FILED
2019 AUG -7 P 2:42
WAKE CO., C.S.C.
BY

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 14001

COMMON CAUSE, et al.,

Plaintiffs,

v.

DAVID LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

MOTION OF GOVERNOR ROY COOPER FOR LEAVE TO FILE AMICUS BRIEF

AND

NOTICE OF AMICUS BRIEF OF ATTORNEY GENERAL JOSH STEIN

Governor Roy Cooper respectfully moves under Civil Rule 7(b) for leave to file the attached amicus brief in support of the plaintiffs in this lawsuit. Attorney General Josh Stein also provides notice under section 1-260 of the North Carolina General Statutes that he seeks to be heard, through the attached brief, on the constitutionality of the statutes challenged in this lawsuit.

This motion and notice state the Governor's and the Attorney General's interest in this case and discuss why this Court may benefit from hearing their views.

THE GOVERNOR'S AND THE ATTORNEY GENERAL'S INTEREST IN THIS CASE

Because of the Governor's and the Attorney General's roles in state government, they have a strong interest in being heard on the unconstitutionality of partisan gerrymandering.

The Governor is our state's chief executive. N.C. Const. art. III, § 1. He enforces the laws of this state. *Id.* § 5(4). He also plays a key role in the legislative process: He proposes legislation, and he may also veto most bills passed by the legislature. *Id.* art. II, § 22; *id.* art. III,

§ 5(2), (3). Because partisan gerrymandering affects the exercise of the Governor's authority, the Governor has a strong interest in being heard on why partisan gerrymandering violates our state constitution.

The Attorney General is our state's chief legal officer. *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 52, 312 S.E.2d 241, 244 (1984). When laws enacted by the legislature are challenged in court, the Attorney General is charged with defending our state, its constitution, and the rights that our constitution guarantees to the sovereign people. *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987).

In keeping with the Attorney General's constitutional role as the lawyer for the sovereign people, section 1-260 of our General Statutes provides that whenever a statute "is alleged to be unconstitutional, the Attorney General of the State shall . . . be entitled to be heard." N.C. Gen. Stat. § 1-260 (2017). Because partisan gerrymandering undermines the sovereignty of the people and violates their rights, the Attorney General, as the people's lawyer, has a strong interest in being heard.

WHY THE VIEWS OF THE GOVERNOR AND THE ATTORNEY GENERAL MAY ASSIST THE COURT

For at least two reasons, the perspectives of the Governor and the Attorney General will help this Court resolve the important issues raised by this case.

First, both the Governor and the Attorney General have a unique perspective because they represent all the people of our state. The people elect the Governor and the Attorney General statewide. N.C. Const. art. III, §§ 2(1), 7(1). Because the Governor and the Attorney General are elected statewide, they are effective advocates for the constitutional rights of our state's voters.

Second, by virtue of their constitutional roles and experiences in office, both the Governor and the Attorney General are well versed in the rights that our state constitution protects. Likewise, they have an important perspective on the threat that partisan gerrymandering poses to popular sovereignty and the people's constitutional rights to free elections, freedom of speech and association, and equal protection of the laws. In their brief, the Governor and the Attorney General rely on their knowledge of our state constitution to offer a concise analysis of key issues in this case.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that this Court consider the attached amicus brief along with other post-trial filings in this case. If the Court decides that the Attorney General, as well as the Governor, should proceed by motion, the Attorney General requests that the Court treat this notice as his motion for leave.

This 7th day of August, 2019.

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This 7th day of August, 2019.

Matthew W. Sawchak

ATTACHMENT:
PROPOSED AMICUS BRIEF

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
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COMMON CAUSE, et al.,

Plaintiffs,

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DAVID LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

AMICUS BRIEF OF GOVERNOR ROY COOPER AND ATTORNEY GENERAL JOSH STEIN

INTRODUCTION

Under our state constitution, the people are supposed to govern themselves, by freely choosing their elected representatives.

Today, however, the sovereign people of this state are blocked from exercising their constitutional right to govern themselves. Our state's current legislature has used its power over redistricting to insulate the legislature from the votes of many North Carolinians. From the Atlantic to the mountains, partisan mapmakers have drawn district lines block by block, precinct by precinct, with one goal in mind: stopping voters from voting one political party out of power. Instead of voters choosing their representatives, representatives are entrenching themselves in power by choosing their voters.

That practice—partisan gerrymandering—violates our state constitution. This Court can and should right this constitutional wrong.

From the very founding of North Carolina, our constitution has protected the people's right to govern themselves. Partisan gerrymandering clashes with that fundamental

constitutional principle. It also violates multiple specific guarantees in our constitution: Partisan gerrymandering denies voters their right to free elections. It denies voters equal protection. And it punishes voters for their political speech and association. In all of these ways, partisan gerrymandering violates the North Carolina Constitution.

Our state courts are fully equipped to remedy this problem. Indeed, averting constitutional dangers like gerrymandering is exactly why our courts have the power of judicial review. More than two centuries ago, our state courts held for the first time in *Bayard v. Singleton* that they could strike down laws that violate our constitution. 1 N.C. 5, 7 (1787). The *Bayard* court explained that if it lacked the power of judicial review, members of the General Assembly would be able to pass laws that make "themselves the Legislators of the State for life." *Id.* Today, through gerrymandering, that danger of legislative entrenchment has come to pass. This Court has a duty to stop this assault on democracy.

