NO. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff-Appellant,

v.

TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE,

Defendants-Appellees.

From Wake County

****

BRIEF OF THE NORTH CAROLINA LEGISLATIVE BLACK CAUCUS AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT

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From Wake County

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BRIEF OF THE NORTH CAROLINA LEGISLATIVE BLACK CAUCUS AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLANT[1]

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[1] No person other than the Caucus and its counsel wrote or contributed money to this brief.

ARGUMENT

A racially gerrymandered supermajority of the General Assembly cannot use its illegitimate power as a launch pad for amending the North Carolina Constitution. In ruling otherwise, the Court of Appeals made a number of errors. The North Carolina Legislative Black Caucus will focus on two of those errors in this brief.

First, the Court of Appeals gave too little weight to the severity of the racial gerrymandering that gave rise to this case. The court suggested that this race-based discrimination was a boon to Black North Carolinians, "result[ing] in more African Americans being elected to the General Assembly than ever before." *N.C. State Conf. of NAACP v. Moore*, 849 S.E.2d 87, 96 (N.C. Ct. App. 2020) (principal op.). As the Legislative Black Caucus can attest, however, that picture is inaccurate. The gerrymander at issue diminished minority voting strength and limited minority representation in the General Assembly. Indeed, when that gerrymander was eventually undone and North Carolina voters had the opportunity to vote under constitutional legislative maps, the Caucus's membership *increased*. And gerrymandering was only one of many racially discriminatory measures that Defendants adopted over the past decade to make it harder for people of color to elect the representatives of their choice.

Second, the Court of Appeals gave too much weight to the impact of invalidating the constitutional amendments at issue, reasoning that such a

ruling would call into question all of the legislation enacted by the gerrymandered legislature. In fact, the General Assembly's authority to propose constitutional amendments is distinct from, and more limited than, its authority to enact ordinary legislation. And there are a number of sound reasons for denying a racially gerrymandered legislature the power to propose constitutional amendments while still allowing it to pass regular laws. Thus, the Court of Appeals' concern about the validity of other legislation poses no actual impediment to the correct result in this case: a ruling that a General Assembly cannot amend the North Carolina Constitution with a supermajority achieved through the use of racial gerrymandering.

I. DECLARING THE CONSTITUTIONAL AMENDMENTS HERE INVALID IS AN APPROPRIATE REMEDY FOR DEFENDANTS' DISCRIMINATION AGAINST MINORITY VOTERS AND THEIR REPRESENTATIVES.

In overturning the trial court's ruling and rejecting the challenge to the constitutional amendments in this case—Session Laws 2018-119 (the "Tax Amendment") and 2018-128 (the "Voter ID Amendment")—the Court of Appeals gave inadequate significance to the constitutional violation on which that challenge rests. Rather than resulting from a redistricting plan designed for partisan advantage and supported by the "compelling purpose" of "ensur[ing that North Carolina's legislative districting] maps would not run afoul of the VRA," *N.C. NAACP*, 849 S.E.2d at 92 (principal op.), the challenged

amendments resulted from the "most extensive unconstitutional racial gerrymander ever encountered by a federal court," *Covington v. North Carolina* (*Covington II*), 270 F. Supp. 3d 881, 892 (M.D.N.C. 2017). Indeed, there is "'no rational disagreement' as to whether the districting plans at issue . . . violated the Constitution." *Id.* A federal three-judge panel unanimously held that Defendants' plan violated the Constitution, and the U.S. Supreme Court affirmed without argument or dissent. *Id.*

When viewed in this historical context, invalidating amendments that disproportionately affect—and in the case of Voter ID, disenfranchise—African Americans is an appropriate response to Defendants' unprecedented conduct. Indeed, "[t]he scope of the remedy must be proportional to the scope of the violation." *Brown v. Plata*, 563 U.S. 493, 531 (2011). To understand the extraordinary and unconstitutional lengths to which the legislature has gone to entrench its power at the expense of minority legislators, candidates, and voters, and to understand why the invalidation of the constitutional amendments at issue is therefore a commensurate remedy, a proper understanding of the historical background is necessary.

