No. TENTH JUDICIAL DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA, Plaintiffs, vs. TIM MOORE, in his official capacity, and PHILIP BERGER, in his official capacity, Defendants.	From Wake County 18 CVS 9806

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PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases

N.C. Constitution

Statutes

Rules

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, the "Defendants"), pursuant to Rule 23 of the North Carolina Rules of Appellate Procedure, respectfully petition this Court to issue its writ of supersedeas and, pursuant to Rule 23(e), move the Court to enter a temporary stay.

Claiming that the challenge to Session Laws 2018-119 and 2018-128 based on what Plaintiffs would call a usurper legislature is an issue of first impression, the trial court became perhaps the first court in the country to invalidate legislation based on the theory that a state's legislative branch was made up of so-called usurpers who could not pass valid laws. While the trial court's ruling appears to be unique, the issue, in fact, is not. Our North Carolina Supreme Court has rejected the same theory. Further, precedent from the United States Supreme Court and lower federal and state courts universally weighs against Plaintiffs' usurper theory in no small part because of the irreparable harm—confusion regarding whether laws of the General Assembly are valid and an increase in legal challenges to such laws—such a decision can cause. Here, despite its efforts to portray its decision as limited, the trial court's adoption of Plaintiffs' overreaching theory had the effect of striking down the will of over two million North Carolina voters who ratified two amendments to our Constitution in the 2018 general election. This Court must immediately return the State of North Carolina to the status quo in place prior to entry of the trial court's order under which the power of the separately-elected, coordinate, legislative branch to act was recognized.

INTRODUCTION

In this action, Plaintiffs sought to void four constitutional amendments in two distinct ways: first, by attacking the language proposed in the session laws presenting the constitutional amendments to the citizens, and, second, by arguing that the Legislature that proposed the constitutional amendments was made up of

usurpers. The people of North Carolina rejected two of the constitutional amendments challenged by Plaintiffs. As for the two amendments ratified by voters (one regarding the income tax rate cap and the other regarding voter identification), Plaintiffs convinced the trial court that the Legislature that proposed the constitutional amendments lacked the sovereign authority to do so because of redistricting violations. That federal courts determined that North Carolina had redistricting violations is not disputed in this case. Rather, the issue is whether, when a legislature has members from districts held to be improperly drawn, those members are usurpers such that any laws passed by the usurpers are invalid.

The trial court was not without guidance on this issue because Plaintiffs' theory was not new. Numerous courts, including the United States Supreme Court, have examined the issue and declined to find that a "usurper legislature" exists or cannot act. The trial court, however, did not rely on precedent. Instead, in its conclusions of law, the trial court cited only two cases, *Covington v. North Carolina*, 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017), and *Dawson v. Bomar*, 322 F.2d 445, 446 (6th Cir. 1963). While the 22 February 2019 Order appears to reference *Convington* as support for striking down two session laws proposing constitutional amendments, such support is lacking. The *Covington* court actually denied a special election, even in the face of the plaintiffs' argument that an immediate election was warranted because the Legislature was made up of usurpers who could not act. *Covington*, 207 F. Supp. 3d at 901. The federal district court noted there was no state law authority for holding that a redistricting violation leads to usurper status for the legislature in

question. The *Covington* court's emphasis on state law is notable in light of the fact that the trial court's 22 February 2019 Order *cites no state law*. The trial court appears to cite *Dawson* for the proposition that striking down two constitutional amendments will not lead to chaos and confusion about, for example, what other laws could be called into question. However, *Dawson*, does not provide the support sought but rather emphasizes that it is inappropriate to substitute the court's wisdom for that of the legislature. For the trial court to encroach on the legislative branch in this way is, in and of itself, a violation of the separation of powers.

FACTUAL AND PROCEDURAL BACKGROUND

Challenges to electoral districts initiated in state court

Following the 2010 census, in July 2011, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, the North Carolina Senate, and the United States Congress. Challenges to the new districts were brought in state and federal court. *See, e.g., Dickson v. Rucho*, 367 N.C. 542, 547, 766 S.E.2d 238, 243 (2014), cert. granted, judgment vacated, 135 S. Ct. 1843, 191 L. Ed. 2d 719 (U.S. 2015) ("*Dickson I*"); *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015) ("*Dickson II*"); *Harris v. McCrory*, No. 1:13-CV-949 (M.D.N.C. 24 October 2013); *Covington v. North Carolina*, No. 1:15-CV-399 (M.D.N.C. 19 May 2015).