The Governor and the Attorney General ask this Court to declare that partisan gerrymandering violates our state constitution and grant this state's voters a swift and effective remedy.

BACKGROUND

North Carolina's current legislative maps are the result of an intentional effort to ensure long-lasting partisan control of the General Assembly. The effort traces back to 2010, when the national Republican Party deployed a sophisticated plan to gain control of state governments in several swing states, including North Carolina, ahead of the decennial census. The goal of the effort was to win majorities in state legislatures in 2010 and thus "[c]ontrol[ ] the redistricting process in . . . states [that] would have the greatest impact on determining how both state legislative and congressional district boundaries would be drawn" for the next decade. The

Redistricting Majority Project, www.redistrictingmajorityproject.com. The committee targeted the North Carolina General Assembly, pouring vast resources into flipping both chambers to Republican control. *Id.*

In the 2010 elections, the Republican Party gained control of a majority of the North Carolina House of Representatives and Senate. JSF ¶¶ 34-39. Soon thereafter, the new legislature began creating new legislative maps. The Legislative Defendants hired Dr. Thomas Hofeller as a consultant to help draw these maps.

In 2011, Dr. Hofeller, working with the Legislative Defendants, created plans that used past election results to predict partisan voting behavior in new districts. *Cooper v. Harris*, 137 S. Ct. 1455, 1476 (2017). The goal, as the Legislative Defendants have admitted elsewhere, was to create plans that would ensure Republican majorities in the House and Senate. Defendants-Appellees' Brief on Remand at 55-56, *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015) (No. 201PA12-3), 2015 WL 4456364.

Dr. Hofeller's use of past election results worked as planned. By 2012—the first election with Dr. Hofeller's 2011 maps—Republicans won 64% of the seats (77 out of 120) in the North Carolina House, even though Republican candidates won only 51.6% of the statewide vote. Joint Stipulation of Facts (JSF) ¶¶ 41, 42. In the North Carolina Senate, Republicans won 66% of the seats (33 out of 50), but only 51.2% of the vote. *Id.* ¶¶ 44, 45. These results gave Republicans more than three-fifths of the seats in both chambers—enough to override the Governor's veto. *See* N.C. Const. art. II, § 22(11).

In 2014 and in 2016, Republicans held onto their veto-proof majorities in both chambers, even though Republican candidates never won more than 56% of the vote in either chamber. JSF ¶ 66. Because the 2011 gerrymander created so many non-competitive districts, 55 of the

120 seats in the House and 19 of the 50 seats in the Senate went uncontested (by candidates of any party) in 2012. *Id.* ¶¶ 43, 46. Sixty-two seats in the House and 21 seats in the Senate went uncontested in 2014. *Id.* ¶¶ 50, 53. Sixty seats in the House and 18 seats in the Senate went uncontested in 2016. *Id.* ¶¶ 57, 60.

In 2017, more than two dozen districts in the 2011 plans were invalidated as unconstitutional racial gerrymanders. As a remedy for those racial gerrymanders, a three-judge federal district court gave the General Assembly the opportunity to draw new maps. *Covington v. North Carolina*, 267 F. Supp. 3d 664, 667 (M.D.N.C. 2017).

To create these maps, the Legislative Defendants openly used political considerations as an official and primary criterion. PX603 at 132. The House and Senate Committees on Redistricting adopted past election results as a redistricting criterion. No Democrats voted in favor of including this criterion, but all of the Republicans on the committees did. *Id.* at 141-48. The Legislative Defendants also opposed amendments offered by Democrats to prohibit the General Assembly from attempting to gain partisan advantage for any party in redrawing plans. *Id.* at 166-74. The committees rejected these amendments—again on party-line votes. *Id.* The redistricting committees also adopted traditional redistricting criteria. Exhibit 37 to Notice of Filing, *Covington v. North Carolina*, 283 F. Supp. 3d 410 (M.D.N.C. 2018) (No. 1:15-CV-399), ECF No. 184-37 [hereinafter 2017 Redistricting Criteria].

Even before the redistricting committees adopted these criteria, however, Dr. Hofeller had already drawn up the vast majority of the districts. 2 Tr. 397-427.[1] In doing so, he used partisan data. He made a concerted effort to maximize the interests of the Republican Party, disadvantaging voters who had traditionally voted for non-Republicans. 2 Tr. 307, 336-37, 461-

[1] This brief cites the trial transcript in the form "[volume] Tr. [page(s)]."

62. Dr. Hofeller did not consult with any legislators other than the Legislative Defendants. PX601 at 22-23.

On straight party-line votes, redistricting committees in both houses adopted Dr. Hofeller's proposed maps with only minimal changes. PX605 (House plan); PX606 (Senate plan). No Democrats voted for these plans. PX605; PX606. After some minor modifications, the full House and Senate followed suit—again, on a party-line vote.[2] PX587 ¶ 71.

These 2017 plans are largely impervious to shifts in voter support—just as they were designed to be. The 2017 plans were designed to create two seawalls: one that would ensure a Republican supermajority, and another that, at a minimum, would ensure a Republican majority. 5 Tr. 1119-21.