Defendants took their first steps to expand and entrench legislative power following gains in the state legislature in the 2010 election.[2] In 2011,

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[2] Defendants were named in their official capacity, and references here to "Defendants" are generally to the legislative majority, not the individuals.

the new majority—not yet a supermajority—redrew North Carolina's House and Senate maps. Defendants, with the help of map-drawer Dr. Thomas Hofeller, designed 28 state legislative districts to ensure that each had a 50%-plus-one majority black voting age population ("BVAP"). *Covington v. North Carolina*, 316 F.R.D. 117, 126-27 (M.D.N.C. 2016). By concentrating African-American voters in a small number of districts, Defendants reduced African Americans' overall political influence across the state. *See id.* Defendants' dilution of minority voting power was so significant that fixing it required redrawing "more than two thirds of the districts in both the House . . . and Senate"—81 (or 68%) in the House and 36 (or 72%) in the Senate. (R p 184, ¶ 11 ("Order"))[3]

Defendants' purported justification for drawing these majority-Black districts was to comply with the Voting Rights Act of 1965 (the "VRA"). *Covington*, 316 F.R.D. at 132-33. Contrary to the Court of Appeals' view that this was a "compelling purpose," *N.C. NAACP*, 849 S.E.2d at 92 (principal op.), *Covington* concluded that Defendants *did not* have a strong basis in evidence

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[3] At the same time Defendants designed the racially gerrymandered 2011 *state* redistricting plan, they implemented a *congressional* redistricting plan with racially gerrymandered districts. *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016), *aff'd sub nom., Cooper v. Harris*, 137 S. Ct. 1455, 1482 (2017). These unconstitutional congressional districts represented yet another attempt by Defendants to procure and maintain their party's electoral power by minimizing minority voting strength in North Carolina.

for concluding the VRA required such districts. *Covington*, 316 F.R.D. at 167; *see also id.* at 124 ("Defendants have not shown that their use of race . . . was narrowly tailored to further a compelling state interest," or that "their use of race was reasonably necessary" to satisfy the VRA.).

Rather, "Defendants knew they were increasing the BVAP in districts where African-American candidates, who were purportedly also the African-American voters' candidates of choice, *were already consistently winning*." *Id.* at 173 (emphasis added). Indeed, in previous decades, "[m]any African-American General Assembly candidates . . . had electoral success even when running in non-majority-black districts." *Id.* at 125-26. These candidates won in "effective coalitional districts" in which minority citizens "form[ed] coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *Id.* at 133.[4]

Because Defendants had no valid justification for concentrating Black voters into fewer districts, the district court in *Covington* concluded that all 28

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[4] At the trial challenging the congressional districts, former congressman and state senator Mel Watt testified he told a state legislator involved in redistricting efforts, "I'm getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I'll probably get 80 percent of the vote, and that's not what the Voting Rights Act was designed to do." *Cooper*, 137 S. Ct. at 1476 & n.10. The U.S. Supreme Court described Watt's testimony as "[p]erhaps the most dramatic testimony in the trial." *Id.*

districts were unconstitutional racial gerrymanders. *Id.* at 176. The Supreme Court affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

Although the Court of Appeals stated that it was not "condon[ing] the creation of more majority-minority districts than that required by the VRA," it suggested that Defendants' racial gerrymander was benign because "the number of African Americans serving in the General Assembly increased from 24 to 32" under the unconstitutional maps. *N.C. NAACP*, 849 S.E.2d at 92, 96 (principal op.). But that suggestion is at odds with *Covington* and longstanding jurisprudence articulating the harms caused by racial gerrymanders.

Redistricting plans, like the ones here, that pack into the same districts "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bear[ ] an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). These plans "reinforce[ ] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls." *Id.* They also inflict serious harm by suggesting to elected officials "that their primary obligation is to represent only the members of [one racial] group, rather than their constituency as a whole." *Id.* at 648. The fact that more African-American legislators are elected under

an unconstitutional redistricting plan than under a previous plan does not undo or excuse these harms.