On 11 August 2016, the *Covington* federal district court entered an opinion and judgment finding that the 2011 majority black legislative districts constituted racial gerrymanders. The *Covington* district court did not enjoin the 2011 majority black

districts for the 2016 election but, rather, prohibited the State from using those districts in elections after 2016. The federal district court also directed that new plans be drawn by the General Assembly in its "next legislative session." *Covington v. North Carolina*, 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). By order entered on 29 November 2016, the federal district court ordered that a special election be held in 2017 for the purpose of electing new legislators in the redrawn districts. *Covington v. North Carolina*, No. 1:15-CV-399, 2016 WL 7667298, at *3 (M.D.N.C. Nov. 29, 2016), vacated and remanded, 137 S. Ct. 1624, 198 L. Ed. 2d 110 (2017).

On 5 June 2017, the United States Supreme Court affirmed the decision of the *Covington* district court, *see North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 2211 (2017), but also vacated the district court's order requiring a special election due to the district court's failure to undertake an equitable weighing process to select a fitting remedy for the violations identified, *see North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 1624, 1626 (2017).

On 19 September 2017, on remand of the question regarding special elections, the district court denied the plaintiffs' request for a special election

> because ordering a special election would entail either unduly abbreviating the process for enacting and reviewing new legislative districting plans, or ignoring a number of state laws designed to protect voters and the integrity of elections, or accepting the compressed, overlapping schedule proposed by Plaintiffs—which would likely confuse voters, raise barriers to participation, and depress turnout. We believe that pursuing any of these paths would not be in the best interests of Plaintiffs or the people of North Carolina. Rather, Plaintiffs and North Carolinians are most likely to regain the representation by constitutionally elected legislators that they have long been denied

> through a vigorously contested election, using constitutional districting plans, with a fully energized and engaged electorate.

Covington v. North Carolina, 270 F. Supp. 3d 881, 902 (M.D.N.C. 2017).

Ultimately, the General Assembly proposed 116 districts; objections were raised as to some of the districts; and, a Special Master was appointed to redraw some of the challenged districts. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 414 (M.D.N.C.), *aff'd in part, rev'd in part*, 138 S. Ct. 2548, 201 L. Ed. 2d 993 (U.S. 2018). The legislative districts for the 2018 general election were set following review by the federal district court and the United States Supreme Court. *Covington v. North Carolina*, 283 F. Supp. 3d 410, 414 (M.D.N.C.), aff'd in part, rev'd in part, 138 S. Ct. 2548, 201 L. Ed. 2d 993 (U.S. 2018); *North Carolina v. Covington*, 138 S. Ct. 2548, 2554, 201 L. Ed. 2d 993 (U.S. 2018).

Challenged Session Laws

Throughout all of the redistricting challenges, the General Assembly was never barred from making and passing laws. Therefore, the North Carolina General Assembly continued to serve, passed 214 laws in 2017, and passed 146 laws in 2018, including the session laws found to be void by the trial court.

Session Law 2018-1191

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[1] In their Second Amended Complaint filed on September 19, 2018, Plaintiffs challenged Session Laws 2018-119, 2018-128, 2018-132 (establishing a commission to assist with the filling of judicial vacancies) and 2018-133 (proposing a bipartisan board of ethics and elections enforcement). At the 2018 general election, voters rejected the proposed amendments set forth in Session Laws 2018-132 and 2018-133, and, by motion filed on 28 December 2018, Plaintiffs have dismissed their claims related to Session Laws 2018-132 and 2018-133 as moot.

House Bill 1092, entitled "An Act to amend the North Carolina Constitution to provide that the maximum tax rate on incomes cannot exceed seven percent," was adopted by more than three-fifths of both houses of the North Carolina General Assembly. It was ratified as Session Law 2018-119 on 28 June 2018. Session Law 2018-119 set forth a proposed constitutional amendment specifying that "[t]he rate of tax on incomes shall not in any case exceed seven percent." Previously, the Constitution provided that "[t]he rate of tax on incomes shall not in any case exceed ten percent." The proposed amendment was ratified by the voters of North Carolina with 57.35% of voters voting in favor of the amendment, and 42.65% voting against. *See* https://bit.ly/2Oz6iUI.