The effects of those plans show that the plans put partisanship ahead of traditional redistricting criteria. Dr. Hofeller designed the 2017 plans to create as many Republican seats as possible—more Republican seats than are produced by thousands of simulated plans that follow the General Assembly's nonpartisan redistricting criteria. 2 Tr. 250-51, 262-64, 287, 302, 319-20, 338-39. In addition, the 2017 plans elected significantly fewer non-Republicans than would have been elected under the vast majority of possible plans that conform to traditional redistricting criteria. 5 Tr. 1109-13. The 2017 plans also show a greater partisan bias than 99.999% of trillions of simulated maps that conform to these criteria. 6 Tr. 1304-07, 1342-43, 1442-43.

This extreme use of partisanship has entrenched the Legislative Defendants in power. In comparison with alternative plans that follow traditional redistricting principles, the 2017 plans

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[2] Representative William Brisson was the only Democratic member of the House who voted for the plans. Representative Brisson, however, switched to become a Republican just a few months after taking that vote.

were often one of the only plans that would preserve the Republican supermajority in both chambers. 5 Tr. 1119-21. Likewise, by the same measure, the 2017 plans were often one of the only plans that would preserve the Republican *majority* in both chambers. *Id.* The chance that this level of bias is unintentional is "astronomically small." *Id.* at 1088.

In short, the 2017 plans make "extreme use of partisan considerations, a finding that is mathematically impossible to be caused by the interaction of political geography" and traditional redistricting criteria. PX508 at 4; *see* 6 Tr. 1401-03. In the 2017 plans, as shown above, partisan intent predominated over all other considerations. 2 Tr. 250-51, 262-64, 287, 302, 319-20, 338-39. Indeed, Dr. Hofeller had already created the vast majority of what became the enacted 2017 maps, using partisan data, well before the redistricting committees even articulated their nominal districting criteria. 2 Tr. 397-427.

The Legislative Defendants and Dr. Hofeller were able to create maps with such extreme partisan bias because of advances in technology. Over the last few years, sophisticated mapping software and the emergence of big data have "allowed gerrymanders to be more accurate and aggressive. The process of gerrymandering has evolved from an art to a science, allowing for a smaller margin of error." Alan Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions as a Solution*, 56 Harv. J. Legis. 1, 14 (2019). Mapmakers have access to city-block-level data, and even information on individual voters. Vann R. Newkirk II, *How Redistricting Became a Technological Arms Race*, The Atlantic (Oct. 28, 2017), www.theatlantic.com/politics/archive/2017/10/gerrymandering-technology-redmap-2020/543888/. Mapmakers can use these granular data with surgical precision. With the help of software, they can generate thousands of possible maps that adhere to traditional districting

criteria, then choose the map that is most slanted in favor of their preferred party. That is exactly what Dr. Hofeller did here.

In sum, the Legislative Defendants and their agent deliberately crafted the 2017 plans to entrench their political party in power, insulating that party from all but the most titanic shifts in voting behavior. *See supra* pp. 4-6.

ARGUMENT

The North Carolina Constitution prohibits partisan gerrymandering. The 2017 plans violate that prohibition. This Court can and should stop gerrymandering from continuing to subvert the people's right to govern themselves.

I. Partisan Gerrymandering Violates the North Carolina Constitution.

Partisan gerrymandering violates fundamental principles and specific guarantees in the North Carolina Constitution. As shown below, partisan gerrymandering makes elections unfree. It denies voters the right to vote on equal terms. Finally, it unconstitutionally punishes voters for their political association and expression.

A. Partisan gerrymandering violates our state constitution's fundamental guarantee of democracy.

Partisan gerrymandering clashes with a central feature of our state constitution: its guarantee of popular sovereignty.

Our state's original 1776 constitution included a declaration of rights that secured self-government by the people. The declaration's very first clause affirmed that "[a]ll political power is vested in and derived from the people." N.C. Const. of 1776, Declaration of Rights, § I. Today's constitution reaffirms that guarantee. N.C. Const. art. I, § 2.

The General Assembly was created to serve "as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001); *see* N.C. Const. of 1776 § I. Thus, our original constitution mandated that the legislature be popularly elected. *See* N.C. Const. of 1776 §§ II, III.

This feature alone, however, did not ensure that the people would retain control over their legislature. The framers recognized that a popularly elected legislature might try to entrench itself in office, denying the people their right to self-government. For instance, William Hooper, one of our delegates to the Continental Congress, urged that our state constitution include measures to prevent legislators from making "their own political existence perpetual." 10 *Colonial and State Records of North Carolina* 867-68 (William L. Saunders ed., 1886) [hereinafter Colonial Records vol. 10], https://docsouth.unc.edu/csr/index.php/document/csr10-0407.

Likewise, to protect against the legislature "vot[ing] itself perpetual," John Adams recommended in 1776 that our constitution split the General Assembly into two chambers, so that one legislative body could check the other. 11 *Colonial and State Records of North Carolina* 324 (Walter Clark ed., 1895), https://docsouth.unc.edu/csr/index.php/document/csr11-0189. Taking Adams's advice, our original constitution divided the General Assembly into two chambers, as it remains today. *See* N.C. Const. of 1776 § 1; N.C. Const. art. II, § 1.

In addition to these structural protections against legislative entrenchment,[3] our original constitution also sought to safeguard the mechanism that most directly allows the people to exercise their sovereignty: elections. As one of these safeguards, our original constitution mandated that all elections be free. N.C. Const. of 1776, Declaration of Rights, § VI. That protection remains in our constitution today. N.C. Const. art. I, § 10.

