Court of North Carolina. *NC NAACP v. Moore*, 18 CVS 9806, Wake County, Order on Inj. Relief, Aug. 21, 2018. (Exhibit 1). Although this order enjoined the North Carolina Bipartisan State Board of Elections and Ethics Enforcement ("Board of Elections") from placing constitutional amendment proposals authorized by Senate Bill 814 and House Bill 913 on the November 2018 ballot, it denied NC NAACP's motion for the same relief as to Senate Bill 75 and House Bill 1092. NC NAACP now requests that this Court accept review of this matter.

In support of this petition and motion, NC NAACP shows the Court the following:

INTRODUCTION

NC NAACP comes to the Court with an urgent request – that the Court suspend the Rules of Appellate Procedure to the extent necessary to prevent manifest injustice to the Constitution of the State of North Carolina and to the citizens of this state. *See* N.C. R. App. P. 2.

The issues in this case go to the very heart of our constitutional order: Does a North Carolina state legislature whose supermajority rests on an unlawful racial gerrymander and that thus does not fairly represent the people, have the authority to put constitutional amendments on the ballot? Can the North Carolina General Assembly ("N.C.G.A.") place misleading, incomplete, and vague language before the voters despite its constitutional duty to submit amendment "proposals" to the people?

Because the democratic foundation of our state hinges on the answer to these constitutional questions, the prudent next step is to pause and allow deliberate consideration of the issues. If the ballots are certified for release with these two misleading and incomplete ballot questions in place, NC NAACP will suffer immediate and irreparable harm. Moreover, the public would suffer from the chaos of misleading

and incomplete amendments being put to a vote before adjudication as to their legality. If the amendments pass, years of confusion and litigation will inevitably follow. Our most fundamental right—the right to vote—will be under a shroud of uncertainty. And confusion will reign supreme.

As the three-judge panel correctly held, for two of the four amendments in the present case, injunctive relief would appropriately preserve the status quo by preventing the N.C.G.A. from prematurely submitting to the voters misleading proposals that amend our Constitution in ways that further entrench their own political power at the expense of popular sovereignty.

Accordingly, NC NAACP respectfully requests that this Court issue a writ of supersedeas pursuant to Rule 23 to prevent manifest injustice, and to exercise its inherent authority over the lower courts of North Carolina pursuant to the North Carolina Constitution and Rule 2 by bypassing the Court of Appeals and reviewing the three-judge panel's denial of injunctive relief regarding Senate Bill 75 and House Bill 1092. N.C. Const. art. IV, § 12; N.C. Gen. Stat. § 7A-31(b). NC NAACP further requests that the Court temporarily enjoin the Board of

Elections from placing constitutional amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot.

STATEMENT OF PROCEDURAL HISTORY

On August 6, 2018, Plaintiffs NC NAACP and Clean Air Carolina filed a Complaint for Declaratory and Injunctive Relief and a Motion for Temporary Restraining Order ("TRO") pursuant to N.C. Gen. Stat. §§ 1-253, and Rules 65 and 57 of the North Carolina Rules of Civil Procedure. Plaintiffs sought injunctive relief to prevent the State Board of Elections from placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot. A similar challenge related to two of those constitutional amendments was filed the same day by Governor Roy Cooper. 18 CVS 9805, Wake County. On August 7, 2018, Wake County Superior Court Judge Paul Ridgeway heard arguments on Plaintiffs' and the Governor's motion for preliminary injunctive relief.

Before Judge Ridgeway entered an order transferring both matters to a three-judge panel of the Superior Court, he recognized the urgency of these cases. *NC NAACP v. Moore*, 18 CVS 9806, Wake County, Tr. of Hr'g. Aug. 7, 2018., (Exhibit 2) at p. 116; *see also* N.C.

Gen. Stat. § 1-267.1; N.C. Gen. Stat. § 1-1A, Rule 42(b)(4). That same day, the Chief Justice of this Court assigned the Honorable Forrest Donald Bridges, Thomas H. Lock, and Jeffrey K. Carpenter to hear the constitutional challenges raised in the cases.

The three-judge panel heard arguments in both cases on August 15, 2018. On August 17, 2018 the three-judge panel issued an Order on Temporary Measures designed to preserve the status quo and prevent the Board of Elections from taking "any action to authorize or approve any language to be placed on the official ballot for the November 2018 general election." *NC NAACP v. Moore*, 18 CVS 9806, Wake County, Placeholder Order, Aug. 17, 2018 (Exhibit 3). The order is set to expire at 11:59 pm on the third non-weekend day after three-judge panel enters its final order on the Preliminary Injunction, and thus will expire on August 24, 2018.

