No. 267P18 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ROY COOPER, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE;
TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

From Wake County
No. 18 CVS 9805

****

GOVERNOR ROY COOPER'S PETITION FOR WRIT OF SUPERSEDEAS OR PROHIBITION, MOTION FOR TEMPORARY STAY, AND MOTION TO SUSPEND APPELLATE RULES

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PETITION FOR WRIT OF SUPERSEDEAS OR PROHIBITION

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The more things change, the more they stay the same. The events of the past few weeks have followed a pattern that has become all too familiar in our State in recent years. The General Assembly violated the North Carolina Constitution—it devised false and misleading ballot questions that threatened to deceive the voters into adopting proposed constitutional amendments that would have abolished the separation of powers. The General Assembly was caught red-handed—the Governor challenged this violation, and the courts did their constitutional duty by enjoining the legislature's overreach. The General Assembly has now retreated to a new position less extreme than its original one—adopting new proposed amendments and ballot questions that omit some of the most problematic aspects of the originals. But the General Assembly's new position is *still* unconstitutional—the new ballot questions are still misleading, and they still fail to provide the voters with the information they need to make an intelligent decision on the wisdom of the new proposed amendments.

Yesterday, a three-judge federal district court called out the General Assembly for this very pattern of committing unconstitutional actions, and then altering those actions without curing them. In *Common Cause v. Rucho*, 2018 WL 4087220 (M.D.N.C. Aug. 27, 2018), the court observed that this same General Assembly, when proposing remedial districts to address "one of the most widespread racial gerrymanders ever encountered by a federal court," nevertheless offered a proposal that would have maintained the racial gerrymander. *Id.* at *109.

This pattern of doubling down on the manipulation of election outcomes "call[s] into question the General Assembly's commitment to enacting constitutionally compliant, non-discriminatory election laws." *Id.* The General Assembly has repeated this same sad pattern by adopting new ballot questions that are less egregious, but still unconstitutional—rendering it necessary for the courts to stop these new questions from appearing on the November 2018 ballot.

Although the usual course would be to seek this relief in the trial court in the first instance, the General Assembly's actions have foreclosed that course here. To satisfy federal deadlines for making absentee ballots available to voters, the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the "Board") must begin preparing those ballots no later than September 1. The General Assembly has sought to run out the clock by pursuing, and ultimately dropping, an appeal concerning its original proposals, and by adopting its new proposals only yesterday, five days before the ballot deadline. The consequence of this gamesmanship is that it is already too late for the Governor to return to the trial court and secure an order preventing these ballot questions from appearing on the ballot.

At this point, only this Court can provide that relief. To maintain the status quo and prevent the General Assembly from misleading the voters into amending their Constitution, the Court should issue its writ of supersedeas—or, in the alternative, its writ of prohibition—and prevent these new ballot questions from appearing on the ballot.

BACKGROUND

I. The original proposed amendments

On the morning of 6 August 2018, the Governor brought suit in Wake County Superior Court to challenge two ballot questions that the General Assembly had devised to submit proposed constitutional amendments (contained in Session Laws 2018-117 and 2018-118) to the voters. The Governor claimed that these ballot questions violated the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108 because they were misleading, incomplete, and discriminatory. He sought a temporary restraining order and a preliminary injunction to prevent the ballot questions from going on the ballot.[1]

That afternoon, Defendants the Board and James A. ("Andy") Penry, in his official capacity as Chair of the Board (together, the "State Board Defendants"), filed their responsive papers, in which they answered the Complaint, crossclaimed against Defendants Philip E. Berger and Timothy K. Moore (the "Legislative Defendants"), and moved for a temporary restraining order and a preliminary injunction.

The following day, 7 August 2018, the Honorable Paul C. Ridgeway heard the Governor's and the State Board Defendants' motions for temporary restraining

[1] The Governor's Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction, as well as the other pleadings and orders from the trial court proceedings, are included in the appendix to the Governor's Petition for Discretionary Review Prior to Determination by the Court of Appeals and Motion to Suspend Appellate Rules, filed in this Court on 22 August 2018.

order. That afternoon, Judge Ridgeway referred the case to a three-judge panel, and the Chief Justice assigned the members of the panel.

On 15 August 2018, the panel heard the pending motions for preliminary injunction. On 21 August 2018, a majority of the panel ruled that the Governor and the State Board Defendants had established a substantial likelihood that they would prevail on the merits of their claims that the ballot questions at issue violated the North Carolina Constitution. Order on Injunctive Relief ¶ 58 ("Order").[2] The panel also ruled that placing these questions on the ballot would inflict irreparable harm on the Governor and the State Board Defendants. *Id.* ¶ 59. The panel therefore granted a preliminary injunction and enjoined the ballot questions from appearing on the November 2018 ballot. *Id.* ¶ 60. On 23 August 2018, Judge Carpenter filed a separate opinion dissenting from portions of the Order.

On 22 August 2018, the Governor petitioned this Court to grant discretionary review, prior to determination by the Court of Appeals, of any appeal of the Order pursued by the Legislative Defendants. At about the same time, the Legislative Defendants noticed an appeal of the Order. Later that evening, the Legislative Defendants filed a petition for a writ of supersedeas and a motion for temporary stay in the Court of Appeals. On 23 August 2018, the Court of Appeals stayed the Order pending a ruling on the Petition, and stayed the preparation or printing of ballots pending further order of the Court. Today, 28 August 2018, the Court of

[2] The Order is included in the appendix to this petition at App. 7.

Appeals dissolved the stay of the Order and the stay against the preparation and printing of ballots.

II. The new proposed amendments

On 24 August 2018, the General Assembly convened a special session to enact new versions of the proposed amendments that the panel had enjoined. The House of Representatives passed those proposals on August 24, and the Senate passed them on August 27—five days before the September 1 deadline for preparing the official ballots for the November 2018 general election.

The first proposed amendment (the "Elections Board Proposal") would restructure the Board to have eight members rather than the current nine. *See* Session Law 2018-133, § 1.[3] The Governor would appoint the members of the Board, but he could not appoint more than four members from the same political party, and he would be required to choose the appointees from lists submitted by the majority and minority leaders in the General Assembly. *See id.* The proposed amendment would therefore overrule this Court's decision, in *Cooper v. Berger*, that a materially identical configuration of the Board violated the separation of powers by preventing the Governor from appointing a majority of members who shared his policy views and preferences. *See* 370 N.C. 392, 413-18, 809 S.E.2d 98, 110-14 (2018).

The General Assembly has provided that this proposal will be submitted to the voters using the following ballot question (the "Elections Board Ballot Question"):

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[3] Session Laws 2018-132 and 2018-133 are included in the appendix to this petition at App. 1 and App. 5, respectively.

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.

Session Law 2018-133, § 2.[4]

The second proposed amendment (the "Judicial Vacancies Proposal") would repeal the provision of the Constitution (Article IV, § 19) granting the Governor the power to fill judicial vacancies. Session Law 2018-132, § 4. In its place, the proposal would add a new constitutional provision creating the following system for filling judicial vacancies:

- When a vacancy occurs in the office of Justice or Judge, the people of the State would submit nominations to a commission, whose members would be appointed by the Chief Justice, the Governor, and the General Assembly. Session Law 2018-132, § 1.
- The commission would inform the General Assembly whether each nominee was "qualified or not qualified to fill the vacant office, as prescribed by law." *Id.*
- The General Assembly would choose two or more of the qualified nominees and recommend them to the Governor. *Id.*
- The Governor would be required to appoint one of the nominees recommended by the General Assembly. If the Governor did not make such an appointment within ten days, the General Assembly would elect an appointee to fill the vacancy. *Id.*
- Rather than serving until the next general election (as under current law), the appointees would serve until the next election

[4] The Elections Board Proposal would make changes to the Board similar to those in the original proposal in Session Law 2018-117, and the Elections Board Ballot Question would describe those changes to the Board in terms similar to those in the original ballot question. The Elections Board Proposal and Ballot Question omit the remainder of the original proposal and ballot question.