As shown below, partisan gerrymandering makes elections unfree. It also violates other important rights that protect North Carolinians' authority to govern themselves.

B. Partisan gerrymandering violates the free-elections clause.

The free-elections clause, section 10 of article I, is one of the clauses that makes the North Carolina Constitution "more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). As shown below, partisan gerrymandering violates our constitution's guarantee of free elections.

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[3] Since the founding, our state constitution has been amended to add further checks against legislative abuses of power. Initially, the General Assembly appointed the Governor, the Attorney General, and all judges. N.C. Const. of 1776 §§ XIII, XV. Today, the people independently elect the Governor, the Attorney General, and most judges, making these officials an independent check on the legislature. N.C. Const. art. III, §§ 2(1), 7(1); *id.* art. IV, § 16. Since 1997, moreover, the Governor has been empowered to veto most bills passed by the legislature. *Id.* art. II, § 22(1). The veto power allows the Governor, who is elected statewide, to ensure that ill-advised measures do not become law.

Gerrymandering, however, undermines these structural checks against legislative abuses. It facilitates the election of unrepresentative legislative supermajorities that can enact measures over the Governor's veto, strip power away from other branches, and consolidate power in the legislature. *See id.*

The history of the free-elections clause shows that it is intended to protect against manipulation of the electoral process to skew electoral outcomes. Our Supreme Court has relied on the free-elections clause to strike down laws that affect election outcomes by forcing voters to support certain candidates. In *Clark v. Meyland*, for example, the court invalidated a law that required voters to swear an oath to support their party's candidates in elections. 261 N.C. 140, 142-43, 134 S.E.2d 168, 170 (1964).[4] As shown below, the origins of the free-elections clause confirm that the clause prohibits practices, like partisan gerrymandering, that systematically manipulate elections to influence their outcome. An election is not free when the will of the voters is systematically frustrated.

Our constitution's free-elections clause was modeled on a nearly identical clause in Virginia's declaration of rights. Virginia's clause was inspired by a similar clause in the English Bill of Rights that was adopted after the Glorious Revolution of 1688.[5] That clause provided that the "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. c. 2 (Eng.).

The English free-elections clause was a response to a king's efforts to manipulate parliamentary elections. King James II used a number of strategies to pack Parliament with his

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[4] The Legislative Defendants argue that the free-elections clause prohibits only executive and judicial interference with elections, not legislative interference. Leg. Defs.' Pretrial Br. 23-24. They are mistaken. As noted above, our Supreme Court has already applied the free-elections clause to invalidate *statutes* that make elections unfree. *Clark*, 261 N.C. at 142-43, 134 S.E.2d at 170-71. In addition, the Legislative Defendants overlook a fundamental goal of our constitution: to protect the people from *the legislature* making its "own political existence perpetual." Colonial Records vol. 10, *supra*, at 867-68, https://docsouth.unc.edu/csr/index.php/document/csr10-040.

[5] *See* Va. Const. of 1776, Bill of Rights, § 6; 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 86 (1974); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929).

allies. These strategies included the king's attempts to manipulate the composition of the electorate—to pick voters and thereby control election outcomes, rather than letting voters freely choose their representatives.

During this period of English history, the king had the power to modify voting rights by issuing new municipal charters. In some constituencies, the king issued new charters to shrink the electorate to help his allies, while in others, he expanded the electorate to ensure that his opponents would lose. *See* George H. Jones, *Convergent Forces: Immediate Causes of the Revolution of 1688 in England* 75-78 (1990). The electorate was manipulated in different areas "based on the detailed suggestions of the [king's] agents as to what specific local rights could, with electoral advantage, be confirmed or extended." J.R. Jones, *The Revolution of 1688 in England* 148 (1972). In sum, this English precursor to gerrymandering meted out voting power based "on probable results, not on principle." G.H. Jones, *supra*, at 76.

James II's plan to pack parliament helped incite the Glorious Revolution in England, with William and Mary dethroning James II. Among the central reforms of the revolutionaries was the call for the election of a "free and lawful parliament," chosen without manipulation of the franchise. Grey S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 250 (2007).

When North Carolina colonists later challenged British rule, they consciously sought to emulate the rights achieved after the Glorious Revolution. In 1775, for example, North Carolina's delegates to the Continental Congress urged the colony to fight against any British attempts to violate "glorious Revolution principles." Colonial Records vol. 10, *supra*, at 23, https:// docsouth.unc.edu/csr/index.php/document/csr10-0011. In keeping with those principles, the new state's leaders demanded that the election of delegates to North Carolina's Provincial

Congress "be free and impartial," presaging the free-elections clause that soon appeared in our declaration of rights. *Id.* at 702, https://docsouth.unc.edu/csr/index.php/document/csr10-0302.

As this history shows, the free-elections clause was inspired by the need to protect against efforts to manipulate the electoral process to control the outcomes of legislative elections. In England, elections were not free when James II manipulated the composition of the parliamentary electorate to ensure that his supporters would prevail. In North Carolina, likewise, elections are not free when legislators manipulate the composition of the electorate by moving voters in and out of districts to entrench current legislators and their allies.

For these reasons, gerrymandering districts for partisan gain violates the free-elections clause.

C. Partisan gerrymandering denies voters equal protection.

Partisan gerrymandering also denies voters equal protection when they cast their ballots.