Session Law 2018-128

House Bill 1092, entitled "An act to amend the North Carolina Constitution to require photo identification to vote in person," was ratified as Session Law 2018-128 on 29 June 2018. Session Law 2018-128 set forth a proposed constitutional amendment that would add to Article VI (suffrage and eligibility to office) a requirement for photo identification for voting in person:

> Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

It is notable that, although never challenged by Plaintiffs, the same General Assembly the trial court found lacked power to pass Session Laws 2018-119 and 2018-128 also passed Session Law 2018-96 (setting forth a proposed amendment related to the right to hunt and fish) and 2018-110 (setting forth a proposed amendment related to victims' rights). Both of these proposed amendments were ratified by voters. *See* https://bit.ly/2Oz6iUI.

Session Law 2018-128, § 1. The new language now appears in Article VI, Sections 2 (Qualifications of voter) and 3 (Registration). The proposed amendment was ratified by the voters of North Carolina with 55.49% of voters voting in favor of the amendment, and 44.51% voting against. *See* https://bit.ly/2Oz6iUI.

Procedural Background

Plaintiffs filed their Complaint on 6 August 2018.[2] Plaintiffs' Motion for Temporary Restraining Order was heard before the Honorable Paul C. Ridgeway on 7 August 2018. Plaintiffs argued that the current General Assembly is a usurper body that lacks authority to pass the proposed amendments and that the ballot language for presenting the proposed constitutional amendments (specifically, the amendments set forth in Session Laws 2018-117, 2018-118, 2018-119, and 2018-128) violated the Constitution. Judge Ridgeway determined that Plaintiffs' challenges were facial challenges that must be heard and determined by a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1. Chief Justice Martin appointed a three-judge panel on the afternoon of 7 August 2018, and the panel scheduled a hearing on Plaintiffs' request for interlocutory injunctive relief for 15 August 2018.

On 21 August 2018, the three-judge panel enjoined the amendments as proposed in Session Laws 2018-117 and 2018-118 from being included on the ballot. Order on Injunctive Relief, Wake County Superior Court Case Nos. 18 CVS 9805 and 18 CVS 9806. In response, the General Assembly ratified Session Laws 2018-132 and 2018-133, which made changes to the proposed amendments and ballot language

[2] Plaintiffs' First Amended Complaint was filed on 9 August 2018.

related to the bipartisan board of ethics and elections enforcement and judicial vacancies. Although Plaintiffs filed petitions for writs of supersedeas with both the Court of Appeals and the Supreme Court (twice) to enjoin the inclusion of the amendments proposed in Session Laws 2018-119 and 2018-128 on the November 2018 ballot, further injunctive relief was denied.

Plaintiffs filed their Second Amended Complaint on 19 September 2018 to include challenges to Session Laws 2018-132 and 2018-133.

Plaintiffs filed their Motion for Partial Summary Judgment on 1 November 2018.

Defendants filed their Answer, which included their Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), on 13 November 2018.

A hearing on Plaintiffs' Motion for Partial Summary Judgment and Defendants' Motions to Dismiss was held before the Honorable G. Bryan Collins, Jr. on 15 January 2019. The trial court issued its Order on 22 February 2019 granting Defendants' Motion to Dismiss Plaintiff Clean Air Carolina under Rule 12(b)(1) and granting Plaintiffs' Motion for Partial Summary Judgment, declaring Session Laws 2018-119 and 2018-128 void *ab initio* and declaring the amendments to the Constitution effectuated by Session Laws 2018-119 and 2018-128 void.

Defendants filed their Notice of Appeal on 25 February 2019.[3] Thereafter, Defendants filed a Motion to Stay in the trial court on 26 February 2019. Defendants' Motion to Stay was denied by Order entered on 1 March 2019.