> *after that*—meaning that the appointees could serve for more than two years without being subject to election. *Id.*

The General Assembly has provided that this proposal will be submitted to the voters using the following ballot question (the "Judicial Vacancies Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

Session Law 2018-132, § 6.[5]

When it enacted these new proposed amendments, the General Assembly did not repeal the original proposed amendments. Instead, it chose to rely on the preliminary injunction entered by the panel—a preliminary injunction that the Legislative Defendants had repeatedly insisted, both before the panel and on appeal, that the courts lacked jurisdiction to enter—as a backstop to prevent conflicting proposals from appearing on the ballot. To that end, after adopting the

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[5] Unlike the original proposed amendment in Session Law 2018-118, the new proposed amendment in Session Law 2018-132 includes the words "containing no other matter" in a portion of the proposal that exempts judicial vacancy bills from the Governor's veto. *See* Session Law 2018-132, § 5. The new proposed amendment is otherwise the same as the original one, but the corresponding ballot questions are different.

new proposals on 27 August 2018, the Legislative Defendants moved to dismiss their appeal and withdraw their supersedeas petition in the Court of Appeals.

STATEMENT OF ISSUE PRESENTED AND RELIEF SOUGHT

The issue presented by this petition is whether the ballot questions in Session Laws 2018-132 and 2018-133 violate North Carolina law. The relief sought is to prevent these ballot questions from appearing on the official ballot for the November 2018 general election.

REASONS WHY A WRIT SHOULD ISSUE

North Carolina law requires ballot questions concerning proposed constitutional amendments to be fair and accurate. Indeed, the Legislative Defendants conceded as much in the Court of Appeals when they disavowed any "claim that the [North Carolina] Constitution would condone misleading, unfair, or inaccurate language on the ballot." Petition for Writ of Supersedeas and Motion for Temporary Stay, No. P18-584, at 29.

Like the original ballot questions enjoined by the panel, however, the new ballot questions adopted by the General Assembly are neither fair nor accurate. They are instead misleading and incomplete. These ballot questions therefore violate the North Carolina Constitution. And they would cause irreparable harm to the Governor and the people of North Carolina if they appeared on the November 2018 ballot.

Because the General Assembly waited until yesterday to adopt these ballot questions, time is too short—and the questions here too important—for the Governor to seek relief in the trial court prior to the September 1 deadline for

preparing official ballots. Only this Court can take the prompt, decisive action needed to preserve the status quo and prevent the General Assembly from misleading the people into amending their Constitution. Pursuant to Sections 1 and 12(1) of Article IV of the North Carolina Constitution, Section 7A-32(b) of the North Carolina General Statutes, and Rules 2, 8, 22, and 23 of the North Carolina Rules of Appellate Procedure, this Court should issue a writ of supersedeas or prohibition to prevent these new ballot questions from appearing on the November 2018 ballot. *See, e.g.*, *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987) ("Through its inherent power [protected by Article IV, § 1,] the court has authority to do all things that are reasonably necessary for the proper administration of justice."); *State v. Ellis*, 361 N.C. 200, 205, 639 S.E.2d 425, 428 (2007) ("[T]his Court will not hesitate to exercise its rarely used general supervisory authority [under Article IV, § 12(1)] when necessary to promote the expeditious administration of justice, and may do so to consider questions which are not properly presented according to its rules." (internal quotation marks omitted)).

I. North Carolina law requires ballot questions concerning proposed constitutional amendments to be fair and accurate.

The North Carolina Constitution provides that the people alone have the power to amend their Constitution. In fact, it says so twice. Article I, § 3 provides that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government." Article XIII, § 2 reaffirms that "[t]he

people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution."

The General Assembly, in contrast, does not have the power to amend the Constitution. Rather, it has the power to *propose* amendments to the Constitution. *See* N.C. Const. art. XIII, § 4. To do so, the General Assembly must "adopt an act *submitting the proposal* to the qualified voters of the State for their ratification or rejection." *Id.* (emphasis added).

Inherent in this mandate to submit proposed amendments to the voters—and in the principle that the people alone can amend their Constitution—is a requirement that the ballot fairly and accurately reflect the proposed amendment. Otherwise, as a majority of the three-judge panel in this case reasoned, the General Assembly has not actually submitted the proposal to the voters. It has instead taken for itself—and from the people—the power to amend the Constitution. *See* Order ¶ 45 ("In order for the proposals to be submitted to the will of the people, the ballot language must comply with . . . constitutional requirements . . . .").[6]

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[6] Although Article XIII, § 4 authorizes the General Assembly to prescribe the "manner" for submitting proposed amendments to the voters, that provision does not (as the Legislative Defendants have repeatedly argued) grant the General Assembly carte blanche to say whatever it likes on the ballot—however false and misleading. As the U.S. Supreme Court has held when interpreting similar language in the Elections Clause of the U.S. Constitution (which grants authority to the states to regulate the "times, places and manner of holding elections for Senators and Representatives"), the term "manner" "encompass[es] matters like notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (internal quotation marks omitted). "Manner" does not encompass "dictat[ing] electoral outcomes," favoring particular results, or "evad[ing] important

Because the General Assembly has never before attempted to amend the Constitution through deceit, the North Carolina courts have not previously had occasion to hold that the Constitution requires fair and accurate ballot questions concerning proposed amendments. But courts in other states have interpreted similar constitutional provisions to require ballot language concerning proposed amendments to be fair and accurate.

For example, the Florida constitution provides that amendments proposed by the legislature "shall be submitted to the electors." Fla. Const. art. XI, § 5. "Implicit in this provision," the Florida Supreme Court has held, "is the requirement that the proposed amendment be *accurately* represented on the ballot; otherwise, voter approval would be a nullity." *Armstrong v. Harris*, 773 So. 2d 7, 12 (Fla. 2000). This requirement imposes "a kind of 'truth in packaging' law for the ballot," under which "the ballot [must] be fair and advise the voter sufficiently to enable him intelligently to cast his ballot." *Id.* at 13 (internal quotation marks and emphasis omitted).

The Idaho constitution likewise requires that, when the legislature proposes an amendment, it must "submit such [proposed] amendment or amendments to the electors of the state." Idaho Const. art. XX, § 1. Under this provision, the Idaho

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constitutional restraints." *Id.* at 523 (internal quotation marks omitted). Consistent with that reasoning, Article XIII is properly understood to permit the General Assembly to frame ballot language concerning a proposed amendment—but not to permit the General Assembly to represent the proposal on the ballot in unfair and inaccurate terms. After all, Article XIII also mandates that, when the General Assembly proposes an amendment, "[t]he proposal shall be submitted" to the voters. N.C. Const. art. XIII, § 4. A proposal has not been "submitted" to the voters if the ballot asks them to vote on something *substantively different from* the proposal. *See* Order ¶ 45. That is what unfair and inaccurate ballot language does.

Supreme Court has held, "[t]he Legislature cannot propose one question and submit to the voters another." *Lane v. Lukens*, 283 P. 532, 533 (Idaho 1929); *see also, e.g.*, *Nez Perce Tribe v. Cenarrusa*, 867 P.2d 911, 913 (Idaho 1993) (reaffirming that the Idaho constitution requires the ballot to advise the voter of "the actual issue to be determined" (quoting *Lane*, 283 P. at 533)).

As the panel in this case correctly concluded, the same is true under North Carolina law. Indeed, interpreting the North Carolina Constitution to require fair and accurate ballot questions concerning proposed constitutional amendments follows from longstanding principles of North Carolina law.

For example, the panel relied on *Hill*, a decision of this Court arising from a proposal to raise school board funds in Lenoir County through new property taxes. *See* 97 S.E. at 499. The proposal included taxes at both the county level and the township level. *See id.* But the question put to the voters referred only to the county tax, and not the township tax. *See id.* at 498, 501. This Court held that, as a result, the township tax proposal had not been "submitted" to the voters, and the voters had not ratified it. *See id.* at 501. In reaching that conclusion, the Court articulated a principle that the panel emphasized here: The language submitted to the voters must "fully inform[] [them] of the question they are called upon to decide," and "it is essential that it be stated in such manner as to enable them intelligently to express their opinion upon it." *Id.* at 500-01; *see* Order ¶ 43. To do otherwise, *Hill* reasoned, would violate "the very spirit of popular elections" and "the sacred and inviolable

right of the citizen, under the Constitution itself, to be heard at the ballot box." 97 S.E. at 502-03.

