

No. COA 24-1109

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IN THE  
**North Carolina Court of Appeals**

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BEVERLY BARD, *et al.*,  
*Plaintiffs-Appellants*,  
v.  
NORTH CAROLINA STATE  
BOARD OF ELECTIONS, *et*  
*al.*,  
*Defendants-Appellees.*

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On Appeal

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**MOTION OF  
CHARLES THELEN PLAMBECK,  
HON. ROBIN E. HUDSON, AND JONI L. WALSER  
FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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FEBRUARY 28, 2025

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Pursuant to Rule 28.1(a) and (b)(2) of the North Carolina Rules of Appellate Procedure, Charles Thelen Plambeck, Hon. Robin E. Hudson, and Joni L. Walser (“*Amici*”) respectfully move this Court for leave to file an amicus curiae brief in support of Plaintiffs-Appellants Beverly Bard, *et al.*

### **INTEREST OF THE *AMICI CURIAE***

*Amici* are citizens of North Carolina attentive to the fundamental principles of the constitution of their home state. *Amici* wish to bring to the attention of the Court the protections of liberty chartered in the North Carolina Constitution. The issue of representation in the legislature is not remote or hypothetical to North Carolinians. The present welfare of its people depends directly on the accountability and responsiveness of its representatives.

### **REASONS FOR THIS AMICUS BRIEF**

This brief focuses on the legal history of the constitutional right to a fair election asserted by Plaintiffs, and this court’s obligation to vindicate it. These individual rights and judicial

obligations trace to the dawn of representative democracy in England. They remain essential to keep the legislature accountable and within the limits assigned of their authority, and to preserve the liberties that are the birthright of North Carolinians. The law and history set out in the brief of *amici* are of direct relevance to the resolution of this case.

*Amici* are knowledgeable in North Carolina constitutional law and legal history. *Amicus* Hon. Robin E. Hudson is a former justice of the Supreme Court of North Carolina. *Amici* Charles Plambeck and Joni Walser have carried out exacting scholarship on the right of free elections in North Carolina and its antecedents.

### **ISSUE PRESENTED IN THE BRIEF**

Whether the trial court erred in granting the Legislative Defendants' Motion to Dismiss under Rule 12(b)(6), when the Complaint states a claim for violation of Plaintiffs' constitutionally protected, justiciable right to fair elections free from government manipulation of the election process.

**AMICPS POSITION ON THE ISSUE**

The trial court erred because the constitutional violations Plaintiffs allege state a claim for which relief may be granted.

In ruling on a motion to dismiss under N.C. R. Civ. P. 12(b)(6), the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979).

Plaintiffs allege that in 2024, the General Assembly denied Plaintiffs the right to vote because of how they likely would cast it. The Assembly nullified their votes by deliberately grouping them with an insurmountable number of supporters of the Assembly's own preferred candidates. The effect on the Plaintiffs was the same as if, because of their dissenting beliefs, they were denied access to the polls, or their vote set aside uncounted. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”).

If true—and for purposes of Rule 12(b)(6) they must be viewed as admitted—they violate the Constitution.

The Assembly has the prerogative to enact elections regulations, but not to contrive them so that the votes of their critics are ineffective. The North Carolina Constitution prohibits anyone in authority, including the legislature, from subverting the fundamental democratic power of the right to vote. These textual guarantees are collectively referred to and indelibly understood as the right to a fair election.

As detailed in the brief of *amici*, the right to a fair election is guaranteed by: (a) N.C. CONST. art. I, § 10 (Free Elections Clause); (b) N.C. CONST. art. I, § 2 (Will of the People); (c) protections of property, liberty of conscience, and equality in N.C. CONST. art. I, §§ 13, 19, 32, 33, and 34; (d) N.C. CONST. art. II, §§ 3 and 5; and (e) the common law.

These constitutional violations are actionable. *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (“one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. . . . [T]he common law, which provides a

remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right.”).

The trial court’s ruling seems to presuppose that no violations of constitutionally protected voting rights have a judicial remedy. They interpret *Harper III*<sup>1</sup> as reversing the established constitutional order, raising the Assembly’s districting prerogative above the individual’s right to select their own representatives. Such a profound revision is impossible because it is in effect a constitutional amendment without a convention.<sup>2</sup> *Harper III* must be understood for the narrow proposition that the right of free elections is not an affirmative mandate for proportional representation.

A critical point is that Plaintiffs do not seek to relitigate *Harper III*. Plaintiffs do not seek state-wide redistricting that will produce a proportionally representative outcome. Plaintiffs merely object to the Assembly amassing highly detailed personal data to discern Plaintiffs’ convictions, determining

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<sup>1</sup> Harper v. Hall, 384 N.C. 292, 886 S.E.2d 393 (2023) (*Harper III*).

<sup>2</sup> N.C. CONST. art. XIII, § 2 (reserving to the people the right to revise or amend the Constitution).

that Plaintiffs are unlikely to support the Assembly's preferred candidate, and assigning them to a district where their dissenting vote will have no effect.

In sum, Plaintiffs state a prima facie violation of constitutional protections for which there is a judicial remedy. Dismissal under Rule 12(b)(6) is therefore inappropriate.

**CONCLUSION**

The trial court's dismissal under Rule 12(b)(6) should be reversed. *Amici's* brief in support of Plaintiffs-Appellants should be admitted.

Respectfully submitted,

*/s/ JEFFREY S. WARREN*  
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FEBRUARY 28, 2025



**CERTIFICATE OF FILING AND SERVICE**

I certify that on 28th February 2025, I caused a copy of the foregoing to be filed with the North Carolina Court of Appeals by submitting it through the Court's electronic filing website.

I further certify that on 28th February 2025, I caused the foregoing to be served on all counsel of record by sending a copy to counsel's correct and current electronic mail addresses, which are listed below:

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Electronically submitted this the 28th day of February 2025.

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