[3] This Court has appellate jurisdiction for numerous reasons. The 22 February 2019 Order of the trial court does not dispose of the entire case. Plaintiffs' usurper theory was one claim of unconstitutionality, and the three-judge superior court panel that has jurisdiction over Plaintiffs' facial challenge to the text of the ballot language has not yet entered a final order. N.C. Gen. Stat. § 7A-27(b)(4) permits appeal from any order where authorized by statute. N.C. Gen. Stat. § 1A-1, Rule 62(h) provides an immediate right of appeal where a declaratory judgment prevents or restrains enforcement of a statute, which is the case here. Further, sections 7A-27(b)(a) through (c) also apply. Because Plaintiffs have dismissed the State Board of Elections and Ethics Enforcement, an agency Plaintiffs sought to restrain from printing ballots, the only relief sought in the Second Amended Complaint was a declaration that Session Laws 2018-119 and 2018-128 are void. The trial court provided that relief, and there is nothing more to determine on the usurper issue. The remainder of the case—the direct facial challenge to the amendments pending before the three-judge panel that also seeks a declaration that the challenged session laws are void—is now moot; there is no further relief a court could provide than the relief Plaintiffs have already received. Thus, the 22 February 2019 Order has the effect of discontinuing the action. *See* N.C. Gen. Stat. § 7A-27(b)(c). To conclude otherwise would leave this case in a trial court loop that would prevent a timely review of this order. *See* N.C. Gen. Stat. § 7A-27(b)(b). Finally, the trial court's order calls into question the General Assembly's ability to enact valid legislation. As the main purpose of the General Assembly is to make laws, an opinion that calls that ability into question affects a substantial right of the legislative branch. *See* N.C. Gen. Stat. § 7A-27(b)(a). However, to the extent this Court believes that jurisdiction is lacking under N.C. Gen. Stat. § 7A-32, this Court can grant supersedeas and certiorari pursuant to § 7A-32(c) in aid of its jurisdiction or to "supervise and control the proceedings of any of the trial courts." Pursuant to *House of Raeford Farms, Inc. v. City of Raeford*, 104 N.C. App. 280, 284, 408 S.E.2d 885, 888 (1991), this Court may grant a writ of certiorari where there is no appeal provided at law, a prima facie case of error exists below, and there is merit to the petition. To the extent this Court disagrees with applicability of the laws cited above, the circumstances of this case meet the remaining factors in spades.

REASONS WHY THIS WRIT SHOULD ISSUE

I. THIS COURT HAS THE AUTHORITY TO ISSUE A WRIT OF SUPERSEDEAS TO STAY THE INJUNCTION ENTERED BY THE TRIAL COURT.

Under Rule 23 of the North Carolina Rules of Appellate Procedure, a writ of supersedeas is available "to stay the . . . enforcement of any . . . order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken . . . ." N.C. R. App. P. 23(a)(1); *see also* N.C. Gen. Stat. § 1-269 (authorizing the writ of supersedeas). A petitioner may apply to the Court of Appeals for a writ of supersedeas after "a stay order or entry has been sought by the applicant . . . by motion in the trial tribunal and such order or entry has been denied . . . by the trial tribunal." N.C. R. App. P. 23(a). *See also* N.C. R. App. P. 8(a). As set forth above, the trial court has denied Defendants' Motion for Stay and, therefore, this Petition is timely.

The Supreme Court of North Carolina has held that "[t]he writ of supersedeas may issue in the exercise of, and as ancillary to, the revising power of an appellate court," and the writ's purpose "is to preserve the status quo pending the exercise of appellate jurisdiction." *Craver v. Craver*, 298 N.C. 231, 237-38, 258 S.E.2d 357, 362 (1979); *see also City of New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544, 545-46 (1961). Here, the status quo to be preserved is the status quo in effect immediately prior to entry of the trial court's Order, *i.e.*, a General Assembly with at least de facto authority to pass Session Laws 2018-119 and 2018-128 and constitutional amendments as proposed by Session Laws 2018-119 and 2018-128 and ratified by the

voters of North Carolina. Based on the lack of support for the trial court's 22 February 2019 Order and the confusion created by the trial court's finding that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and is therefore not empowered to pass legislation that would amend the state's Constitution," a writ of supersedeas is appropriate.

II. THE TRIAL COURT'S ORDER IS CONTRARY TO PRECEDENT.

Perhaps in order to justify its ultimate conclusion that Session Laws 2018-119 and 2018-128 are void *ab initio*, a conclusion reached without citation to any legal support,[4] the trial court held that "[w]hether an unconstitutionally racially-gerrymandered General Assembly can place constitutional amendments onto the ballot for public ratification is an unsettled question of state law[5] and question of first impression for North Carolina courts." 22 February 2019 Order. In fact, the North Carolina Supreme Court, the United States Supreme Court, and other courts have considered challenges to laws based on claims of improperly constituted legislatures,

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[4] The 22 February 2019 Order essentially cites only two cases, the *Covington* line of cases and *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963), in support of the conclusions of law. As discussed below, the *Covington* court did not rule on the usurper argument raised by plaintiffs therein, and the *Dawson* court held contrary to the trial court, finding that it was necessary to uphold the acts of a malapportioned legislature. *Dawson* at 446.