In 1971, our state constitution was amended to give North Carolinians an express guarantee of equal protection of the laws. N.C. Const. art. I, § 19. This clause protects, among other rights, "the right to vote on equal terms." *Northampton Cty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). That right is so crucial to our democracy that it receives greater protection under our state constitution than it receives under the federal constitution. *See Blankenship v. Bartlett*, 363 N.C. 518, 522-24, 681 S.E.2d 759, 763-64 (2009); *Stephenson v. Bartlett*, 355 N.C. 354, 376, 380-81 & n.6, 562 S.E.2d 377, 393, 395 & n.6 (2002).

Applying our state constitution's enhanced guarantee of equal protection, our courts have struck down laws that single out certain voters for disfavored treatment. For instance, our Supreme Court has held that electing the General Assembly from a combination of single-

member districts and multiple-member districts would deny voters equal protection. *Stephenson*, 355 N.C. at 377-81, 562 S.E.2d at 393-96. Designing districts this way offends equal protection because it unfairly grants those voters who live in districts that elect multiple members more "representational influence" than other voters enjoy. *Id.* at 377, 562 S.E.2d at 393.

Partisan gerrymandering inflicts the same harm: It deliberately relegates certain voters to second-class treatment. By gerrymandering districts, a legislature makes it harder for disfavored voters to elect their preferred candidates, while simultaneously making it easier for favored voters to elect theirs. Favored voters enjoy greater representational influence than disfavored voters receive. Because gerrymandering denies disfavored voters the same voting influence that favored voters have, the practice violates our state's equal-protection clause. *See id.*

D. Partisan gerrymandering violates voters' rights to free speech and association.

Gerrymandering districts for partisan gain is unconstitutional for yet another reason: It penalizes certain citizens based on their speech and association.

In 1971, when the people amended the constitution to guarantee equal protection, they also amended it to secure freedom of speech. N.C. Const. art. I, § 14. Our state courts have reserved the right to extend this state-constitutional guarantee beyond the scope of the First Amendment to the U.S. Constitution. *See, e.g.*, *Evans v. Cowan*, 122 N.C. App. 181, 184, 468 S.E.2d 575, 577 (1996).

Our constitution also protects the people's right "to assemble together to consult for their common good." N.C. Const. art. I, § 12. Our Supreme Court has recognized that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204-05 (2011).

Voting for a political party's candidates exercises these speech rights and associational rights. "[C]itizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Id.* at 49, 707 S.E.2d at 205.

Because voting involves protected speech and association, the government may not selectively burden the political expression of certain voters. *See, e.g.*, *State v. Bishop*, 386 N.C. 869, 875-76, 787 S.E.2d 814, 818-19 (2016) (holding that statutes aimed at particular viewpoints receive strict scrutiny).

Political gerrymandering creates just such a selective burden. It makes it harder for supporters of a disfavored party to elect their preferred candidates, while making it easier for a favored party's supporters to elect theirs.

Under the free-speech and free-association clauses, moreover, the government may not retaliate against voters based on how they vote. As our courts have agreed, the government may not penalize citizens based on disagreement with their political activity. *Feltman v. City of Wilson*, 238 N.C. App. 246, 252-53, 767 S.E.2d 615, 620 (2014).

Again, though, that is exactly what partisan gerrymandering does. When legislators gerrymander districts, they assign voters, based on their past political expression, to districts where their votes will count for less. In this way, gerrymandering penalizes voters for their prior votes. This retaliation against voters based on their political speech is unconstitutional. Voters cannot be punished for their engagement with our democratic system. *See id.*

As these points show, partisan gerrymandering not only makes elections unfree and unequal, but also infringes voters' speech and associational rights—all in violation of the North Carolina Constitution.

E. North Carolina case law yields a test for unconstitutional partisan gerrymandering.

As shown above, partisan gerrymandering violates the North Carolina Constitution's guarantees of free elections, equal protection, and free speech and association.

Case law under those guarantees leads to a straightforward test for unconstitutional partisan gerrymandering. Under that test, a court can find an unconstitutional partisan gerrymander when a districting plan reflects a prohibited intent: an intent to influence the outcome of elections by discriminating against certain voters based on their party affiliation or voting history.

This test for political gerrymandering corresponds with the practice's key features: intentional manipulation of the electoral process and intentional discrimination against certain voters to thwart the people's right to govern themselves.

Plaintiffs can show a prohibited intent by proving one or more of several factors. The following factors are not exclusive, nor are they a checklist. In particular cases, some factors might be more important than others:

- The legislature, or its agents, considered partisan data when drawing district lines.
- The districting plan at issue has discriminatory partisan effects: It reduces, or is likely to reduce, the influence of voters of the disfavored party. For example, plaintiffs can show such a partisan effect through evidence that, compared to other plans that adhere to the legislature's stated nonpartisan districting criteria, a plan is relatively unfavorable to the electoral prospects of the disfavored party.
- The legislature passed the plan through unusual procedures.
- Members of the legislative majority, or their agents, have made statements that reflect a partisan intent.

- The districting plan includes districts with unusual or unnatural shapes that reflect the partisan characteristics of precincts adjoining the district lines or that divide political subdivisions or communities of interest.

Under proper circumstances, plaintiffs might show the prohibited intent through a strong showing on even one or two of these factors. For example, evidence that district lines are substantially likely to produce a partisan effect is enough to allow a court to infer that those lines were drawn with a partisan intent. *See, e.g.*, *Snyder v. Freeman*, 300 N.C. 204, 213, 266 S.E.2d 593, 599 (1980) (holding that people are presumed to intend the consequences of their actions).