On August 21, 2018, Judges Bridges and Lock, writing for a majority of the three-judge panel, issued their final order on Plaintiffs' motion for preliminary injunctive relief, granting in part and denying in

part Plaintiff- Petitioner NC NAACPS's[1] request for relief. The order enjoined the Board of Elections from placing constitutional amendment proposals authorized by Senate Bill 814 and House Bill 913 on the November 2018 ballot, finding that key elements of the ballot questions for these two amendments would either mislead or not sufficiently inform voters about the proposed amendments. The panel, however, declined to enjoin the Board from placing amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot. The panel also denied Legislative Defendants' 12(b)(1) Motion to Dismiss NC NAACP's claims, finding that the NC NAACP has standing and that its claims are justiciable.

The three-judge panel certified this matter for immediate appellate review, finding that this "order affects substantial rights of each of the parties to this action." (Exhibit 1 ¶ 62). N.C. Gen. Stat. §§ 1A-1, Rule 54; 1-277(a); and 7A-27(d)(1)

[1] The three-judge panel dismissed Plaintiff Clean Air Carolina on grounds that it lacked standing, a ruling that Clean Air Carolina believes was in error, but does not challenge at this time.

Absent a stay or further action from this Court, the State Board of Elections and Ethics Enforcement is thus permitted to begin the process of finalizing ballots on Saturday, August 28, 2018.

STATEMENT OF FACTS

Over a year ago, the United States Supreme Court determined that the North Carolina legislative branch was unlawfully constituted by way of an unconstitutional racial gerrymander. *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 affected at least 77 out of North Carolina's 100 counties and 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, over two-thirds of the seats in the N.C.G.A.

North Carolinians have thus lived for the better part of a decade under an unconstitutional body that does not reflect the will of the people. This fall marks the first opportunity since 2010 when North Carolinians will elect members of the General Assembly from districts that have been liberated from the distorting influence of the N.C.G.A.'s

unlawful racial gerrymander. At the end of the most recent regular legislative session, the leadership of the N.C.G.A. went beyond its day-to-day business and hurriedly passed legislation that would place before the voters six constitutional amendments.

Four of the six proposed constitutional amendments are the subject of this suit: 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 "Boards and Commissions Amendment," Exhibit 4); 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 5); House Bill 1092, "An Act to Amend the North Carolina Constitution to require photo identification to vote in person" (the "Voter ID Amendment," Exhibit 6); and 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 7).

The three-judge panel below has already enjoined the State Board of Elections from placing two of the four amendments, the Board and Commissions Amendment and the Judicial Vacancies Amendment on the ballot for the November 2018 election. Absent action from this Court, the remaining two proposed amendments—Voter ID and Tax Cap—will be presented on the ballot with vague and misleading language or will require significant additional implementing language before their full scope and extent becomes clear.

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. Here, 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 110.) The amendments at issue in this case, including the Voter ID and Tax Cap Amendments, passed that three-fifths margin by just one or two votes.

Plaintiff-Petitioner NC NAACP is a non-profit group that frequently educates its members and the public about issues of government. NC NAACP's fundamental mission is the advancement

and improvement of the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination. Affidavit of Rev. Dr. T. Anthony Spearman (Exhibit 8). If the amendments are placed on the ballot, NC NAACP will immediately suffer irreparable harm as it will be forced to divert resources from other priority areas towards educating voters about the amendments' true nature. NC NAACP will also be harmed if the amendments become law.

REASONS WHY THIS COURT SHOULD EXERCISE ITS DISCRETION TO CERTIFY THIS CASE FOR REVIEW PRIOR TO CONSIDERATION BY COURT OF APPEALS

NC NAACP respectfully requests that this Court accept this case for review, bypassing the Court of Appeals. N.C. Const. art. IV, 12(1); N.C. Gen. Stat. § 7A-31(b); N.C. R. App. P. 2, 21. North Carolina General Statute § 7A-31 allows this Court to permit certification before the case has been considered by the Court of Appeals, if it determines that "any" of a list of circumstances apply, including: (1) "[t]he subject matter of the appeal has significant public interest," (2) "[t]he cause

involves legal principles of major significance to the jurisprudence of the State," and (3) "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." N.C. Gen. Stat. § 7A-31(b). The statute is thus "sweepingly broad" and provides this Court with the authority to bypass the Court of Appeals. *Spartan Leasing, Inc. v. Brown*, 285 N.C. 689, 698, 208 S.E.2d 649, 655 (1974) (holding that the discretionary authority vested in the Supreme Court by § 7A-31 enables review of the entire record below on a petition for writ of certiorari).