[5] In *Covington*, the federal district court held the same based on the plaintiffs' concession that whether the General Assembly as then composed was empowered to act was an unsettled question of state law. *Covington v. North Carolina*, 270 F. Supp. 3d at 901. Defendants do not concede as much but rather submit that the North Carolina Supreme Court has addressed this question in *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 319 (1939), as will be discussed in more detail below. There is no indication that the *Leonard* decision was brought to the attention of the federal district court.

but neither Plaintiffs nor Defendants has found a single case in which a law was struck down on such grounds.

A. The North Carolina Supreme Court has held that a collateral attack like that asserted by Plaintiffs is a non-justiciable political question.

In *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, 319 (1939), our Supreme Court heard challenges to the constitutionality of a sales tax provision. In addition to challenging what they claimed were created arbitrary exemptions, the plaintiff also argued that the law was unconstitutional because "the General Assembly of 1937 was not properly constituted . . . and that none of the legislation attempted at this session can be regarded as possessing the sanctity of law." *Id.* at 324. The Supreme Court noted that "the authorities are against [the plaintiff] on this point," and concluded that the question as to whether the legislature could enact valid legislation "is a political one, and there is nothing the courts can do about it." *Id.*

The *Leonard* court cited an Illinois decision that came to the same conclusion when a law was challenged on the grounds that the legislature was not properly apportioned:

> we hold that we are not authorized by the Constitution of Illinois to declare that the General Assembly that passed the Deadly Weaspon [sic] Act of 1925 was not a de jure legislative body and the members thereof de jure members and officers of that General Assembly. The Act of 1925 is therefore not unconstitutional on the grounds contended for in this case.

People v. Clardy, 334 Ill. 160, 167, 165 N.E. 638, 640–41 (1929).

The Supreme Court of Hawaii (while still a territory) held similarly. *Territory v. Tam*, 36 Haw. 32 (1942): "an Act of the legislature is not invalid, even though the legislature had failed to effect reapportionment pursuant to constitutional mandate." *Id*. at 34-35. According to the Hawaii court, "the question is political and not justiciable." *Id.* at 35.

As the United States Supreme Court recognized in *Baker v. Carr,* 369 U.S. 186, 217 (1962), any one of the following conditions may give rise to a non-justiciable political question:

> … a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. (emphasis added).

Here, although what the trial court found to be "an illegally constituted General Assembly" passed 146 laws in 2018, including six laws proposing constitutional amendments that were presented to North Carolina voters for consideration and numerous other laws passed with the same three-fifths margin, the trial court held only that Session Laws 2018-119 and 2018-128 were void. The Order provides no manageable standards to determine what laws are void and what laws are valid. *See, e.g., Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d

365, 391 (2004) ("the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes . . . ."). To parse what laws are void and what laws are valid becomes a difficult task, which is why the Court in *Leonard* characterized Plaintiffs' argument about the illegitimacy of the legislature as "[q]uite a devastating argument, if sound." *Leonard*, 216 N.C. at 89 3 S.E.2d at 324.

While the trial court limited its ruling to the two constitutional amendments at issue, its logic strikes well beyond those amendments. Once the seam is cut, pulling on the string begins to unravel the entire garment. The trial court appears concerned about the viability of the three-fifths margin. If a three-fifths vote is not viable for a constitutional amendment, under the trial court's logic, why would it be viable for any three-fifths vote? Amendments are ratified or rejected directly by *the people* of North Carolina, consistent with Article I, Section 3. The trial court struck down two amendments passed by *the people*; in effect it cancelled their votes not because of any election issue but because the legislative vote, according to the trial court, was tainted. Gubernatorial veto overrides, consistent with Article II, Section 22, require no popular vote—only a three-fifths vote of each house of the General Assembly. The lack of measurable standards for such a decision could further unravel additional votes over additional time periods.

Questioning the validity of laws passed by the General Assembly through such a collateral attack on the institution has also been held to be a political question because it would demonstrate a lack of respect for the coordinate branch of government. In *Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham*, 912

So. 2d 204 (Ala. 2005), the Alabama Supreme Court determined it could not decide whether the "majority" required to pass a law in Alabama meant the majority of those legislators present or a majority of all legislators. Among other reasons, the court noted, "[i]f the judiciary questions the legislature's declaration that Act No. 288 and Act No. 357 were validly enacted by the legislature, we would be demonstrating a lack of the respect due that coordinate branch of government." *Id.* at 219. The separation of powers set forth in Article I, Section 6 of our Constitution is absolutely implicated when the judicial branch holds that the legislative branch cannot act. Judicial review of the constitutionality of individual acts is a cornerstone of the separation of powers, but the collateral attack on the institution that leads to the invalidation of specific, some, or all acts of the legislature is a gross overstep of judicial authority.