Defendants can disprove intent by showing that a plan is actually and predominantly motivated by important nonpartisan goals (such as compliance with traditional districting criteria) and that the plan is narrowly tailored to serve those goals.

This test reflects case law under the three North Carolina constitutional guarantees at issue: the equal-protection clause, the free-speech clause, and the free-elections clause. Case law under these provisions shows that they ban intentional discrimination:

- Under the equal-protection clause, the North Carolina Supreme Court has analyzed whether a discriminatory intent motivated a facially neutral law. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971). Under the same clause, the Supreme Court has clarified that vote dilution is not a legitimate government interest. *Blankenship*, 363 N.C. at 527, 681 S.E.2d at 766; *Stephenson*, 355 N.C. at 377-81, 562 S.E.2d at 393-96.
- Under the free-speech clause, the Supreme Court has held that election laws must be politically neutral and nondiscriminatory. *Libertarian Party*, 365 N.C. at 51, 707 S.E.2d at 206. The court has also recognized that laws are invalid when the

"animating impulse behind" them is discriminatory. *Bishop*, 368 N.C. at 875-76, 787 S.E.2d at 819 (applying the First Amendment).

- Under the free-elections clause, the Supreme Court has analyzed whether a law has a legitimate justification or instead serves only the purpose of interfering with free elections. *Clark*, 261 N.C. at 142-43, 134 S.E.2d at 170-71. That analysis reflects the history of the free-elections clause—a response to an intentional campaign to manipulate election outcomes. *See supra* pp. 10-12 (discussing that history).

This case easily satisfies the above test. As the next section discusses, the 2017 plans show strong evidence of partisan intent.

II. The 2017 Legislative Districts Are Unconstitutional Partisan Gerrymanders.

The 2017 legislative districts are unconstitutional partisan gerrymanders. They were drawn with partisan intent. Legislators of one political party systematically worked to make sure that the 2017 maps would entrench their party in office—and that the maps would prevent voters who do not support that party from having their electoral preferences realized.

Multiple forms of evidence show this partisan intent.

First, the 2017 maps were drawn with *partisan criteria and partisan data.* The Legislative Defendants adopted redistricting criteria that included past voting behavior, a measure of partisanship. 2017 Redistricting Criteria, *supra*. Indeed, even before the Legislative Defendants formally adopted those redistricting criteria, Dr. Hofeller had already drawn the district lines for more than 90% of the census blocks in the state, using only past election results and voting patterns. 2 Tr. 397-401.

The fact that the Legislative Defendants directed Dr. Hofeller to rely on partisan data is enough to show that the maps at issue were intentionally created to disadvantage certain voters based on their political affiliation and expression. *See* 2017 Redistricting Criteria, *supra*; *see also Harris*, 137 S. Ct. at 1475 (upholding federal district court's finding that North Carolina legislative leaders' directions on the use of race in drawing maps "evinced intentionality"). But here, even more striking is the *way* Dr. Hofeller used partisan data: Nearly every time he exercised discretion in drawing district lines, he exercised it in a way that disadvantaged voters who were likely to favor non-Republican candidates. 4 Tr. 876-78.

Second, the 2017 maps were enacted through an *unusual process*. The Legislative Defendants directed Dr. Hofeller to create maps. PX601 at 23:3-6. Dr. Hofeller created these maps without meaningful input from the public, from non-Republican legislators, or even from neutral third parties. *Id.* at 22-23. In addition, Dr. Hofeller substantially finished drawing the 2017 plans before the members of the redistricting committees were appointed, before those committees adopted redistricting criteria, and before the public or non-Republican legislators could comment on those criteria. 2 Tr. 397-427. In short, non-Republicans were locked out of the map-drawing process.

The General Assembly did not meaningfully change any of the district lines that Dr. Hofeller drew. *See* PX605 (House plan); PX606 (Senate plan). After the maps were drawn, moreover, the redistricting committees and the chambers of the General Assembly passed Dr. Hofeller's maps by party-line votes. PX587 ¶ 71.

Third, the partisan *effects* of the 2017 plans also show that the Legislative Defendants intended to disadvantage voters who preferred non-Republican candidates.

Statistical evidence shows these partisan effects:

- The 2017 plans created more Republican-leaning districts than would result from any of *two thousand* alternative plans that rely on the General Assembly's nonpartisan redistricting criteria. 2 Tr. 262-64, 287, 302, 319-20, 338-39; PX0001 at 3-4.
- The 2017 plans also elect significantly fewer non-Republicans than would be elected under virtually all districting plans the legislature could have drawn based on traditional redistricting criteria. 5 Tr. 1109-13. Almost every other map that could have been created under traditional nonpartisan redistricting criteria would have been likely to produce more non-Republican seats than the 2017 maps did. 6 Tr. 1342-46.
- The 2017 plans are also less responsive to swings in the electorate's choices than 99.999% of simulated maps that are based on traditional redistricting criteria. 6 Tr. 1304.

As these statistics show, the 2017 maps had the effect of ensuring that non-Republican voters would be disadvantaged and that the Republican Party would maximize the number of

seats under its control in the General Assembly.[6] These statistical data, by themselves, are enough to show that the 2017 plans were intentionally designed to disadvantage non-Republican voters—and thus are unconstitutional gerrymanders.