Similarly, in *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971), this Court confronted a challenge to a municipal bond referendum on grounds that city officials had issued inaccurate information prior to the election. Although the Court concluded that inaccurate statements outside the ballot did not call the results of the referendum into question, it reasoned that the referendum could have been invalidated had the ballot itself contained any "misleading statement or misrepresentation." *Id.* at 119, 179 S.E.2d at 447.

If ballot questions must fully and fairly inform voters about a local property tax proposal (*see Hill*), and if ballots cannot contain misleading statements or misrepresentations concerning a municipal bond referendum (*see Sykes*), it follows even more strongly that these same principles apply to proposed constitutional amendments that would alter the balance of powers in state government.

Moreover, like many other states, North Carolina has enacted a statute codifying a requirement that ballot questions be fair and accurate. Section 163A-1108 provides that the Board "shall ensure that official ballots throughout the State" are "readily understandable by voters" and "[p]resent all candidates and questions in a fair and nondiscriminatory manner." N.C. Gen. Stat. § 163A-1108(1)-(2). This statutory mandate reinforces the conclusion that the Constitution requires fair and accurate ballot questions for proposed amendments. *Cf. Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 254 (1997) (observing, in the course of

interpreting the Constitution to grant a right to a sound basic education, that the General Assembly had "embraced that right" by statute). Furthermore, because this statutory requirement applies to "official ballots throughout the State," it applies to ballot questions concerning proposed amendments—and thus independently requires those ballot questions to be fair and accurate.

In applying analogous constitutional and statutory provisions, courts in other states have adopted a common set of judicial standards for determining when ballot language concerning proposed constitutional amendments is unlawful. These decisions provide helpful guidance in applying the requirement of fairness and accuracy that North Carolina law demands. For example:

- Courts have held that ballot language is unlawful when it is misleading.[7]
- Courts have held that ballot language is unlawful when it suffers from material omissions.[8] Put differently, as the panel

[7] *See, e.g.*, *Kimmelman v. Burgio*, 497 A.2d 890, 895-96 (N.J. App. Div. 1985) (determining ballot language was misleading because it "indicat[ed that] the amendment involve[d] only a routine housekeeping matter" and "further[ed] a power the Legislature already ha[d]," whereas the proposed amendment actually would have "alter[ed] the basic relationship between the executive and legislative branches of government" and overruled a decision of the New Jersey Supreme Court); *Armstrong*, 773 So. 2d at 18 (ruling ballot language was misleading because it implied that the proposed amendment would have expanded the constitutional rights of Florida citizens, when it actually would have "nullif[ied] those rights"); *Fla. Dep't of State v. Mangat*, 43 So. 3d 642, 646, 648 (Fla. 2010) (holding ballot language was misleading because it described the proposal as "ensur[ing] access to health care services without waiting lists" and "protect[ing] the doctor-patient relationship," when the proposal did not even address those matters); *Lane*, 283 P. at 533-34 (concluding ballot language was "diametrically opposed" to the proposal because it described the proposal as "limit[ing]" various terms of office to four years, whereas the proposal actually would have extended those terms from two years and fixed them at four years).

concluded, courts have concluded that ballot language should "fairly present[ ] to the voter the *primary purpose and effect* of the proposed amendment." Order ¶ 44 (emphasis added) (citing, *e.g.*, *Stop Slots MD 2008 v. State Bd. of Elections*, 34 A.3d 1164, 1191 (Md. 2012)).

- Courts have held that ballot language is unlawful when it characterizes the measure in a subjective, argumentative, or partisan manner—or, as N.C. Gen. Stat. § 163A-1108 puts it, when the ballot language is "discriminatory."[9]

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[8] *See, e.g.*, *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 127-29 (Ohio 2012) (holding ballot language was materially incomplete because it failed to identify who would select the members of a proposed redistricting commission or what criteria the commission would use in drawing districts—matters that went to "the very core of the proposed amendment"); *Askew v. Firestone*, 421 So. 2d 151, 155-56 (Fla. 1982) (ruling ballot language was materially incomplete because it described a proposal as prohibiting former elected officials from lobbying state bodies or agencies for two years unless they filed a financial disclosure—yet failed to mention that there was already an *absolute* bar on lobbying for two years, and that the proposal's chief effect would have been to "abolish the present two-year total prohibition"); *Anne Arundel Cty. v. McDonough*, 354 A.2d 788, 803-05 (Md. 1976) (determining ballot language was materially incomplete because it failed to inform the voters about the nature of a rezoning proposal or sufficiently identify the parcels that would be rezoned); *Johnson v. Hall*, 316 S.W.2d 197, 198-99 (Ark. 1958) (concluding ballot language was materially incomplete because it described a proposed amendment as "requir[ing] adequate safety devices at all public railroad crossings" without informing voters of the scope of the proposed requirements or the burdens that they would impose (capitalization altered)); *Sears v. Treasurer & Receiver Gen.*, 98 N.E.2d 621, 631-32 (Mass. 1951) (deciding ballot language was materially incomplete because it failed to inform the voters, among other things, how a proposal to provide monetary assistance to the elderly would be funded and administered).

[9] *See, e.g.*, *State ex rel. Bailey v. Celebrezze*, 426 N.E.2d 493, 494-95 (Ohio 1981) (concluding ballot language was "in the nature of an argument" because it implied, without any apparent objective basis, that the proposal would require taxpayers to bear some of the costs of workers' compensation and would change the existing workers' compensation system from a non-profit system to a for-profit one); *Evans v. Firestone*, 457 So. 2d 1351, 1355 (Fla. 1984) (determining ballot summary amounted to "editorial comment" and "subjective evaluation" when it asserted that a proposal would "avoid[ ] unnecessary costs").

These decisions ultimately reflect a standard that the panel in this case summarized well: A ballot question must fully and fairly inform the voters of what is at stake and facilitate their intelligent, independent decision on the proposed amendment. *See* Order ¶¶ 43-44, 55, 57; *Hill*, 97 S.E. at 500-01; *Armstrong*, 773 So. 2d at 13. When a ballot question violates that standard, it has no place on the ballot.

II. The ballot questions here violate North Carolina law.

The new ballot questions that the General Assembly passed yesterday violate North Carolina law. Although the General Assembly has excised some of the more flagrant aspects of the original ballot questions that the panel enjoined, the new versions are still neither fair nor accurate. They are still misleading. They are still incomplete. And they still fail to inform voters of their primary purpose and effect. Ultimately, these ballot questions still do not fully and fairly inform the voters of what is at stake or facilitate an intelligent, independent decision on the proposed amendments. These new ballot questions therefore violate both the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108. Like the first-try ballot questions enjoined by the panel, these new ballot questions should not be included on the November 2018 ballot.

A. The Elections Board Ballot Question

The Elections Board Ballot Question describes the Elections Board Proposal as a "[c]onstitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law." Session Law 2018-133, § 2. This ballot question violates North

Carolina law because it does not give voters the information they need to make an intelligent, informed decision whether to amend their Constitution.

First, it is false, misleading, and incomplete for the ballot question to state that the Separation of Powers Proposal would "establish" the State Elections and Ethics Board. Session Law 2018-117, § 5. That Board already exists. Indeed, it is a Defendant in this case. The General Assembly's use of the word "establish" falsely and deceptively suggests—with the aim of fooling voters into ratifying the proposal—that the voters need a constitutional amendment to create a board to administer our ethics and elections laws. Because this is not the case, the question is misleading. *See Evans*, 457 So. 2d at 1355 (holding that ballot language was misleading because it stated that a proposal would "establish[]" citizens' rights in civil actions, whereas one aspect of the proposal (the availability of summary judgment) "ha[d] long been established in Florida," and the effect of the proposal was actually "to elevate this procedural rule to the status of a constitutional right").

The inclusion of the words "in the Constitution" in the ballot question do not remedy this failing. To the contrary, they highlight exactly why the question is misleading. If a voter even notices these three words, they appear innocuous, even redundant. Of course a proposal to amend the Constitution to create an elections board would establish that board in the Constitution—where else? Why do the Legislative Defendants seek to amend the Constitution to establish an elections board "in the Constitution"? The answer—again, one not provided to voters—is that

the North Carolina Constitution currently bars them from exercising the level of control they desire over the existing Board.