Making matters worse, Defendants' attempts to maintain their unlawful grip on power through racially gerrymandered plans did not end with the Supreme Court's affirmance in *Covington*. To the contrary, Defendants delayed, opposed, and undermined efforts to remedy the racially gerrymandered plan and its attendant harms. Indeed, the *Covington* court called Defendants out for "act[ing] in ways that indicate they are more interested in delay than they are in correcting this serious constitutional violation." *Covington II*, 270 F. Supp. 3d at 884. Defendants made "no effort to draw and submit constitutional redistricting plans" before the U.S. Supreme Court affirmed, and they opposed a special election under constitutional maps. *Id.* at 887-89. When Defendants did engage in the remedial process, the "*Covington* panel . . . expressed 'serious' concerns that several districts drawn by the General Assembly to remedy the constitutional violation either perpetuate[d] the racial gerrymander or [we]re otherwise legally unacceptable." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 622 n.13 (M.D.N.C. 2018), *vacated on other grounds by* 138 S. Ct. 2679 (2018).

All the while, the partisan supermajority elected under the unconstitutional maps passed a series of racially discriminatory laws designed to entrench their wrongfully procured power. *See, e.g.*, *id.* (citing cases showing

that "[t]he legislature elected under the racially gerrymandered 2011 districting plan has enacted a number of pieces of voting- and election-related legislation that have been struck down by state and federal courts as unconstitutional or violative of federal law").

For example, after years of expanded voting access for African Americans, when "African American registration and turnout rates had finally reached near-parity with white registration and turnout rates [and] African Americans were poised to act as a major electoral force," the General Assembly used data regarding race-based voting practices to pass legislation that included numerous voting and voting registration measures, "all of which disproportionately affected African Americans." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). In striking down this law, the Fourth Circuit described it as "the most restrictive voting law North Carolina has seen since the era of Jim Crow." *Id.* at 229.

The Fourth Circuit found that the General Assembly's aim in enacting this law was "to entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party." *Id.* at 233. In other words, a partisan supermajority in the General Assembly—elected, at least in part, as a result of racial gerrymandering—sought to preserve and expand its illegitimate electoral gains by imposing barriers to voting and voting registration that would disproportionately keep African-American voters away from the polls.

Foiled by the Fourth Circuit, Defendants tried to achieve through a constitutional amendment what they had failed to achieve through the law-making process. By enacting the Voter ID Amendment challenged in this case, they hoped to insulate their efforts to disproportionately impair African Americans' voting power from constitutional challenge. They could use their supermajority to pass a bill to amend the Constitution, and then justify or defend future efforts to impose voter ID requirements by pointing to the amended Constitution. Defendants moved forward with this plan to lock voter ID into the Constitution during "the final two days of the 2018 regular legislative session"—that is, in the *final two days* they could wield the supermajority they created through racially gerrymandered maps. Order ¶ 12.

With the help of those maps, Defendants succeeded. *Id.* ¶¶ 13-14. The Voter ID Amendment passed the House by "just two votes over [the] three-fifths majority required for a constitutional amendment, and in the Senate the number was just three votes over the required margin." *Id.* ¶ 13. Likewise, the Tax Amendment passed the House by "just one vote over the [required] three-fifths majority" and the Senate by "just four votes over the required margin." *Id.* ¶ 14. Had Defendants not unlawfully procured their partisan supermajority through racial gerrymandering, Defendants likely would not have had the required number of votes to put the Voter ID and Tax Amendments on the

ballot. The racial gerrymander therefore tainted the three-fifths majority required to amend the North Carolina Constitution.

The Legislative Black Caucus itself could have played a critical role in stopping these amendments. Every member of the Caucus voted against the Voter ID and Tax Amendments, and both passed by the slimmest of margins—two votes for Voter ID, and one for Tax. If not for nearly a decade of unconstitutional impairment of the political power of minority voters and their representatives, the result could have been different. Indeed, when voters were finally able to vote in districts untainted by racial gerrymandering in 2018, the Caucus added two members—which would have jeopardized Defendants' ability to pass the Amendments singlehandedly.[5]

But instead, using their unlawfully obtained constitutional amendments as cover, Defendants continued their efforts to entrench their political power by burdening minority voters' access to the polls. In particular, Defendants used the Voter ID Amendment as the impetus to enact yet another discriminatory voter ID statute (Session Law 2018-144)—and did so over

[5] Because the remedial map used in the 2018 election altered more than two-thirds of the House and Senate districts, Order ¶ 11, the Caucus would not have been alone in its opposition. When finally given the opportunity, African-American voters engaged in the coalition-building Defendants' racial gerrymander had prevented, combining their voting power to elect Democrats who often vote with the Caucus—and likely would have voted against the amendments at issue here.