The Supreme Court has previously invoked this statute to allow for discretionary review of a case on direct appeal that was never docketed in the Court of Appeals. *State v. Ward*, 300 N.C. 150, 151, 266 S.E.2d 581, 582 (1980), N 1 (citing N.C. Gen. Stat. § 7A-31(b)(3), without reference to Rule 15 of the Rules of Appellate Procedure, to allow this Court to decide a criminal appeal that should have first been filed in the Court of Appeals). The *Ward* Court determined that it could bypass the regular procedures as set forth in the Rules of Appellate Procedure in order to avoid unnecessary delay. *Id.*

Even more so than in *Ward*, the circumstances of the present case justify bypassing the Court of Appeals. First, the subject matter of this case, which concerns whether a slate of constitutional amendments may be placed on the ballot, raises issues of significant public interest. Second, the case involves legal principles of major significance to the jurisprudence of this State, in that it involves two constitutional challenges—one concerning the limitations of an unlawfully constituted, racially-gerrymandered General Assembly's authority and one concerning the legislature's duty not to put forward misleading, vague, or incomplete proposals for amending the Constitution. Third, because delay in final adjudication could result in unconstitutionally-proposed amendments being placed before voters in the upcoming election, it will result and thereby cause substantial harm to the administration of our state government. N.C. Gen. Stat. § 7A-31(b). As noted above, the lower court's Temporary Stay will expire on August 24, 2018. The State Board of Elections has stated that it must start preparing ballots no later than September 1, 2018.

Even setting aside § 7A-31(b), this Court has inherent authority under Article IV, Section 12(1) of the Constitution of North Carolina to

exercise "jurisdiction to review upon appeal any decision of the courts below." *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428–29 (2007) (holding that even though § 7A–31(a) explicitly prohibits the Supreme Court from reviewing lower-court rulings on motions for appropriate relief in this type of case, such a statute cannot limit the state Supreme Court's constitutional authority). The *Ellis* Court ruled that it would not hesitate to use its general supervisory authority "when necessary to promote the expeditious administration of justice," even when doing so may otherwise violate the Court's rules. *Id.* (citing *State v. Stanley,* 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975)). In *Ellis*, this Court exercised its authority in order to ensure the uniform administration of North Carolina's criminal statutes. Here, the integrity of the Constitution is at stake, an interest that is all the more worthy of exercising this Court's inherent supervisory authority

I. The subject matter of the appeal has significant public interest.

Certification by the Supreme Court is appropriate when, in the opinion of the Supreme Court, the subject matter of the appeal has significant public interest. N.C. Gen. Stat. § 7A-31(b)(1). A case can rise to the level of significant public interest either due to the importance of

the issue at stake or the importance of the litigants involved in the dispute. In this instance, both are present. The three-judge panel's partial denial of injunctive relief in this matter puts a significant public interest at risk–that of ensuring that the voters are not presented with misleadingly written and incomplete amendment proposals that may later be deemed unconstitutional. Moreover, if these amendments are allowed to be placed on the ballot, and they are ratified by voters, significant chaos and confusion will follow. Additional litigation will almost certainly be brought to determine the authority of the unconstitutional, racially-gerrymandered N.C.G.A. to propose these amendments, as well as the legitimacy of key changes to fundamental issues, including access to the polls and taxation. Thus, preliminary injunctive relief in this case, provided by the Supreme Court upon certification of this matter, would serve the public interest. The litigants in this case include some of the highest-ranking officials in North Carolina, including the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and each of the members of the Board of Elections. Plaintiff-Petitioner NC NAACP is the oldest and largest civil rights organization in the state. The case has garnered

significant public attention, as its outcome could potentially directly affect issues fundamental to the citizens of North Carolina.

This Court has a long history of certifying cases for review before a determination by the Court of Appeals when a constitutional matter is in question. *See, e.g., Hart v. State*, 773 S.E.2d 885 (N.C. Oct. 10, 2014) (appeal involving constitutionality of private school "voucher" program); *Richardson v. State*, 773 S.E.2d 885 (N.C. Oct. 10, 2014) (same); *Cubbage v. Bd. of Trs. of the Endowment Fund*, 773 S.E.2d 884 (N.C. Oct. 10, 2014) (appeal involving constitutionality of proposed sale of Hoffman Forest); *State v. Young*, 773 S.E.2d. 882 (N.C. Mar. 12, 2014) (appeal involving constitutionality of sentence of life without parole for juvenile); *State v. Seam*, 773 S.E.2d 882 (N.C. Mar. 12, 2014) (same); *State v. Perry*, 773 S.E.2d 882 (N.C. Mar. 12, 2014) (same); *Hoke Cty. Bd. of Educ. v. State*, 579 S.E.2d 275 (N.C. Mar. 18, 2003) (appeal involving claim that State failed in its constitutional duty to provide sound basic education); *Pope v. Easley*, 548 S.E.2d 527 (N.C. May 3, 2001) (appeal involving constitutionality of legislative change to size of Court of Appeals); *Williams v. Blue Cross Blue Shield*, 552 S.E.2d 637 (N.C. July 19, 2001) (appeal involving constitutionality of employment

provisions of county ordinance and enabling act for ordinance); *Bailey v. State*, 541 S.E.2d 141 (N.C. Nov. 4, 1999) (appeal involving constitutional challenge to tax on retirement benefits).