Just seven months ago, in *Cooper v. Berger*, the Supreme Court rejected the General Assembly's most recent attempt to exercise control over the board that controls the conduct of elections. In that case, the Court resolved "a conflict between two competing constitutional provisions," the Governor's duty under the Take Care Clause to see that the laws are faithfully executed under Article III, § 5(4), and the legislature's ability to prescribe "functions, powers, and duties" of state agencies and boards under Article III, § 5(10). 370 N.C. at 412, 809 S.E.2d at 110. The Court's analysis followed the framework established in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), which was in turn built on a foundation of earlier precedents, and ultimately on the Separation of Powers Clause of the Constitution.

Under these cases, the General Assembly unconstitutionally interferes with the Governor's duties under the Take Care Clause when it attempts to establish a structure whereby officers appointed by the legislature "form a majority on a commission that has the final say on how to execute the laws." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. This is because such a structure would strip the Governor of his constitutional duty to "take care that the laws are faithfully executed in that area," and the "separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself." *Id.*

In *Cooper*, the Court made clear that this principle is functional, not formulaic, and the question is whether the Governor has "the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed." 370 N.C. at 415, 809 S.E.2d at 112. In applying this standard to election board legislation similar to the proposed amendment at issue here, the Court held that the legislation "impermissibly, facially, and beyond a reasonable doubt interfere[d] with the Governor's ability to ensure that the laws are faithfully executed." *Id.* at 418, 809 S.E.2d at 114.

There can be no dispute that the proposed constitutional amendment is an attempt to overcome this ruling. But the decisions in *McCrory* and *Cooper* represent the settled resolution of a dispute involving all three branches of government. The legislature intruded on the Governor's constitutional authority, the executive challenged this overreach, and the judiciary adjudicated the dispute in favor of the Governor. As a matter of settled precedent, and in the face of final rulings entered pursuant to this Court's exercise of its supreme judicial power, this has to mean something.

But the General Assembly is unhappy with the answer, and it has responded by reopening the dispute on two fronts. Earlier this year, it passed legislation in an attempt to circumvent this Court's ruling in *Cooper*—legislation that is the subject of ongoing judicial proceedings before a three-judge panel. Indeed, the Legislative Defendants have asked that panel to withhold decisions on pending motions to see if their efforts to amend the Constitution succeed—further highlighting the

connection between the proposed constitutional amendment and the ongoing fight over the meaning of the Separation of Powers Clause and the Take Care Clause.

The Legislative Defendants have also pursued a flanking action, attempting to make an end run around existing constitutional limits on their power by amending the Constitution itself. To be clear, the Governor does not contend the Constitution prohibits this. Under the Constitution, the General Assembly may ask voters whether they would like to amend the Constitution to overturn the losses it has experienced in the courts and reallocate the balance of power between the executive and legislative branches, nullifying this Court's judicial decisions in the process. What it cannot do is to attempt to achieve this result while pretending it is doing something else. *See Kimmelman*, 497 A.2d at 895-96 (holding that ballot language was misleading because, as here, it portrayed a proposed amendment as a "routine housekeeping matter," when the proposal actually would have overruled a decision of the New Jersey Supreme Court and "alter[ed] the basic relationship between the executive and legislative branches of government").

If the General Assembly wants the voters of this State to take their side and support their ongoing efforts to enhance their control over state government, it must ask them directly. On this score, the Elections Board Ballot Question fails. It says nothing of the ongoing dispute it is intended to resolve, and it does not even hint that it would overturn decisions of this Court. Accordingly, the question is too misleading and incomplete to enable the voters to make an informed decision on how to resolve these important issues. In short, the answer the Legislative

Defendants seek—that they can amend the Constitution to give them control over the Elections Board that the Separation of Powers and the Take Care Clauses currently prevent them from exercising—does not fall within the scope of the ballot question they seek to ask.

Second, it is incomplete to state that the Elections Board Proposal would establish the Board without providing any information about the manner in which the proposal would do so. In particular, the ballot question fails to convey that the General Assembly would recommend every member of the Board, and that the Governor would not have the authority to select candidates as he sees fit. Again, the context is critical: The Elections Board Proposal would overrule *Cooper v. Berger* and declare victory for the General Assembly in the years-long constitutional struggle over appointments to the Board. By failing to mention these matters, the ballot question not only fails to advise the voters fairly, it actively discourages them from making an informed, intelligent decision.

Third, it is misleading and argumentative to state that the Elections Board Proposal would make the Board "bipartisan." Session Law 2018-133, § 3. This phrasing suggests that the Board will act in a bipartisan manner. But the proposed amendment does not and cannot guarantee such a result. Indeed, having four members from each party could just as easily produce partisan gridlock—one of the reasons this Court invalidated the same structure in *Cooper v. Berger*. *See* 370 N.C.

at 415-16, 809 S.E.2d at 112-113 & n.12.[10] Ultimately, therefore, characterizing the Board as "bipartisan" is nothing more than argument—which has no place on a fair ballot.

Finally, in addition to being unfair and inaccurate by commission, the Elections Board Ballot Question is unfair and inaccurate by omission. This ballot question fails to mention that it would shift power from the Governor to the General Assembly, or even that it would *affect* the Governor, his duty to take care that the laws be faithfully executed, or the separation of powers. Indeed, none of these words and concepts even *appear* in this ballot question—even though taking authority away from the Governor is the primary purpose and effect of the proposed amendment. Far from advising the voters of what is at stake, therefore, this ballot question hides the ball. *See Johnson*, 316 S.W.2d at 198-99 (holding that ballot language was materially incomplete because it failed to inform voters about the scope of the changes that the proposed amendment would make). For all of these reasons, the Elections Board Ballot Question violates both the North Carolina

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[10] The Legislative Defendants have publicized that their prescribed bipartisan election commission is "modeled after the Federal Elections Commission." Press Statement on behalf of Speaker Moore, N.C. House Approves New Ballot Referendums Proposing Bipartisan Oversight of Elections and Judicial Appointments (Aug. 24, 2018) http://speakermoore.com/n-c-house-approves-two-new-ballot-referendums-proposing-bipartisan-oversight-ethics-enforcement-judicial-appointments/. The Federal Elections Commission, however, is notoriously ineffective, producing deadlocked decisions that "blink[] reality." C*itizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016). Indeed, to the extent that deadlock diminishes early voting opportunities that the Legislative Defendants see as adverse to their interests, this may be precisely the point.

Constitution and N.C. Gen. Stat. § 163A-1108. This question should not appear on the ballot.

B. The Judicial Vacancies Ballot Question

The Judicial Vacancies Ballot Question would lead voters to think they are being asked to change the process for filling judicial vacancies from a system controlled by a single branch of government, the executive, to a new and improved system in which the people of North Carolina will have opportunities to provide input, all three branches of government will share authority for determining judicial qualifications, and authority will be divided between the legislature (recommending) and the governor (appointing). This is all a charade. The ballot language obfuscates the primary purpose and effect of this proposed amendment: to strip the Governor of his constitutional authority to appoint judges, transfer that authority to the exclusive control of the General Assembly, and entrench the legislature's preferred judges by extending their terms in the vacant seats they would fill.

Not only does the ballot question hide the true nature of these proposed changes, it is argumentative, unfair, and discriminatory. It implies that the amendment is based on principles of popular sovereignty and separation of powers, luring the voter to support it in the belief that it is a good government measure. But the invocation of these high ideals is subterfuge. The primary purpose and effect of this proposed amendment are to consolidate power to appoint judges in the legislature, and to diminish the roles of the executive and informed citizens in the process.

It is particularly pernicious and brazen to invoke cherished democratic ideals of separation of powers in ballot language that promotes an amendment actually designed to consolidate power in the legislature. Fortunately, as set forth above, North Carolina law does not permit deceiving the voters in this fashion. For the legislature to properly exercise its authority to submit a proposed amendment under Section 4 of Article XIII, "it is essential that [the question] be stated in such a manner to enable them intelligently to express their opinion upon it." *Hill*, 176 N.C. at 578. The proposed ballot language falls well short of this requirement. Indeed, it is designed to trigger a positive response in voters by alluding to the positive (separation of powers, checks and balances) and disguising the negative (concentration of power in a single branch). This effort, relying as it does on misleading the voters, violates the Constitution.