The 22 February 2019 Order erroneously ignores North Carolina Supreme Court precedent and similar decisions from other courts in reaching the conclusion that the issues before the trial court were justiciable. For that reasons, this Court should issue a writ of supersedeas.

B. Courts have upheld the right of what the 22 February 2019 Order refers to as an "illegally constituted General Assembly" to act.

In addition to precedent holding that the question before the trial court (and now before this Court on appeal) amounts to a non-justiciable political question, even where courts have found a legislature to be improperly constituted, courts have been

unwilling to hold that such bodies may not act.[6] As recognized by the United States Supreme Court, "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act." *Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J., concurring). Moreover, "legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment" are "not therefore void." *Ryder v. United States*, 15 U.S. 177, 183 (1995) (acknowledging prior holding in *Connor v. Williams*, 404 U.S. 549, 550-51 (1972)); *Buckley v. Valeo*, 424 U.S. 1, 142 (holding legislative acts performed by legislators elected in accordance with unconstitutional apportionment plan are given de-facto validity).

Other federal courts have reached similar conclusions. *See, e.g., Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963) ("Nothing in *Baker v. Carr*, 369 U.S. 186, intimates that a legislature elected from districts that are invidiously discriminatory in violation of the Fourteenth Amendment is without power to act."); *Dawson v. Bomar*, 322 F.2d 445, 446 (6th Cir. 1963); *Martin v. Henderson*, 289 F. Supp. 411, 414 (E.D. Tenn. 1967) (holding malapportioned legislature is nonetheless still empowered to act); *Everglades Drainage League v. Napoleon B. Broward Drainage Dist.*, 253 F.

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[6] The three-judge panel assigned to consider Plaintiffs' facial challenges to Session Laws 2018-119 and 2018-128 concluded that Plaintiffs' usurper argument "constitutes a collateral attack on acts of the General Assembly" and was, therefore, not within the panel's jurisdiction, but the panel also unanimously rejected the argument that the General Assembly is a usurper legislative body. Order at ¶¶ 11-12. Moreover, the panel held that to conclude that the General Assembly is a usurper body "would result only in causing chaos and confusion in government," a result that should be avoided. *Id.* at ¶ 12.

246, 252 (S.D. Fla. 1918) ("the Legislature passing chapter 7430 was the Legislature de facto, and its acts are therefore binding. This I understand from the authorities to be the law, and no authority contra has been cited to me.").

The trial court completely ignored these cases, and Plaintiffs have attempted to discount these cases on the grounds that state (rather than federal) law should control. However, as recognized by the federal district court in *Covington*, "Plaintiffs cite no authority from state courts definitively holding that a legislator elected in an unconstitutionally drawn district is a usurper . . . ." *Covington v. North Carolina*, 270 F. Supp. 3d at 901. Indeed, yet again, there is state law support for the contrary. *See State v. Latham & York,* 190 Kan. 411, 426, 375 P.2d 788 (1962), *cert. denied,* 373 U.S. 919 (1963) ("the fact that a legislature has not reapportioned in accordance with the state constitution does not preclude it from making any law or doing any act within the legislative competence.... Any other conclusion would result in the destruction of state government.").

The cases that Plaintiffs do rely on—cases regarding criteria for determining when an officer has *de facto* status[7]—do not control the question at issue, nor did they find apparent favor with the trial court as none were cited. *See Keeler v. City of New Bern*, 61 N.C. 505, 507 (1868) (holding that New Bern councilmen who were never actually elected to office were usurpers and unable to bind the town in contract); *see*

[7] According to Black's Law Dictionary, the phrase "de facto" "is used to characterize an officer, a government, a past action, or a state of affairs which must be accepted for all practical purposes but is illegal or illegitimate," while "de jure" means legitimate or lawful.

Van Amringe v. Taylor, 108 N.C. 196, 12 S.E. 1005, (1891) (when clerk of the registrar of an election precinct fraudulently obtains possession of books under a promise to return them, which he refuses to do, and assumes to act as registrar, he is not a *de facto* officer; election held by him as registrar and his appointees as judges is void).