Because of the importance of the issue at stake, certification of review under N.C. Gen. Stat. § 7A-31(b)(1) is merited in this case.[2]

II. Legal principles of major significance to the jurisprudence of the State are at stake.

Certification by the Supreme Court is also appropriate when, in the opinion of the Supreme Court, the cause involves legal principles of major significance to the jurisprudence of the State. N.C. Gen. Stat. § 7A-31(b)(2). This case involves two constitutional challenges to actions of the N.C.G.A. Constitutional challenges of this nature are significant to the jurisprudence of the State as illustrated by, for example, the fact that an appeal to the Supreme Court lies of right in cases "[w]hich directly involve[s] a substantial question arising under the Constitution of . . . this State." N.C. Gen Stat. § 7A-30(1).

[2] Given the urgency of this case, NC NAACP hereby incorporates all substantive pleadings from the Superior Court as Exhibit 10 to facilitate this court's prompt review.

Absent action by this Court, the three-judge panel's denial of preliminary injunctive relief in this matter will result in a ballot that contains vague and incomplete constitutional amendments with misleading questions that have been proposed by an illegally constituted usurper legislature. It is hard to imagine a matter more significant to the jurisprudence of the State than the State Constitution. By granting discretionary review, this Court can ensure that constitutional questions are resolved prior to amending the document that lies at the heart of the system of law in North Carolina. Thus, this matter warrants certification of review under N.C. Gen. Stat. § 7A-31(b)(2).

III. Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.

Certification by the Supreme Court is appropriate when delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm. N.C. Gen. Stat. § 7A-31(b)(3). In this instance there is no dispute as to the necessity of prompt action. This case will come before this Court eventually, as an appeal of right will still lie following a determination by the Court of Appeals. N.C. Gen Stat. § 7A-

30(1). But the Board of Elections must act quickly to finalize the November 2018 ballot to ensure that absentee voting can begin on schedule.[3] Certifying this case for review now, rather than waiting for the case to make its way through the Court of Appeals, would not only promote judicial efficiency, but would give this Court the opportunity to prevent the harm that would ensue if NC NAACP was granted relief *after* the amendments had been put to the voters. As such, this matter warrants certification of review under N.C. Gen. Stat. § 7A-31(b)(3).

ISSUE FOR WHICH REVIEW IS SOUGHT

In the event the Court grants this Petition, NC NAACP intends to present the following issue in its brief to the Court: whether the three-judge panel erred in denying NC NAACP's request for preliminary injunctive relief preventing the Board of Elections from placing the proposed constitutional amendments authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot.

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[3] The State Board of Elections Defendants have noted in their briefing before the three-judge panel below the following: "If the content of the ballots is not finalized by August 17, the Court can move the deadline for mailing ballots (currently September 7, 60 days before the election) to a date no later than September 22 (45 days before the election). *See* 52 U.S.C, § 20302(a)(8)(A); N.C. Gen. Stat. § 163A-1305." State Board Defs.' Reply Br. in Support of TRO & PI at 9 n.1 (Exhibit 11).

REASONS WHY THIS COURT SHOULD ISSUE A WRIT OF SUPERSEDEAS AND TEMPORARY STAY

NC NAACP respectfully requests, pursuant to N.C. R. App. P. 2, 8, and 23, that this Court issue its writ of supersedeas to review the three-judge panel's denial of the motion to preliminarily enjoin the Board of Elections from placing constitutional amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot.

IV. Issuance of a writ of supersedeas and temporary stay is appropriate here.

The three-judge panel certified this matter for immediate appellate review, finding that this "order affects substantial rights of each of the parties to this action." (Exhibit 1 ¶ 62). N.C. Gen. Stat. §§ 1A-1, Rule 54; 1-277(a); and 7A-27(d)(1). The purpose of a writ of supersedeas and temporary stay is to preserve the status quo while the case is on appeal. *See Craver v. Craver*, 298 N.C. 231, 237-38, 258 S.E.2d 357, 362 (1979) (explaining that the purpose of the writ of supersedeas "is to preserve the status quo pending the exercise of appellate jurisdiction") (citing *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (per curiam)).