More specifically, here is how the ballot question frames the question for voters. On entering the voting booth, they would be asked to decide whether they are "FOR" or "AGAINST" changing the process for filling judicial vacancies:

"from a process in which"	"to a process in which"
"the Governor has sole appointment power"	"the people of the State nominate individuals to fill vacancies,"
	a "commission comprised of appointees made by the judicial, executive, and legislative branches" plays a role,
	there will be "recommendations to the legislature as to which nominees are deemed qualified,"
	the "legislature will recommend at least two nominees to the Governor," and
	the "Governor will appoint judges."

This question admits only one "correct" answer—FOR the proposal.[11] The current system is made to appear unitary, even monarchical. Many voters will believe that giving "sole" power to a single branch is bad, but few will know that the claim is inaccurate, and the ballot question will inform no one that the proposed amendment would repeal an important provision of our Constitution. The description of the proposed system, by contrast, paints a glowing portrait of the people collaborating with all three branches, with the legislature and the executive each having a role to play in the final decision. Paired with the misleading characterization of the existing process, its design is clear: to encourage voters to support the proposed amendment.

In both its description of the existing process and its summary of the proposed new process, the amendment and existing law reveal that the language voters would see on the ballot is deceptive and misleading. As detailed below, if the amendment were to appear on the ballot and pass, here is how the process for filling judicial vacancies would actually change:

[11] In other words, it "suggests the answer desired," which is the definition of a leading question. *State v. Howard*, 320 N.C. 718, 721 (1987). "The traditional North Carolina view is that . . . leading questions are undesirable because of the danger that they will suggest the desired reply to an eager and friendly witness." *Id.*

"from a process in which"	"to a process in which"
the Governor appoints judges to fill vacancies under § 19 of Article 4 of the Constitution,	the General Assembly takes a majority vote to pick judges under new § 23 of Article IV of the Constitution, Session Law 2018-132 § 1,
the Governor has a statutory obligation to give "due consideration" to nominations of district court judges by members of the bar, N.C. Gen. Stat. § 7A-142, and	after receiving nonbinding recommendations from a commission that is charged only with determining whether basic qualifications are met, *id.*,
all judges and justices appointed by the Governor are required to quickly stand for election by the voters, N.C. Const. Art. IV, § 19.	the legislature selects two or more judges from hundreds or thousands of names that will include their preferred candidates, and submits them to the Governor, *id.,*
Judges, who apply the law, are not beholden to legislators, who make the law.	the Governor must appoint one of the candidates, chosen by the legislature, *id.*, and
	judges chosen by the legislature serve up to four years before standing for election by the voters, *id.*

As this summary reveals, the ballot question utterly fails in its responsibility to communicate the primary purpose and effect of the proposed amendment to North Carolina voters. Nowhere in the lengthy ballot question do voters learn of the simple fact that the legislature will be the ultimate decision-maker in this process.

The specific details are as misleading as the general. Beginning with the existing process, it is not accurate to describe the Governor as holding "sole appointment authority." First, although the ballot question gives no such indication, the Governor's authority to fill judicial vacancies resides in the Constitution. Telling voters that they would be repealing (indeed removing) the Governor's constitutional authority to fill judicial vacancies would elicit a very different reaction from voters

than presenting the misleading suggestion that they will be distributing some of his "sole appointment power" to other branches.

Second, in making appointments to the district court bench, which is responsible for most of the public's regular interactions with the judiciary, from family law cases to misdemeanors and wills, the Governor has a statutory obligation to consider up to five candidates nominated from the local bar. *See* N.C. Gen. Stat. § 7A-142. Judicial districts conduct bar elections to make these nominations, and the Governor generally selects the top vote-getter. Thus, the district court judges whom our State's voters are most likely to encounter are not subject to the "sole appointment power" of the Governor, as the ballot question tells the voters. The district court judges are actually selected in cooperation with practicing attorneys in the district who know the candidates and have assessed their qualifications firsthand.

Finally, under Article IV, § 19 of the Constitution, the Governor can appoint a Justice or Judge for, at most, about two years. This is because all Justices and Judges the Governor appoints must stand for election at the next election for members of the General Assembly. *See* N.C. Const. Art. IV, § 19 ("[A]ppointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices."). Under the Constitution as it now stands, Justices and Judges are relieved from standing for election at the earliest possible opportunity *only* when next election occurs in fewer than 60 days—that is, in the situation where the new

appointee could not be added to the ballot. The design of the present system in the Constitution is to ensure that the Governor's appointees are quickly subject to review by voters, who will decide whether to keep or reject them. In short, our present system enables voters to play a central role in selecting their judges through elections, as the Constitution requires, even when vacancies occur.

Turning to the process the new amendment proposes, the ballot question begins with the misleading suggestion that the "people of the State" would now be more involved in selecting judges. Session Law 2018-132, § 6. This is false. The people could, indeed, nominate judges to the commission.[12] But the people's role is limited to providing names to the commission, and the amendment says nothing about the people's role beyond that fact, despite the question's indication that they will play a substantive role in the new process.

At this point, the commission is charged with determining whether these licensed attorneys are "qualified or not qualified to fill the vacant office, as prescribed by law." Apart from the sheer number of candidates, this would not be a challenging task; North Carolina law establishes only the most basic requirements for service as a Justice or Judge. First, a Justice or Judge must be "duly authorized to practice law in the courts of this State." N.C. Const. art. IV, § 22. Second, a

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[12] In fact, in the absence of implementing legislation, any one of the "people of the State" could presumably nominate every single licensed attorney in North Carolina by purchasing an Excel file from the State Bar for $10.00 and submitting it to the commission. *See* Member Mailing List Request Form, www.ncbar.gov/media/283879/member-mailing-list-request.pdf. As of 2017, there were 24,069 licensed North Carolina attorneys with in-state addresses. *See* N.C. State Bar, Annual Report 2017 at 7, *available at* https://www.ncbar.gov/media/490661/ncsb-annual-report.pdf.

Justice or Judge must be at least 21 years of age, and less than 72 years of age. N.C. Const. art. VI, § 6; N.C. Gen. Stat. § 7A-4.20. Third, judges must be eligible to vote in the district in which they serve. N.C. Const. art. VI, § 8; *see also* N.C. Gen. Stat. § 7A-140 (requiring district court judges to be residents of their districts). There are no other qualifications.

Indeed, legislative attempts to impose further qualifications could raise concerns under Section 1 of Article IV of the Constitution, a provision expressly designed to protect the judiciary from legislative interference. *See* Article IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article."). Thus, to the extent the General Assembly intends to claim that the new amendment grants it the authority to impose additional qualifications for judicial service, the ballot language becomes even more misleading. Any new qualifications established by the legislature (notwithstanding the express constitutional prohibition on meddling by the General Assembly) would involve a legislative determination of what it means for a judge to be "qualified." This is the opposite of the process described in the ballot language, which asserts that the *commission* is "charged with making recommendations *to the legislature* as to which nominees are deemed qualified." Session Law 2018-132, § 6 (emphasis added).

Next, the commission passes its recommendations to the legislature. *Id.* § 1. The proposed amendment does not charge the commission with rating or ranking candidates in any way. And even if they were, the General Assembly has no obligation to give any deference or consideration to the recommendations, in contrast to the Governor's statutory obligations regarding district court judges. *See id.* (omitting any requirement that the General Assembly actually do anything with the recommendations provided by the commission, other than pick their judges from a list likely to include hundreds of North Carolina lawyers). And of course, there is nothing to prevent individual legislators from submitting any names they like to the commission in the event that they wish to choose a judge that the commission had not already forwarded to them. The legislators pick their judges by majority vote and provide at least two names to the Governor. *See id.* ("The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section.").

At this point, the Governor must choose one of the judges selected by the legislature. *Id.* The Governor has 10 days to make his or her choice between the General Assembly's preferred candidates. *Id.* If he does not or cannot make a choice with this timeframe, the General Assembly does it for him. *See id.* ("If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law."). If the General Assembly is not in

session when a vacancy occurs, the Chief Justice can appoint a placeholder judge to serve until the General Assembly reconvenes. *Id.*

Finally, and significantly, the Judicial Vacancies Proposal would make a significant and undisclosed change to the current process for judicial elections following vacancies. As discussed above, judges appointed to fill vacancies currently "hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices." N.C. Const. art. IV, § 19. Under the proposed amendment, rather than standing for election in the next general election, the legislature's judicial vacancy appointees would be permitted to serve until the next election after that—perhaps an additional two years. The Judicial Vacancies Proposal would accomplish this shift by replacing the language in Section 19 with a new constitutional provision, Section 23(1), as follows:

> Appointees shall hold their places until the next election ***following the election for members of the General Assembly held after the appointment occurs***, when elections shall be held to fill those offices.