But there is more: This record also contains direct evidence that the 2017 plans disadvantaged non-Republican voters. In the 2018 elections for the North Carolina House of Representatives, Democrats won 51.2% of the vote, but won only 45.8% of the seats. JSF ¶¶ 68, 69. In the 2018 elections for the North Carolina Senate, Democrats won 50.5% of the vote, but won only 42% of the seats. *Id.* ¶¶ 142, 143. In that election, moreover, successful Democratic candidates typically prevailed by significantly larger margins than successful Republican candidates did. 4 Tr. 869-71. This difference in margins of victory shows how the 2017 plans reduced the influence of non-Republican voters. This Court, as the factfinder, can and should infer intent from all of these results. *See, e.g.*, *Snyder*, 300 N.C. at 213, 266 S.E.2d at 599.

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[6] The Legislative Defendants argue that in the 2018 election, Republican candidates prevailed in fewer districts than the plaintiffs' experts' simulations forecast. That criticism lacks merit.

To assess the likely partisan performance of the 2017 plans, the plaintiffs' experts did not use the 2018 election results. Instead, they used the same data Dr. Hofeller used: averages of precinct-level vote totals in pre-2018 statewide elections. 6 Tr. 1322; 5 Tr. 1089.

It is true that in 2018, Democratic candidates did better than the experts' models project, but that point does not negate the strong Republican advantage in the 2017 maps. The effects of the 2017 maps are similar to the effects of cheating in poker: On a single hand of poker, a victim of cheating might beat the cheater, but over a series of hands, the cheater's advantage will carry the day. 5 Tr. 1142.

Thus, it is unremarkable that in that one year, Democratic candidates outperformed the party's average performance in prior statewide elections. What is more remarkable is that even under those conditions, the Republican Party retained control of both houses of the state legislature, just as Dr. Hofeller and the Legislative Defendants designed the maps to achieve.

Finally, the unusual configurations of the 2017 maps confirm the legislature's partisan intent.

- For example, the General Assembly carved out of Senate District 9 (a district that includes almost all of New Hanover County) a Wilmington "notch." By carving this area out of Senate District 9, the General Assembly was able to divide non-Republican voters between Senate Districts 8 and 9, sharply reducing a non-Republican voter's ability to elect a candidate of choice in Senate District 9. The only plausible explanation for the Wilmington notch is partisanship. 4 Tr. 887-90.
- In addition, when drawing Senate Districts 31 and 32, the General Assembly carved a "bite mark" out of the western side of Winston-Salem—the only part of Winston-Salem with a high concentration of voters who tend to vote for Republican candidates. By taking this bite out of Senate District 32 and adding it to Senate District 31, the General Assembly was able to reduce the ability of non-Republican voters in Senate District 31 to elect a candidate of their choice. Here again, the only plausible explanation for the Winston-Salem bite mark is partisanship. 5 Tr. 976-77.
- The Legislative Defendants did not present any evidence that these and other unnatural districting lines in the 2017 maps have a legitimate nonpartisan basis.

In sum, the 2017 maps were created by a single political party, using partisan data, through unusual procedures. That one-party process created legislative maps that overwhelmingly favor one party's candidates. This evidence shows that the Legislative

Defendants intentionally created maps to entrench themselves in power and to disadvantage voters who support different political parties.

The Legislative Defendants have not shown that the 2017 plans' bias against non-Republicans was predominantly motivated by any important nonpartisan goals, such as compliance with nonpartisan districting criteria. Before the General Assembly even announced its formal redistricting criteria, Dr. Hofeller had substantially completed the 2017 maps. 2 Tr. 397-427. Because of that timing, the nonpartisan redistricting criteria that the General Assembly later adopted could not have been the basis for Dr. Hofeller's work. In addition, as shown above, there are thousands of other plans, compliant with traditional redistricting criteria, that are less skewed than the 2017 plans. *See supra* pp. 5-6, 18-19. Given the mapmaking process and its results, the Legislative Defendants cannot show that nonpartisan goals genuinely predominated over partisanship here.

Finally, even if the Legislative Defendants could prove that these maps were drawn predominantly to achieve important nonpartisan goals, the plans would still be unconstitutional because they are not narrowly tailored to serve those goals. To the contrary, these maps are more biased against non-Republican voters than 99.999% of other maps drawn under traditional redistricting criteria. 6 Tr. 1304. Out of the trillions of maps that could have been created under traditional redistricting criteria, the Legislative Defendants adopted maps that would entrench themselves to the maximum extent possible. 6 Tr. 1342-46.

In sum, the Legislative Defendants intended to—and did—rely predominantly on partisan criteria to create maps that would disadvantage non-Republican voters and entrench Republican legislators.

For these reasons, the 2017 plans are unconstitutional partisan gerrymanders.

III. This Court Has the Authority to Stop Partisan Gerrymandering.

As shown above, this case involves an egregious partisan gerrymander that violates our state constitution. Our Supreme Court has recognized that our state courts have the duty to protect the people when their constitutional rights are violated. *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). Because of that duty, the gerrymandering of our state's legislative districts is a justiciable constitutional violation that this Court can remedy.

The U.S. Supreme Court's recent decision that partisan gerrymandering presents a political question under the *federal* constitution does not apply here. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019). In that decision, the Supreme Court expressly recognized that state courts remain free to address partisan gerrymandering under their own state constitutions. *Id.* at 2507.