Rule 23 does not set forth a specific standard for issuing a temporary stay and writ of supersedeas, but rather provides broad discretion to the appellate courts, asking only that "the writ should issue in justice to the applicant." N.C. R. App. P. 23(c). In this case, a stay is necessary: (1) because NC NAACP is likely to succeed on the merits, (2) to prevent irreparable harm to NC NAACP, and (3) it is in the public interest to avoid the chaos and confusion of trying to undo amendments to the state constitution that were illegally placed on the ballot.

A. NC NAACP is likely to succeed on the merits of their claims.

NC NAACP is likely to succeed on the merits of their claims. The attempt by an illegally constituted usurper legislature to place vague, incomplete, and misleading amendments on the ballot violates the state Constitution. N.C. Const. art. I, §§ 2, 3, 35 and art. XIII, § 4. First, because the current N.C.G.A. is the product of illegal, racially-gerrymandered voting districts, it does not enjoy popular sovereignty and does not have power to radically alter the state Constitution. Second, enacting vague and incomplete amendments with misleading

ballot language violates the constitutional requirement to submit a proposal to the qualified voters of our State.

1. The racially-gerrymandered 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*. at § 3 (emphasis added). The Constitution also provides that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." *Id*. at §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 by qualified voters.

Since the United States Supreme Court's ruling in *Covington*, the Legislative Defendants have not possessed the lawful authority to propose constitutional amendments. The federal courts have ruled that the Legislative Defendants lead an unlawfully constituted N.C.G.A. The racial gerrymanders engineered and maintained by the Legislative Defendants was a "widespread, serious, and longstanding . . . constitutional violation—*among the largest racial gerrymanders ever encountered by a federal court*." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017) (emphasis added). The harms attendant to the N.C.G.A's unlawful segregation of voters by race is ongoing and has resulted in "legislators acting under a cloud of constitutional illegitimacy" since the 2012 elections held under illegal district maps. *Id*. at 891. That cloud will not lift until after legislators are elected under maps that have not been found to unlawfully segregate voters on the basis of race in the upcoming 2018 elections. No court has yet ruled on the limits of the N.C.G.A.'s power while it remains under this cloud of constitutional illegitimacy. But because the

federal courts have ruled that the widespread, unconstitutional, racial gerrymander interfered with "the mechanism by which the people confer their sovereignty on the General Assembly," this N.C.G.A. lacks the authority to enact these amendments. *Id.*, 270 F. Supp. 3d at 897.

The federal courts in *Covington* have ruled that the unlawful racial gerrymander infringed on the right to vote itself, a right that is "preservative of all rights." *Covington*, 270 F. Supp. 3d at 890 (quoting *Reynolds v. Sims*, 377 U.S. 533, 562-63 (1964)). The N.C.G.A.'s impermissible segregation of Black voters when drawing districts "strikes at the heart of the substantive rights and privileges guaranteed by our Constitution." *Id.* As the federal court explained:

> unjustifiably drawing districts based on race encourages elected representatives "to believe that their primary obligation is to represent only the members of [a particular racial] group, rather than their constituency as a whole." Such a message is "altogether antithetical to our system of representative democracy," *id*.

Covington, 270 F. Supp. 3d at 891 (quoting *Shaw v. Reno*, 509 U.S. 630, 648 (1993)).

A central aspect of popular sovereignty "is the right of the people to vote for whom they wish." *Id.* at 897 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 820 (1995)). Thus:

> 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.

The importance of popular sovereignty has long been enshrined in North Carolina law. As such, courts have consistently held that once it becomes known that a public official or body obtained their office through means other than the will of the people, they are a usurper to the office and their acts are void ab initio. *See, e.g., 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).

In an early prelude to the federal court's reasoning in *Covington*, this Court succinctly 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 constitutional 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 officer 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 constitutional 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 principles our State is built upon. N.C. Const. art. I § 35.

Here, the N.C.G.A. has been illegally constituted since the leadership of the N.C.G.A. unlawfully used race to construct racially segregated districts in 2011 that resulted in an unaccountable and unconstitutional supermajority in the state legislature. As noted above, the sweeping "unconstitutional racial gerrymanders . . . impact nearly 70% of the House and Senate districts, touch over 75% of the state's counties, and encompass 83% of the State's population—nearly eight million people. *Covington*, 270 F. Supp. 3d at 892. 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 new maps. *See Covington I*, 316 F.R.D. at 1776; *Covington v. North Carolina*, 283 F. Supp. 3d 410, 419 (M.D.N.C. 2018), *aff'd in part, rev'd in part*, 138 S. Ct. 2548. 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" lawful authority. Rather, once the ruling was made and known, under North Carolina law, the N.C.G.A. became a usurper body.