Session Law 2018-132, § 1 (emphasis added).

The purpose and effect of this provision are clear—it will confer an incumbency advantage on Justices and Judges the legislators have chosen. By permitting the judges they would appoint to serve out time remaining before the next election *and a full additional two years*, legislators offer the judges they select a significant advantage in the electoral process. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (plurality op.) (observing that challengers typically must bear "higher costs . . . to overcome the name-recognition advantage enjoyed by an

incumbent"). After as many as four years in office—nearly half of the constitutionally mandated eight-year term for an elected judge—a Justice or Judge appointed by the legislature will receive a running head start in a race against any challenger. Again, this feature of the proposed amendment confers a significant advantage on the legislature's preferred candidates, contravening constitutional principles in the process. *See* N.C. Const. art. I, §§ 9-10 (requiring that elections be frequent and free).

North Carolina voters could ultimately decide to give up a significant measure of their electoral control over the selection of judges in regular elections—but they must know that giving up such control is what they are voting to do. Because the Judicial Vacancies Ballot Question does not ask voters to make this change, the proposed amendment would not reflect their consent if adopted. To the contrary, the ballot question gives exactly the opposite impression—that voters will play a larger role, and not a lesser one, and certainly not that the people will be deprived *sub silentio* of their constitutional right to participate in the selection of judges through the electoral process in a significant way. In short, as with the misleading suggestion that authority currently held by the Governor would be distributed among the three branches, the ballot question appeals to the voters' sense of good civics by promising a more democratic process—while the true purpose and effect of the proposed amendment are to concentrate power over the judiciary in the legislature.

III. This Court should take immediate action to prevent the new ballot questions from appearing on the ballot.

Immediate relief from this Court is needed to preserve the status quo and avoid the irreparable harm that would result if these new ballot questions were permitted to appear on the ballot.

A. These ballot questions will inflict irreparable harm if they appear on the ballot.

Violations of the North Carolina Constitution give rise to irreparable harm as a matter of law.[13] Because the ballot questions here violate the North Carolina Constitution, permitting them to appear on the ballot would cause irreparable harm to the Governor and the people he was elected to serve. For example, these ballot questions threaten to strip the Governor of constitutional authority over the Board and constitutional power to fill judicial vacancies by misleading voters into ratifying the General Assembly's proposed amendments. Placing these ballot questions on the ballot would also inflict irreparable harm on the people of North Carolina by subjecting them to an election involving unconstitutional ballot language.

The injuries from these constitutional violations cannot be undone by a merits ruling in the Governor's favor after the ballots are printed. Indeed, placing

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[13] *See, e.g.*, *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable."); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (reaching a similar conclusion). Federal decisions confirm that the harm from constitutional violations is irreparable *per se*. *See, e.g.*, *Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) ("[T]he denial of a constitutional right, if denial is established, constitutes irreparable harm for purposes of equitable jurisdiction.").

these questions on the ballot, only to have them subsequently invalidated, would give rise to considerable confusion, disruption, and wasted resources. *See, e.g.*, *Senate of State of Cal. v. Jones*, 988 P.2d 1089, 1096 (Cal. 1999) ("The presence of an invalid measure on the ballot steals attention, time, and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure." (citation omitted)). As numerous courts have held, therefore, it is preferable to enjoin unlawful ballot questions from ever appearing on the ballot—and thus to prevent irreparable harm from ever being inflicted. *See* Order ¶ 59 (finding that "irreparable harm will result . . . if the [challenged ballot language] is used in placing these respective proposed constitutional amendments on a ballot").[14]

Neither would the availability of truthful information about the proposed amendments outside the ballot undo the harm from placing misleading and incomplete information on the ballot. As numerous courts have concluded, the

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[14] *See also, e.g.*, *Askew*, 421 So. 2d at 156 (enjoining language concerning a proposed constitutional amendment from appearing on the ballot because it was "so misleading to the public concerning material changes to an existing constitutional provision that this remedial action must be taken"); *Fla. Dep't of State v. Slough*, 992 So. 2d 142, 149-50 (Fla. 2008) (granting the same relief); *Mangat*, 43 So. 3d 642, 651 ("In this case, the ballot language put forth by the party proposing the constitutional amendment contains misleading and ambiguous language. Currently, our only recourse is to strike the proposed constitutional amendment from the ballot, thereby removing it from a vote of the electorate."); *Kimmelman*, 497 A.2d at 894-96 (rejecting an argument that a pre-election challenge was "premature" on the theory that the proposed amendment "may be rejected the voters," and enjoining an existing description of a proposed constitutional amendment from appearing on the ballot).

language on the ballot has an unparalleled influence on voters. *See Cook*, 531 U.S. at 525 (holding that adverse language on the ballot "handicap[ped] candidates at the most crucial stage in the election process—the instant before the vote is cast" (internal quotation marks omitted)).[15] And the uncontested evidence in the record here—evidence grounded in social science research—confirms that a misleading ballot inflicts harm that no off-ballot speech can cure. As Professor Craig Burnett testified in this case by affidavit, "for many voters, the ballot text constitutes the first and only piece of information they will encounter before making a decision and marking their ballots." Affidavit of Craig M. Burnett, Ph.D. at 6 ("Burnett Aff.") (included in the appendix to this petition at App. 44). Professor Burnett's research shows that "[v]oters rarely go beyond what is immediately accessible," and "only a small percentage of voters will seek out additional information, including official summaries." *Id.* at 7-8. Indeed, voters' reliance on the ballot language is particularly acute when the proposal concerns matters that typically spark less interest in the ordinary citizen—including, as here, the structure of government—as opposed to hot-button social issues. *Id.* at 5-6. The evidence therefore demonstrates

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[15] *See also, e.g.*, *N.C. State Bar v. Hunter*, 204 N.C. App. 371, 2010 WL 2163362, at *11 (June 1, 2010) (unpub.) (concluding that, if the ballot had referred to a Supreme Court candidate as "Madame Justice," it "would likely have created confusion in the minds of voters" and thereby "influenced an election"); *State ex rel. Voters First*, 978 N.E.2d at 126 ("In the larger community, in many instances, the only real knowledge a voter obtains on the issue for which he is voting comes when he enters the polling place and reads the description of the proposed issue set forth on the ballot." (internal quotation marks omitted)); *Ex parte Tipton*, 93 S.E.2d 640, 644 (S.C. 1966) ("The reasonable assumption is that [the voter] reads the question proposed on the ballot, and that his vote is cast upon his consideration of the question as so worded.").

that "voter education" cannot remedy the injury that these misleading ballot questions would inflict.

B. The balance of the equities favors immediate relief.

The balance of the equities also favors preventing these ballot questions from appearing on the ballot. Unlike the Governor and the people, the Legislative Defendants will not suffer any meaningful harm—irreparable or otherwise—from such relief. The General Assembly remains free to submit proposed constitutional amendments to the people so long as it uses ballot language that does not violate North Carolina law. Indeed, the General Assembly could propose the same amendments at issue here in a future election if it would frame ballot language that was neither misleading nor incomplete.

C. Preventing these ballot questions from appearing on the ballot will preserve the status quo.

The "status quo" is the "last peaceable" status that existed between the parties "before the dispute between them arose." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 733, 265 S.E.2d 387, 388 (1980). In cases like this one that involve constitutional challenges to statutes (or analogous government action), the last peaceable uncontested status between the parties is the status *before* the statute was enacted—and not afterward. *See, e.g.*, *Preterm-Cleveland v. Himes*, 294 F. Supp. 3d 746, 758 (S.D. Ohio 2018); *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016); *Makindu v. Ill. High Sch. Ass'n*, 40 N.E.3d 182, 193 (Ill. Ct. App. 2015).