The General Assembly that enacted the Session Laws was elected in 2016 under districts that were drawn in 2011. The *Covington* federal district court found that 2011 majority black legislative districts constituted racial gerrymanders but the use of those districts for the 2016 election was not ultimately prohibited. *See Covington v. North Carolina*, 316 F.R.D. 117, 176-78 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The United States Supreme Court affirmed the holding of unconstitutionality, but vacated the district court's requirement for a special election. *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 2211 (2017); *North Carolina v. Covington*, __ U.S. __, 137 S. Ct. 1624, 1626 (2017). By vacating the district court's requirement for a special election, the United States Supreme Court must have acknowledged that the General Assembly would continue to be able to act until the next election. That is consistent with its prior holdings. *See e.g., Baker v. Carr*, 369 U.S. 186, 250 n. 5 (1962) (Douglas, J., concurring). The federal courts also ultimately declined the request by the *Covington* plaintiffs to order special elections for the North Carolina General Assembly in 2017. *See Covington v. North Carolina*, 270 F. Supp. 3d at 902. Thus, the General Assembly had at least *de facto* authority to act; Session Laws 2018-119 and 2018-128 should be valid; the resulting constitutional

amendments should be valid; and this Court should issue a writ of supersedeas staying the 22 February 2019 Order.

III. CONFUSION CAN BE ALLEVIATED BY THE ISSUANCE OF A WRIT OF SUPERSEDEAS.

The 22 February 2019 Order holds Session Laws 2018-119 and 2018-128 void. However, the Order expressly states that "[a]n illegally constituted General Assembly does not represent the people of North Carolina and therefore is not empowered to pass legislation that would amend the state's Constitution."[8] (22 February 2019 Order at p. 12.) While the trial court also concluded that "it will not cause chaos and confusion to declare that Session laws 2018-119 and 2018-128 and their corresponding amendments to the constitution are void *ab initio*," *id.*, based on the rationale set forth in the Order (which seems to be based on the fact that three-fifths of all the members of each house must adopt an act submitting a proposed constitutional amendment to the voters), it would follow that the session laws proposing the four other constitutional amendments that appeared on the 2018 general election ballot would also be void.[9]

The 22 February 2019 Order provides no guidance as to why other laws are not also void. For example, as referenced above, a three-fifths majority of both houses is

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[8] To be clear, the General Assembly cannot pass legislation that would amend the Constitution but, rather, can only pass proposed amendments that are put before the qualified voters of North Carolina for ratification or rejection. N.C. Const. art. XIII, § 4. "The people of this State reserve the power to amend this Constitution." N.C. Const. art. XIII, § 2.

[9] As set forth above, two of those amendments were rejected by the voters.

also required to override a gubernatorial veto. N.C. Const. art. II, § 22. The General Assembly has overridden numerous gubernatorial vetoes since 5 June 2017 (when the Supreme Court affirmed the finding of racial gerrymandering) including the following:

- Session Law 2017-57 (enacting the present state budget);
- Session Law 2018-146 (establishing the current State Board of Elections, which, as of 21 February 2019, has ordered a new election in the 9th congressional district); and
- Session Law 2018-2 (establishing the State Board of Elections and Ethics Enforcement, which certified all other races and referenda in the November 2018 election).

The 22 February 2019 Order exposes these laws (and others) to similar arguments of impropriety and collateral attacks and creates confusion that could lead to increased (and unnecessary) litigation over laws, judicial decisions, and regulatory appointments. Indeed, because the challenged districts were drawn in 2011, the trial court's rationale calls into question all acts of the General Assembly after legislators from the challenged districts were seated in January 2013.

The practical realities of the trial court's decision are not just limited to the past. The trial court's order noted that "[t]he November 6, 2018 election was the first to be held under the remedial maps approved by the federal courts to correct the 2011 unconstitutional racial gerrymander." (22 February 2019 Order, p. 12.) However, the NAACP and other plaintiffs continue to challenge North Carolina's legislative districts for mid-decade redistricting and as political gerrymanders. In *NAACP v. Lewis*, Wake County Superior Court Case No. 18 CVS 2322, a three-judge panel found

that the redrawing of four Wake County districts was not necessary to comply with federal law and violated the North Carolina Constitution's prohibition on mid-decade redistricting. The three-judge panel's 2 November 2018 order, issued just four days before the 2018 general election, allowed the General Assembly "a period of time to remedy the defects in the Wake County House Districts," requiring new districts for use in the 2020 general election. Similarly, in *Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), the federal district court's holding that the state's redistricting plan constituted partisan gerrymandering is currently on appeal, and a suit was filed in November 2018 alleging that maps drawn in 2017 violate the North Carolina Constitution due to partisan gerrymandering, *see Common Cause v. Lewis*, Wake County Superior Court Case No. 18 CVS 14001.