Governor Cooper's veto in a lame-duck legislative session during the waning days of their supermajority. *Holmes v. Moore*, 840 S.E.2d 244, 250 (N.C. Ct. App. 2020).

This new voter ID statute has since been preliminarily enjoined by the North Carolina Court of Appeals, which concluded that the plaintiffs were likely to prove that the law's voter ID requirements were motivated by discriminatory intent against minority voters, and against African-American voters in particular.[6]

"[A] legislature that is itself insulated by virtue of an invidious gerrymander can enact additional legislation to restrict voting rights and thereby further cement its unjustified control of the organs of both state and federal government." *Common Cause*, 279 F. Supp. 3d at 621-22. "Cement" is an apt expression. That is what happened here, as Defendants repeatedly passed legislation that sought to harden the majority they gained in the 2010 mid-term election into a durable advantage.

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[6] *See Holmes*, 840 S.E.2d at 265 ("[T]he General Assembly's history with voter-ID laws, the legislative history of the act, the unusual sequence of events leading to its passage, and the disproportional impact on African American voters likely created by [Session Law 2018-144] all point to the conclusion that discriminatory intent remained a primary motivating factor . . . [reflecting] more of an intention to target African American voters rather than a desire to comply with the newly created Amendment in a fair and balanced manner.").

Defendants drew racially gerrymandered districts in 2011 and obtained a partisan supermajority in 2012. As the litigation over those districts wound its way through the federal courts, Defendants repeatedly passed laws that discriminated against African-American voters and, in particular, sought to entrench their electoral power by disenfranchising Black voters who are less likely to be politically aligned with Defendants. As the Middle District of North Carolina put it, "[t]he harms attendant to [Defendants'] unjustified race-based districting [did] not end with the enactment of an unconstitutional districting scheme." *Covington II*, 270 F. Supp. 3d at 891. Rather, "those harms [began] with the enactment of unconstitutional maps; [were] inflicted again and again with the use of those maps in each subsequent election cycle; and, by putting into office legislators acting under a cloud of constitutional illegitimacy, continue[d] unabated until new elections [were] held under constitutionally adequate districting plans." *Id.*

The Court of Appeals was concerned about a lack of precedent for invalidating constitutional amendments that result from an unconstitutional racial gerrymander. *N.C. NAACP*, 849 S.E.2d at 93-94 (principal op.); *id.* at 96 (concurring op.). But the lack of controlling precedent in this case merely underscores the unprecedented nature of Defendants' conduct. Defendants obtained their supermajority power by implementing the "most extensive unconstitutional racial gerrymander ever encountered by a federal court,"

Covington II, 270 F. Supp. 3d at 892, then proceeded to use their ill-gotten power to alter the North Carolina Constitution, including by proposing yet another voting law (the Voter ID Amendment) designed to target and disenfranchise minority voters and thereby perpetuate their political power at the expense of minority voting rights.

Because "the scope of the remedy must be proportional to the scope of the violation," *Brown*, 563 U.S. at 531, Defendants' unparalleled track record of unconstitutional and racially targeted acts should be the starting point for the Court's analysis in this case. The scope of the remedy imposed by the trial court—rejecting Defendants' effort to write the legacy of a supermajority founded in unconstitutional racial gerrymandering into the North Carolina Constitution—is proportional to the scope of Defendants' violations. The Court of Appeals failed to take accurate stock of the constitutional violations committed by Defendants. It therefore erred in failing to remedy those violations.

II. DECLARING THE CHALLENGED AMENDMENTS INVALID WILL NOT CAST DOUBT ON OTHER LEGISLATIVE ACTS.

The Court of Appeals also reasoned that invalidating the constitutional amendments at issue in this case would create chaos and confusion by calling into question other actions taken by the General Assembly. *N.C. NAACP*, 849 S.E.2d at 95-96 (principal op.); *id.* at 101-03 (concurring op.). According to the

Court of Appeals, the legislature's power to propose constitutional amendments cannot be distinguished from its power to enact ordinary legislation. *See id.* at 96 (principal op.); *id.* at 102-03 (concurring op.). The court therefore concluded that, if the constitutional amendments here are declared invalid, every law enacted by the racially gerrymandered legislature will be subject to attack. *See id.* at 96 (principal op.); *id.* at 102-03 (concurring op.). That reasoning is flawed.