Thus, the status quo here is the status that existed before the General Assembly passed the session laws at issue *yesterday*—which was that the ballot questions at issue would not appear on the ballot and the General Assembly would not employ unlawful ballot language to deceive the people into rewriting their Constitution. An order preventing these ballot questions from appearing on the ballot would therefore preserve the status quo.

D. Immediate relief from this Court is both needed and warranted.

Such an order is needed immediately. Preparation and printing of the official ballots for the November 2018 ballots is imminent. Federal law requires the Board to make absentee ballots available to voters no later than September 22 (45 days prior to the November 2018 election). *See* 52 U.S.C. § 20302(a)(8)(A). As the panel and all parties agree, the Board must prepare, print, and test the ballots before they can be released, and those processes take a minimum of 21 days. *See* Order on Temporary Measures ¶ 1 (included in appendix at App. 39). Thus, the content of the ballot must be settled by September 1—the end of this week.

As a result, the Governor has no time to pursue further proceedings in the trial court, followed by another flurry of proceedings in the appellate courts. Only this Court can provide the immediate, definitive ruling that will ensure the unconstitutional ballot questions at issue here do not appear on the ballot.

The General Assembly bears the responsibility for this emergency. Rather than allowing the issues presented here to be resolved in a prompt and orderly fashion, the General Assembly has delayed and played games with the ballot.

Although the General Assembly adopted its original ballot questions on June 28, it did not finally settle how those questions would appear on the ballot until Saturday, August 4, when it overrode the Governor's veto of Session Law 2018-131 concerning the captions for the ballot questions. The Governor immediately brought suit to challenge those ballot questions. Indeed, he served courtesy copies of his papers on the Legislative Defendants that same Saturday afternoon, only hours after the General Assembly adjourned. The Governor then prosecuted his challenge as quickly as the courts could convene, and obtained a preliminary injunction on August 21.

At that point, the General Assembly continued to stall. It waited nearly a week before adopting its new proposed amendments. In the meantime, the Legislative Defendants pursued an appeal to the Court of Appeals—an appeal that they have now moved to dismiss. They also opposed the Governor's petition for immediate review in this Court.

The General Assembly also continued to play games with the ballot by failing to adopt any mechanism of its own for repealing the original proposed amendments—even while it was seeking to overturn the preliminary injunction entered by the panel. That approach made it possible that both the original proposals *and* the new proposals would appear on the ballot—sowing *even more* confusion among the voters. By engaging in this brinksmanship on matters of grave importance—including whether to amend the North Carolina Constitution to

overrule decisions of this Court and dismantle the separation of powers—the General Assembly has confirmed that it comes to this matter with unclean hands.

Due to the General Assembly's actions, only this Court can prevent these newly adopted ballot questions from appearing on the ballot and inflicting irreparable harm on the Governor and the people of North Carolina. The Legislative Defendants will undoubtedly express dismay and argue that the relief sought here is extraordinary and unprecedented. But to the extent that such relief has not previously been granted, it is only because no previous legislature has so far exceeded the bounds of legitimate democratic processes. This General Assembly is the bull in the china shop of our democracy, and the Court should disregard its feigned outrage that the patrons and shopkeeper are upset.

The Governor respectfully requests that this Court issue its writ of supersedeas or prohibition and enjoin the ballot questions at issue from appearing on the ballot. The Governor also respectfully urges the Court to issue its writ prior to September 1, when the Board must begin preparing the ballots to satisfy federal requirements.

MOTION FOR TEMPORARY STAY

Pursuant to Article IV, §§ 1 and 12(1) of the North Carolina Constitution, N.C. Gen. Stat. § 7A-32(b), and Rules 2, 8, 22, and 23 of the North Carolina Rules of Appellate Procedure, the Governor respectfully requests that this Court temporarily stay the preparation and printing of the ballots until the Court rules on the above petition. The Governor submits that, consistent with the three-judge panel's carefully crafted Order on Temporary Measures, which was designed to preserve

the status quo pending a ruling on the Governor's motion for preliminary injunction, the following stay order would be appropriate:

> Pending further order of this Court, the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, its officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, shall not (a) take any action to authorize or approve any language to be placed on the official ballot for the November 2018 general election or (b) prepare ballots, print ballots, or authorize any person or entity to prepare or print ballots for the November 2018 general election.

MOTION TO SUSPEND APPELLATE RULES

Pursuant to Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, the Governor respectfully moves the Court to suspend any appellate rules that would otherwise prevent the Court from considering or granting the above petition at this time, including any applicable requirements of Rule 22 or 23. In light of the weighty and urgent nature of the matters presented by the petition, suspending any such appellate rules is warranted to prevent manifest injustice and expedite decision in the public interest.

CONCLUSION

For the reasons set forth above, Governor Roy Cooper respectfully urges this Court to issue its writ of supersedeas or prohibition and enjoin the ballot questions at issue from appearing on the official ballot for the November 2018 general election. The Governor also respectfully requests that this Court stay the preparation and printing of the official ballot until the Court rules on the foregoing petition, and suspend the appellate rules to prevent manifest injustice and expedite decision in the public interest.

Respectfully submitted this 28th day of August, 2018.

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Attorneys for Plaintiff Roy Cooper, Governor of the State of North Carolina

VERIFICATION

I, John R. Wester, as counsel for Roy Cooper, in his official capacity as Governor of the State of North Carolina, verify that the facts stated in the attached Petition for Writ of Supersedeas or Prohibition, including any facts incorporated by reference in the Petition, are true to the best of my knowledge, information, and belief.

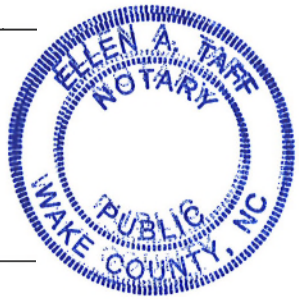
John R. Wester

Sworn to and subscribed before me, this 28th day of August, 2018.

Ellen A. Taff
Notary Public Signature

Ellen A. Taff
Notary Public Name

My commission expires:
08/03/2019



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 Court of Appeals 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 28th day of August, 2018.

Electronically Submitted
John R. Wester

Contents of Appendix

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2018

SESSION LAW 2018-132
HOUSE BILL 3

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO PROVIDE FOR NONPARTISAN JUDICIAL MERIT COMMISSIONS FOR THE NOMINATION AND RECOMMENDATION OF NOMINEES WHEN FILLING VACANCIES IN THE OFFICE OF JUSTICE OR JUDGE OF THE GENERAL COURT OF JUSTICE AND TO MAKE OTHER CONFORMING CHANGES TO THE CONSTITUTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article IV of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 23. Merit selection; judicial vacancies.**

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a

majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity, and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law."

SECTION 2. Section 10 of Article IV of the North Carolina Constitution reads as rewritten:

"**Sec. 10. District Courts.**

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly."

SECTION 3. Section 18 of Article IV of the North Carolina Constitution is amended by adding a new subsection to read:

"(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office."

SECTION 4. Section 19 of Article IV of the North Carolina Constitution is repealed.

SECTION 5. Subsection (5) of Section 22 of Article II of the North Carolina Constitution reads as rewritten:

"(5) Other exceptions. Every bill:

(a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;

(b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;

(c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; ~~or~~

(d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;

(e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter; or

(f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter,

shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses."

SECTION 6. The amendments set out in Sections 1 through 5 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees."

SECTION 7. If a majority of the votes cast on the question are in favor of the amendment set out in Sections 1 through 5 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective upon certification and applies to vacancies occurring on or after the date of the general election.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27th day of August, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2018

SESSION LAW 2018-133
HOUSE BILL 4

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO ESTABLISH A BIPARTISAN BOARD OF ETHICS AND ELECTIONS ENFORCEMENT.

The General Assembly of North Carolina enacts:

SECTION 1. Article VI of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and elections law, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only and shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made by the Governor as follows:

(a) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two Senate political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

(b) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two House of Representatives political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

(3) The General Assembly shall enact general laws governing how appointments shall be made if the Governor fails to appoint a member within 10 days of receiving recommendations as required by this section."

SECTION 2. The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law."

SECTION 3. If a majority of the votes cast on the question are in favor of the amendment set out in Section 1 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office.

SECTION 4. If the amendment is approved by the qualified voters as provided in this section, Section 1 becomes effective March 1, 2019.