Below, the three-judge panel acknowledged the determination made in *Covington* but concluded that NC NAACP's claim "constitutes a collateral attack" and was "not within the jurisdiction" of the panel. (Exhibit 1 at ¶ 11). Nonetheless, the panel denied NC NAACP's claim for relief with regard to the amendments authorized by Senate Bill 75 and House Bill 1092. (Exhibit 1 at p. 30). The court further noted that, assuming *arguendo* that the claim is within its jurisdiction "a conclusion . . . that the N.C.G.A. is a 'usurper' legislative body would result only in causing chaos and confusion in government" and that "considering the equities" such a result "must be avoided." Exhibit 1 at ¶ 12.

The three-judge panel thus correctly recognized that usurper legislatures are limited to only those acts that are 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 public and individuals whose interests may be affected thereby").

The three-judge panel erred, however, in determining that "chaos and confusion" would result if the injunctive relief requested by NC NAACP is granted. No urgent state need is addressed by these proposed amendments. 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. Absent accompanying implementing legislation, the Voter ID amendment lacks uniform standards, but would nevertheless impose an unknown requirement with no consensus as to its full reach. The ensuing risk of conflicting interpretations and implementation from precinct to precinct would lead to mass confusion. The Tax Cap amendment will create confusion as voters are tricked into thinking that their tax rates will be lowered, when in fact only the tax cap will change. To the extent that either of these two amendments serve any state need, they could, without any harm to our state, be placed on the ballot at a later time by a constitutionally-constituted N.C.G.A., so long as it did so in a clear and complete fashion.

Importantly, the very nature of the Constitution and the safeguards that the Constitution requires of the amendment process dictates that proposing constitutional amendments is a line the illegally constituted N.C.G.A. 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. The illegally constituted 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.

A three-fifths supermajority is required in both houses to put a constitutional amendment on the ballot. There is a reason why this high bar is required. It is supposed to be difficult to change our fundamental charter. It is supposed to require deliberation and near consensus in the N.C.G.A.

Here, the two amendments at issue passed this high bar by just one or two votes. Given the scale of the unconstitutional racial gerrymander that infected the maps under which this usurper N.C.G.A. was elected, and the fact that 117 seats had to be redrawn to remedy its taint, it is clear that at least a portion of the votes that made up three-fifths supermajority necessary to pass the proposed amendments, complete with misleading language, were cast by representatives from districts that have since had to be redrawn. 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 and would be tantamount to a rebuke of the right to popular sovereignty. An N.C.G.A. that does not represent the people of North Carolina cannot be permitted to take such extreme steps. The amendment proposals authorized by Senate Bill 75 and House Bill 1092 should thus be declared void *ab initio*.

The judiciary must step in to check this affront to our democracy. To do otherwise would be to do just what the three-judge panel stated it seeks to prevent—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.

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. Article XIII, Section 4 of the state Constitution 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. Ballot questions that are misleading and proffered amendments that are vague and incomplete fall short of a "proposal."

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, Senate Bill 75 and House Bill 1092 will be submitted to the voters

with misleading language, and thus are not the clear and accurate "proposal" the Constitution requires. Second, House Bill 1092 includes vague and incomplete language that will require further implementing legislation before the full scope and extent of the amendment is known. As such, the full "proposal" has not been submitted to qualified voters.

As noted by the three-judge panel below, this Court has made clear that "great particularity should be required in the notice [presented to voters] in order that the voters may be *fully informed of the question they are called upon to decide. . . .* and that even where there is no direction as to the form in which the question is submitted to the voters, it is essential that it be stated in such a manner to enable them *intelligently to express their opinion upon it* . . . ." Exhibit 1¶ 43 citing *Hill v. Lenoir County,* 176 NC 572, 578, 97 SE 498, 500-01 (1918) (emphasis added).

The three-judge panel also found persuasive that 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* Exhibit 1 (*citing Stop Slots MD 2008 v. State Bd. of Elections*, 34 A.3d 1164, 1191 (Md. 2012) (noting

that ballot questions need to be determined on what would put an "average voter" on notice of "the purpose and effect of the amendment"); *Donaldson v. Dep't of Transp.*, 414 S.E.2d 638, 640 (Ga. 1992) (establishing that the courts must "presume that the voters are informed" but the legislature should still "strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each ... amendment"); *Fla. Dep 't of State v. Fla. State Conf. of NAACP Branches*, 43 So. 3d 662, 668 (Fl. 2010) (noting that lawmakers, as well as the voting public, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be"); *State ex rel. Voters First v. Ohio Ballot Bd*, 978 N.E.2d 119, 130 (Ohio 2012) (finding that material omissions in the ballot language of a proposed amendment to the Ohio constitution deprived the voters of the right to know what they were voting upon). *See also 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 on a substantively identical provision).