The General Assembly's power to propose constitutional amendments is different from, and more limited than, its power to enact ordinary legislation. Ordinary legislation can be passed by a simple majority. But legislation proposing changes to the Constitution must meet a higher burden: a three-fifths majority. N.C. Const. art. XIII, § 4.

It follows that the General Assembly's power to enact ordinary legislation does not rise and fall with its power to propose constitutional amendments. A person who cannot lift a 100-pound weight may still be able to shoulder 50. So too here: A General Assembly that cannot meet the *higher* burden needed to change the North Carolina Constitution could still meet the *lower* burden needed to pass regular laws. Thus, a ruling that a racially gerrymandered legislature cannot propose constitutional amendments says nothing about whether a racially gerrymandered legislature can enact ordinary legislation.

In addition to being logically consistent, there are also persuasive practical grounds for distinguishing between a racially gerrymandered legislature's power to enact ordinary legislation and its power to propose constitutional amendments. Allowing even a racially gerrymandered legislature to enact ordinary laws is a matter of necessity. Legislation is needed to keep our state government running (*e.g.*, to pass the annual budget) and to address urgent, unforeseen issues (*e.g.*, COVID-19). If a racially gerrymandered legislature could not enact ordinary legislation until district lines were redrawn and new elections held, the machinery of government would grind to a halt, and emergencies could go unaddressed. In this respect, the Court of Appeals was correct: Denying a gerrymandered General Assembly the power to pass regular laws would create chaos and confusion.

The same is not true of the power to propose constitutional amendments. Constitutional amendments do not keep our State running on a daily basis or address short-term emergencies. No one is suggesting, for example, that we should amend the Constitution to address COVID-19. As a result, there would be nothing chaotic or confusing about a ruling that would have the effect of temporarily limiting the General Assembly's power to propose constitutional amendments until the racial gerrymander is undone.

There is also a far greater threat that a gerrymandered legislative supermajority could entrench its policy preferences in state law through a

proposed constitutional amendment than through ordinary legislation. A simple majority can change ordinary legislation that has been adopted by a racially gerrymandered legislature. That is true even if the legislation was adopted by a supermajority of the General Assembly through a veto override. Statutes passed by overriding a veto remain statutes, and a bare majority of a future legislature can repeal them. Thus, a minority group like the Legislative Black Caucus can form or join a majority coalition to repeal or amend laws passed by a gerrymandered supermajority when the gerrymander is remedied or the political tides change.

Again, however, the same is not true of constitutional amendments. A constitutional amendment—unique among legislative acts—cannot be undone through legislation passed by a simple majority. It can instead be undone only through another constitutional amendment, which requires another legislative supermajority. Thus, a racially gerrymandered supermajority can use constitutional amendments to lock in its policy preferences indefinitely. This permanence of constitutional amendments sets them apart.[7]

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[7] The difficulty of undoing constitutional amendments was a significant part of their appeal for Defendants. *See, e.g.*, Speaker Tim Moore, *Taxpayer Protection Cap in State Constitution Approved by N.C. House*, http://speakermoore.com/taxpayer-protection-cap-state-constitution-approved-n-c-house/ (emphasizing that the Tax Amendment would "safeguard" tax cuts and protect taxpayers from future increases).

This case illustrates the point. After *Covington* finally forced the creation of state legislative districts untainted by racial gerrymandering, North Carolina voters broke the unlawful supermajority. A future election could make the Legislative Black Caucus part of a majority coalition. But even then, despite the will of a majority of North Carolina voters, expressed in a free and fair election, the Caucus and its allies still could not undo the damage created by the unconstitutional supermajority's acts.

For example, if Defendants had adopted voter ID only by statute, a future majority coalition including the Legislative Black Caucus could have undone or amended that statute. But Defendants instead sought to adopt voter ID through a constitutional amendment. If the Court allows that amendment to stand, the Caucus will be able to change it only by forming a *supermajority* coalition—a far more difficult task, and perhaps even an impossible one, given the disproportionate burdens that voter ID requirements impose on voters of color. *See supra* at 9.