The courts of another closely divided state—Pennsylvania—have already condemned and remedied partisan gerrymandering. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa.), *cert. denied*, 139 S. Ct. 445 (2018). The Pennsylvania state courts did so even after the U.S. Supreme Court declined to remedy gerrymandering in the Keystone State. *See Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004). This case calls for a similar outcome.

In the North Carolina state courts, moreover, the content of the political-question doctrine is a question of state law, not federal law. *See Cooper v. Berger*, 370 N.C. 392, 407-08, 809 S.E.2d 98, 107 (2018) (recognizing that the political-question doctrine emerges from the separation of powers mandated by our state constitution). In recent years, our courts have often rejected arguments that important state-constitutional issues are nonjusticiable political questions. *See, e.g.*, *id.* at 412, 809 S.E.2d at 110 (holding that separation-of-powers disputes are not political questions); *Leandro*, 346 N.C. at 345, 488 S.E.2d at 253-54 (holding that the right to

a sound basic education under the state constitution is not a political question); *see also News & Observer Pub. Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007) (holding that the application of the Public Records Act to clemency records is not a political question).

Under North Carolina law, questions are nonjusticiable political questions only if (1) they are textually committed to another branch of government or (2) they lack satisfactory standards for judicial determination. *Cooper*, 370 N.C. at 407-08, 809 S.E.2d at 107. This case does not meet either of those criteria.

First, our state constitution does not give the General Assembly unreviewable power over redistricting. To be sure, the constitution gives the General Assembly authority to draw legislative districts. *See* N.C. Const. art. II, §§ 3, 5. But our Supreme Court has already held that the legislature's exercise of that authority is limited by the protections in our constitution's declaration of rights, including its guarantee of equal protection. *Stephenson*, 355 N.C. at 378-79, 562 S.E.2d at 394. This case calls on the Court to apply that same guarantee, as well as other protections in our declaration of rights. *See supra* pp. 9-14.

Second, as shown above, this Court can judge this partisan gerrymander under manageable standards. Legislative districts violate our state constitution when they are drawn with the intent to disadvantage voters on partisan grounds. *See supra* pp. 15-17. Our state courts routinely consider whether actions reflect a discriminatory intent. *See, e.g.*, *N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 268, 786 S.E.2d 50, 52 (2016) (deciding whether termination of employee was politically motivated); *State v. Headen*, 206 N.C. App. 109, 115, 697 S.E.2d 407, 412 (2010) (assessing whether juror strikes were racially motivated). Deciding whether districts were drawn with a partisan intent is an equally manageable task. Thus, our courts can decide cases like this one by applying familiar tools.

Applying those tools is especially important in this case. Perhaps the most critical constitutional right in our representative democracy is our constitution's guarantee of self-government by the people. *See* N.C. Const. art. I, §§ 2, 10; *supra* pp. 7-12. Partisan gerrymandering violates that guarantee. When legislators gerrymander districts to entrench themselves in power, they break the link between the legislature and the people. The legislature stops working as "the arm of the electorate." *Pope*, 354 N.C. at 546, 556 S.E.2d at 267.

Only this Court can put our legislature back under the people's control. The people cannot do it themselves. In North Carolina, unlike in other states, the people lack the power to enact redistricting reform through popular initiative. Nor will the federal courts intervene. Instead, the federal courts have expressly deferred to state courts like this Court. *Rucho*, 139 S. Ct. at 2507.

Fortunately, this Court's authority is equal to the task. In fact, a core purpose of judicial review in this state is to prevent the legislature from entrenching itself in office. More than two centuries ago, our state courts held that judicial review was necessary to ensure that the members of the General Assembly would never be able to make "themselves the Legislators of the State for life." *Bayard*, 1 N.C. at 7.

As shown above, political gerrymandering involves a similar danger of legislative entrenchment. Gerrymandered districts are drawn with the express aim of entrenching certain legislators in office and making it as hard as possible for voters to remove them.

For these reasons, this case falls squarely within this Court's authority. On behalf of the people they represent, the Governor and the Attorney General urge the Court to exercise that authority.

IV. This Court Should Stop Partisan Gerrymandering Swiftly and Decisively.

Finally, no matter how this Court rules, it should rule swiftly. Time is of the essence.

As shown above, the people of this state have been represented by a gerrymandered legislature for *nearly seven years*. If this Court does not act promptly and decisively, that injury could endure a full decade—from 2013 to 2022.

Indeed, the injury could last even longer. If this Court does not act with dispatch, the new legislature will almost surely draw new gerrymanders after the 2020 census, seeking to entrench itself in power for *another decade*. As that prospect shows, delay in the resolution of this case would have profound and long-lasting consequences.

Now is the time to end this ongoing violation of the people's right to self-government. The need to end that violation calls for this Court to decide this case, and for a likely appeal to be resolved, in time for all aspects of this state's 2020 primary and general elections.

The Governor and the Attorney General ask this Court to invalidate this partisan gerrymander swiftly, restoring our citizens' constitutional right to govern themselves.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that this Court declare that the 2017 plans are unconstitutional, enjoin their use in future elections, and grant other appropriate relief.

This 7th day of August, 2019.

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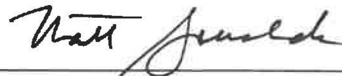

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