As such, the three-judge panel found that the relevant considerations include:

> 1) whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon, 2) whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment, and 3) whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment.

(Exhibit 1, ¶ 44).

These principles of accuracy and fairness have long existed. They are also reflected in North Carolina General Statutes, which require the State Board of Elections 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).

As set forth below and in NC NAACP's pleadings before the three-judge panel, Senate Bill 75 and House Bill 1092 are misleading, vague,

and incomplete and thus, fall short of the requirements for a "proposal" to the people.

(1) Tax Cap 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 opening 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%—well below 7%. The amendment itself will actually lower the maximum allowable income tax cap—which is currently set at 10%. The three-judge panel erred when it concluded that this amendment was not misleading. It is the opening clause of the question that misleads the public. "The income tax rate" in North Carolina will not be reduced, as the ballot language suggests.

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." Gerry Cohen Affidavit, Para. 22 (Exhibit 9). Specifically, Mr. Cohen 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." *Id.*, Para. 23.

(2) 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." The ballot language is incomplete because it fails to define "photo identification." As such, the language fails the three-judge panel's admonition that a ballot question "fairly present to the voter the primary purpose and effect of the proposed amendment." Exhibit 1 at ¶44.

The language does not inform the voter of the effect of the proposed amendment because the effect is not yet known. *See, e.g., Ohio Ballot Bd.*, 978 N.E.2d 119, 129 (Ohio 2012) (holding that "omitting the substantive criteria for redistricting that would be applied" by a redistricting commission created by a proposed amendment amounted to a material omission because it "fails to

adequately inform the average voter of the precise nature of the proposed constitutional amendment").

Without more detail, the phrase "photographic identification" is essentially meaningless. For example, "photographic ID could mean something as difficult to obtain as a United States Passport, or, at the other extreme, photographic ID could mean an expired student ID or even a Costco membership card. Similarly, the "exemptions" to the photo ID requirement presented in the amendment have no meaning. The effect of the amendment has thus not been presented to the voter, as the three-judge panel found is legally required.

Likewise, the language does not "fairly present" the "primary purpose" of the proposed amendment, which is to help bolster the N.C.G.A.'s legal position in state court when imposing strict Voter ID requirements. 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. This is particularly troubling given the fact that this N.C.G.A.'s previous attempt to enact a photo ID requirement was struck down by the U.S. Court of Appeals for the Fourth Circuit for being intentionally racially discriminatory. *N.C. NAACP v. McCrory*, 831

F.3d 204,214 (4th Cir. 2016), cert. denied sub nom., 137 S.Ct. 1399 (2017) (striking down voter ID requirement and other provisions in 2013 N.C. Sess. Laws 381 as passed with racially discriminatory intent because they unlawfully targeted African-American voters "with almost surgical precision.") The ballot text does not make clear the radical consequences that could ensue if the amendment is passed, nor does it make clear to voters that the N.C.G.A.'s intent is to circumvent a federal court ruling that has already enjoined a voter ID law in this state and to attempt to shield future enactments from oversight by state courts.

Just as with the tax amendment proposal, Mr. Cohen expresses concern about the proffered photo identification Amendment proposal noting that 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.

The three-judge panel thus set up a clear test for determining whether or not a ballot question fulfills the constitutional requirement that the proposal be "submit[ed]" to the voters of North Carolina. The three-judge panel then correctly held that the ballot questions for the

Judicial Vacancy and Boards and Commissions amendments failed to meet this standard, but erred when it concluded that the Tax Cap Amendment and Voter ID Amendment proposals did not likewise violate this standard.

B. NC NAACP will suffer irreparable harm absent a temporary stay.

NC NAACP will be immediately and irreparably harmed if the Board of Elections places the amendments onto the ballot for the 2018 general election. NC NAACP will be forced immediately to divert finite and limited resources, which they would otherwise spend on activities germane to their missions, towards educating its members and the public about the constitutional amendments that have been unlawfully proposed by an unconstitutional 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. By contrast, the Legislative Defendants will suffer no harm if this court grants this petition and motion, 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.

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, 317 S.E.2d 699, 700 (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).

There is no question that NC NAACP will be substantially and immediately harmed if these illegitimate amendments are allowed to appear on the ballot presented by misleading questions. NC NAACP is responsible, as part of its mission, for educating its members and the North Carolina electorate more broadly about ballot initiatives that may impact the welfare of the state. When initiatives relating to voting rights and state revenues appear on the ballot, voters look to the NC NAACP 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, 902 S.W.2d 793, 799 (Ark. 1995) ("[A]mending the Constitution is a precise science which entails complete information flowing to the electorate.").