For these reasons, as the trial court concluded, "the requirements for amending the state Constitution are unique and distinct from the requirements to enact other legislation," and the improperly constituted General Assembly was "therefore not empowered to pass legislation *that would amend the state's Constitution*." Order ¶ 10. There is nothing chaotic or confusing about a ruling that a supermajority made possible through racial

gerrymandering cannot cast its policy preferences into constitutional stone, even while it retains the power to pass ordinary legislation. *Id.* ¶ 9. In concluding to the contrary, the Court of Appeals erred.

The Court of Appeals' failure to distinguish between proposed constitutional amendments and ordinary legislation also led it astray in the remainder of its decision. For example, the Court of Appeals concluded that this Court's decision in *Leonard v. Maxwell* controls this case. *See N.C. NAACP*, 849 S.E.2d at 94 (principal op.) (discussing *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316 (1939)). But *Leonard* involved a challenge to ordinary legislation (a sales tax), not a challenge to constitutional amendments. *See Leonard*, 3 S.E.2d at 319. *Leonard* thus does not speak to whether an unlawfully constituted legislature has the power to amend the North Carolina Constitution.[8]

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[8] It is true that *Leonard* contains language stating that the plaintiff's challenge in that case presented a political question. *See Leonard*, 3 S.E.2d at 324. But that language reflects a bygone era when political-question-type reasoning was invoked to reject challenges to state constitutional amendments that disenfranchised African Americans in the Jim Crow South. *See generally* Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 Const. Comment. 295 (2000) (discussing *Giles v. Harris*, 189 U.S. 475 (1903), and its historical context). Any such approach is out of step with modern decisions on the political question doctrine, which make clear that courts not only can, but must, rule on challenges to state laws that target minority voting rights. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 216 (1962) (challenge to legislative apportionment did not present a political question); *Gomillion v. Lightfoot*, 364 U.S. 339, 346-47 (1960) (same for racial gerrymandering). More generally, modern decisions make clear that when "a government action is challenged as

The Court of Appeals further erred in relying on other decisions that similarly permitted gerrymandered legislatures to enact ordinary laws. *See N.C. NAACP*, 849 S.E.2d at 94-95 (principal op.); *id.* at 102-03 (concurring op.). Because those decisions did not address whether gerrymandered legislatures may propose constitutional amendments, they are inapposite here.

The Court of Appeals also erroneously reasoned that, because constitutional amendments must be approved by the people, there is a stronger argument for allowing a racially gerrymandered legislature to propose constitutional amendments than for allowing it to enact ordinary legislation. *See N.C. NAACP*, 849 S.E.2d at 96 (principal op.); *id.* at 101, 104 (concurring op.). As explained above, declaring that a gerrymandered legislature cannot pass ordinary laws would create serious practical problems; declaring that a gerrymandered legislature cannot propose constitutional amendments would not. The requirement to submit constitutional amendments to the people does not change that calculus. In fact, this requirement reinforces the point that constitutional amendments are more difficult to adopt, and more difficult to undo, than legislation—which is why it makes sense to deny a gerrymandered General Assembly only the authority to propose constitutional amendments.

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unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997).

Put differently, even if a bare majority of voters approves an amendment proposed by a racially gerrymandered supermajority, that vote does not cleanse the amendment of its unlawful origins. The three-fifths requirement exists to ensure that *more than* a bare majority of voters, acting through their representatives, is needed to amend the Constitution. Here, the purported legislative supermajority was the product of an unlawful racial gerrymander; the constitutional requirement was unmet. The Court of Appeals therefore overlooked the process required by the Constitution itself in determining that a gerrymandered legislature may propose constitutional amendments merely because those amendments must later be submitted to a bare majority vote.

In sum, the Court of Appeals erred in concluding that chaos and confusion would ensue from a ruling that a racially gerrymandered supermajority cannot make permanent changes to the North Carolina Constitution. That ruling would correctly result in the invalidation of the tainted amendments at issue here—and nothing more.

CONCLUSION

For the foregoing reasons, the North Carolina Legislative Black Caucus urges this Court to reverse the Court of Appeals.

Respectfully submitted this 2nd day of December, 2020.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

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This 2nd day of December, 2020.

Electronically Submitted
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