Given the final mandate that four Wake County districts are defective[10] and the challenges to other districts, the rationale set forth in this Court's 22 February 2019 Order could open the door for challenges to legislation passed by the current General Assembly. Because the trial court focused on the ends in this case—voiding constitutional amendments—the means are substantially unclear. As a result of this decision, is a legislature made up of even a single alleged usurper capable of passing laws? Does the number of presumed usurpers factor in, *i.e.,* are laws that needed the number of legislative votes at issue in the redistricting to pass valid? Can the current General Assembly pass a session law proposing a constitutional amendment? The

[10] In order to redraw these four districts, all of the Wake County districts will be affected.

trial court did not analyze these questions, and the questions left in the wake of the 22 February 2019 Order could have an impact on the ongoing ability of the General Assembly to set an agenda and of the State to govern effectively. These are some of the reasons why no court known to the parties or the trial court has (until the 22 February 2019 Order) invalidated the laws of a legislature on the grounds that some of the legislators are usurpers.

In *Dawson v. Bomar*, 322 F.2d 445 (1963), the Sixth Circuit rejected a death row inmate's challenge to the death sentence he received. He argued that the death penalty law at issue (which involved electrocution) was not valid because it was passed by a malapportioned legislature. *Id*. at 446-47. The petitioner further argued that no chaos or confusion would come from simply setting aside the death penalty law in question, a law certain to impact very few people. The Court's response to such an argument is instructive here:

> For the Court to select any particular category of laws and separate them from the other laws for the purpose of applying either the *de facto* doctrine or the doctrine of avoidance of chaos and confusion would in fact circumvent legal principles in order to substitute the Court's opinion as to the wisdom, morality, or appropriateness of such laws.

Id. at 448.

Here, the trial court, in adopting Plaintiffs' theory, voided the will of the people and substituted its judgment for that of the Legislature and the people of North Carolina.

Finality of a constitutional question under North Carolina law comes from our appellate courts. Issuance of a writ of supersedeas staying this 22 February 2019 Order allows our appellate courts to weigh that Order under the same status quo this Court and the people of North Carolina enjoyed as recently as ten days ago.

MOTION TO STAY

Pursuant to Rule 23(e) of the North Carolina Rules of Appellate Procedure, Defendants respectfully move this Court to issue a temporary stay of the trial court's 22 February 2019 Order. Defendants further incorporate and rely on the arguments presented in the foregoing petition for writ of supersedeas in support of this Motion for Temporary Stay.

CONCLUSION

The trial court erroneously concluded that Plaintiffs' challenge to Session Laws 2018-119 and 2018-128 on the grounds that the General Assembly was illegally constituted is not barred as a non-justiciable political question and erroneously concluded that the General Assembly was not authorized to pass the challenged session laws. Based on this error and on the confusion that the Order creates, this Court should grant Defendants' motion for temporary stay and issue its writ of supersedeas staying the trial court's Order pending a final determination of the appeal.

VERIFICATION

The undersigned attorney for Defendants, after being duly sworn, says:

The contents of the foregoing petition are true to my knowledge, except those matters stated upon information and belief and, as to those matters, I believe them to be true.

Pursuant to Appellate Rule 23, I also hereby certify that the documents attached to this Petition for Writ of Supersedeas are true and correct copies of the pleadings and other documents in the file in Wake County Superior Court, including documents that were served or submitted for consideration as contemplated by Appellate Rule 11.

_____
D. Martin Warf

Wake County, North Carolina

Sworn to and subscribed before me this __ day of March, 2019.

_____

_____
Notary's Printed Name, Notary Public

My Commission Expires:

Respectfully submitted this the 4th day of March, 2019.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically Submitted

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Supersedeas and Motion for Temporary Stay was served upon the persons indicated below via electronic mail and United States Mail, postage prepaid, addressed as follows:

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This the 4th day of March, 2019.

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