An equitable consideration of "the relative conveniences and inconveniences of the parties" also strongly favors an injunction here. *Setzer v. Annas*, 286 N.C. 534, 540, 212 S.E.2d 154, 158 (1975) . If this Court allows these invalid amendments to appear on the 2018 ballot, NC NAACP will suffer immediate and irreparable harm, as described above. By 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.").

Importantly, irreparable harm will not be avoided if this Court holds these proposed amendments to be unconstitutional *after* the election has taken place. First, as discussed above, NC NAACP will suffer immediate irreparable harm if it is 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.").

In other words, granting the temporary stay will cause no harm and instead merely ensure that a legally constituted legislature that has been elected in accordance with the United States and North Carolina Constitutions has the opportunity to deliberate on whether to put these same or other proposed constitutional amendments on the ballot at the next election. Placing vague, misleading, and illegal amendments on the 2018 ballot, by contrast, would cause immediate and irreparable harm to NC NAACP and to the people of North Carolina. An injunction is the appropriate remedy to prevent such needless harm.

C. Allowing potentially unconstitutional amendments on the November 2018 ballot could cause chaos and confusion and is not in the public interest.

Absent action by this Court, the denial by the three-judge panel of NC NAACP's motion to enjoin the Board of Elections from placing constitutional amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot will result in a ballot that contains vague constitutional amendments that have been proposed by an illegally-constituted usurper legislature and that contain misleading, incomplete and vague captions that do not meet constitutional muster. By granting a temporary stay, this Court can ensure that the constitutional questions in dispute are resolved prior to amending the document that lies at the heart of the system of law in North Carolina.

While the harm to the public in permitting such amendments to be included on the ballot is great, Defendants will suffer little, if any, harm if a stay is granted. 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. Rather, the proposed amendments will 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.

When an unconstitutional statute is allowed to take effect (in this case, Senate Bill 75 and House Bill 1092), it creates confusion and results in unnecessary litigation. *See, e.g., Am. Mfrs. Mut. Ins. Co. v. Ingram*, 301 N.C. 138, 148–50, 271 S.E.2d 46, 51–52 (1980) (cataloguing the difficulties posed after an act that had been in effect is later declared unconstitutional); *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 442, 450 S.E. 2d 735, 743 (1994) (determining whether an unconstitutional ordinance would be declared retroactively or only prospectively). The scope of chaos and confusion in this instance would dwarf that in the above cited cases, which involved a private contract and a county ordinance, respectively. Here, the makeup of the Constitution itself is at stake, including such fundamental issues as access to the polls, and taxation.

This Court can prevent such chaos by issuing a temporary stay 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.

NO SECURITY BOND SHOULD BE REQUIRED

NC NAACP respectfully requests that the court reverse the three-judge panel's determination that NC NAACP pay a security bond in the amount of $1,000. Exhibit 1 at 60.

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 . . . ." 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 non-profit organizations with limited means, federal 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). The NC NAACP is a non-profit organization with limited means and a $1,000 bond would have a large impact on the organization and its operating budget. *Planned Parenthood of Cent. N. Carolina v. Cansler*, 804 F. Supp. 2d 482, 501 (M.D.N.C. 2011) (Given the lack of any monetary injury to Defendant, the district court did not require a bond before ordering injunctive relief).

Requiring little or no security is all the more appropriate where the preliminary injunction would have little impact on Defendants, as discussed in detail, *supra*. *See id.* (emphasizing the negligible harm to the coal company and forest supervisor that would be caused by the injunction when affirming nominal security). Defendants have not argued that such a large bond is necessary to secure any "costs and damages" (Exhibit 1 ¶60), nor can they. NC NAACP thus respectfully

requests that this Court reduce the $1000 bond to zero, or, in the alternative, to no more than $100.

CONCLUSION

For the foregoing reasons, NC NAACP respectfully requests that this Court:

1. Certify this case for review in the Supreme Court prior to determination by the Court of Appeals;
2. Issue its writ of supersedeas to suspend the portion of the three-judge panel's order of August 21, 2018 in which the three-judge panel denied Plaintiff-Petitioners' motion to preliminarily enjoin the Board of Elections from placing constitutional amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot as this Court considers the underlying petition;
3. Enjoin the Board of Elections from placing constitutional amendment proposals authorized by Senate Bill 75 and House Bill 1092 on the November 2018 ballot;
4. Reduce the $1,000 bond ordered by the three-judge panel to an amount no more than $100; and

5. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted this 22nd day of August, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorneys hereby certify that they served a copy of the NC NAACP's Motion to Bypass Court of Appeals, Petition for Writ of Supersedeas, and Motion for Temporary Stay upon the parties via e-mail and by U.S. mail to the attorneys for Defendants named below:

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This the 22nd day of August, 2018.

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