SECTION 5. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27th day of August, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9805

2018 AUG 21 P 5:19

ROY A. COOPER, III, in his official Capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON INJUNCTIVE RELIEF

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9806

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

Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity; PHILIP E. BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; JAMES A. ("ANDY") PENRY, in his official capacity; JOSHUA MALCOM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in her official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; and, JOHN LEWIS, in his official capacity, Defendants.	**ORDER ON INJUNCTIVE RELIEF**

THESE MATTERS CAME ON TO BE HEARD before the undersigned three-judge panel on August 15, 2018. All adverse parties to these actions received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, briefs and arguments of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following findings of fact and conclusions of law:

1. As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

STANDING OF PLAINTIFFS

2. 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, (hereinafter "Legislative Defendants") do not contend, nor do we otherwise conclude, that Plaintiff Governor Roy A. Cooper (hereinafter "Governor Cooper") lacks standing to bring a separation of powers challenge in this case. Indeed, "if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim." *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018).

3. Legislative Defendants have, however, filed a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure asserting that Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (hereinafter "NC NAACP") and Plaintiff Clean Air Carolina (hereinafter "CAC") lack standing to bring a challenge to the Session Laws at issue in this matter.

4. NC NAACP contends that it has standing to bring its claims on behalf of its members, citing the core mission of the organization to advance and improve the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination. (Plaintiffs' Amended Complaint ¶ 8). In order for NC NAACP to have standing to challenge the proposed amendments on behalf of its individual members, each individual member must have standing to sue in his or her own right. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159 (2001)

(citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). This showing has not been made here. NC NAACP has not demonstrated that each individual member is a registered voter in North Carolina, or that each individual member is a member of a minority group.

5. NC NAACP does, however, have standing to bring its claims on behalf of the organization itself. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (quoting *Stanley v. Dep't of Conservation & Dev.,* 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). The claims asserted by NC NAACP with respect to the language of the proposed amendments directly impact the ability of the organization to educate its members of the likely effect of the proposed legislation, which is pertinent to the organization's purpose. The undersigned three-judge panel therefore concludes that NC NAACP does have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

6. CAC has not asserted the right to bring its claim on behalf of its members. In order to have standing on its own behalf, CAC must demonstrate that the legally protected injury at stake is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The requirement of particularity has not been met here. The general challenge of informing its members of the effects of the proposed legislation is not an injury particularized to CAC, whose stated mission is

"to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices." (Plaintiffs' Amended Complaint ¶ 17).

7. The specific injuries put forth by CAC concern the merit of the proposed amendments, rather than the manner in which the amendments will appear on the ballot. The courts are not postured to consider questions which involve "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Cooper v. Berger*, 370 N.C. 393, 809 S.E. 2d 98 (2018) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). Article XIII, Section 4 of the North Carolina Constitution expressly grants the North Carolina General Assembly (hereinafter "General Assembly") the authority to initiate the proposal of a constitutional amendment. This authority exists notwithstanding the position of the courts on the wisdom or public policy implications of the proposal. The undersigned three-judge panel therefore concludes that CAC does not have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is granted as to CAC.

POLITICAL QUESTION DOCTRINE

8. Governor Cooper, cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "State Board of Elections"), and NC NAACP have asserted facial challenges to the constitutionality of acts of the General Assembly. The portions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Legislative Defendants have filed a motion under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure in both cases, asserting that the undersigned three-judge panel lacks subject matter jurisdiction on the theory that the claims constitute non-justiciable political questions. A majority of the three-judge panel has concluded that Governor Cooper's facial constitutional challenges, as expressed, present a justiciable issue as distinguished from "a non-justiciable political question arising from nothing more than a policy dispute," *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110, and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is denied as to Governor Cooper.

10. Likewise, a majority of this panel has concluded that NC NAACP's facial constitutional challenges, as expressed, present a justiciable issue, as distinguished from a non-justiciable political question and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

NC NAACP "USURPER LEGISLATIVE BODY" CLAIM

11. NC NAACP has also asserted a claim that the General Assembly, as presently constituted, is a "usurper" legislative body whose actions are invalid. While this panel acknowledges the determinations made in this regard in *Covington v. North Carolina*, 270 F. Supp. 3d 881 (2017), we conclude that this claim by NC NAACP in this action constitutes a collateral attack on acts of the General Assembly and, as a result, is not within the jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1. We therefore decline to consider NC NAACP's claim that the General Assembly, as presently constituted, is a "usurper" legislative body.

12. Furthermore, even if NC NAACP's claim on this point was within this three-judge panel's jurisdiction, the undersigned do not at this stage accept the argument that the General Assembly is a "usurper" legislative body. And even if assuming NC NAACP is correct,

a conclusion by the undersigned three-judge panel that the General Assembly is a "usurper" legislative body would result only in causing chaos and confusion in government; in considering the equities, such a result must be avoided. See *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). For the reasons stated above, we decline to invalidate any acts of this General Assembly as a "usurper" legislative body.

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE[1]

13. On June 28, 2018, the General Assembly enacted Session Law 2018-117 (hereinafter the "Board Appointments Proposed Amendment"), Session Law 2018-118 (hereinafter the "Judicial Vacancies Proposed Amendment"), Session Law 2018-119 (hereinafter the "Maximum Tax Rate Proposed Amendment") and Session Law 2018-128 (hereinafter "Photo Identification for Voting Proposed Amendment"). Each Session Law contains the text of proposed amendments to the North Carolina Constitution. *See* 2018 N.C. Sess. Laws 117 §§ 1-4; 2018 N.C. Sess. Laws 118 §§ 1-5; 2018 N.C. Sess. Laws 119 § 1; 2018 N.C. Sess. Laws 128 §§ 1-2. Each Session Law also contains the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 117 § 5; 2018 N.C. Sess. Laws 118 § 6; 2018 N.C. Sess. Laws 119 § 2; 2018 N.C. Sess. Laws 128 § 3.

14. Governor Cooper and State Board of Elections have asserted claims that the sections containing the ballot language in S.L. 2018-117 and S.L. 2018-118 are facially in violation of the North Carolina Constitution. NC NAACP also has asserted claims that these

[1] In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~strikethrough~~ text in the proposed amendments represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

same sections containing the ballot language, as well as in S.L. 2018-119 and S.L. 2018-128, are facially in violation of the North Carolina Constitution.

15. Section 1 of S.L. 2018-117 proposes to amend Article VI of the North Carolina Constitution by adding a new section to read:

> **Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**
> (1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.
> (2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:
> (a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.
> (b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader.

2018 N.C. Sess. Laws 117, § 1.

16. Section 2 of S.L. 2018-117 proposes to amend Article I, Section 6 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 6. Separation of powers.**
> (1) The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.
> (2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission.

2018 N.C. Sess. Laws 117, § 2.

17. Section 3 of S.L. 2018-117 proposes to amend Article II, Section 20 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 20. Powers of the General Assembly.**
> (1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.
> (2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers.

2018 N.C. Sess. Laws 117, § 3.

18. Section 4 of S.L. 2018-117 proposes to amend Article III, Section 5 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 5. Duties of Governor.**
> ...
> (4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.
> ...
> (8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative, or judicial appointment and shall be faithfully executed as enacted.
> ....

2018 N.C. Sess. Laws 117, § 4.

19. Section 5 of S.L. 2018-117 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-4 of S.L. 2018-117 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-117 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority.

2018 N.C. Sess. Laws 117, § 5.

20. Section 1 of S.L. 2018-118 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect,

in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law.

2018 N.C. Sess. Laws 118, § 1.

21. Section 2 of S.L. 2018-118 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

> (3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 118, § 2.

22. Section 3 of S.L. 2018-118 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

> (3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 118, § 3.

23. Section 4 of S.L. 2018-118 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:[2]

> Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 118, § 4.

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[2] For the sake of clarity, this section is not displayed as ~~struck through~~ despite the proposed amendment fully removing the language from the North Carolina Constitution.

24. Section 5 of S.L. 2018-118 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

> (5) Other exceptions. Every bill:
> (a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;
> (b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;
> (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; ~~or~~
> (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;
> (e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or
> (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,
> shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 118, § 5.

25. Section 6 of S.L. 2018-118 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-118 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-118 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

2018 N.C. Sess. Laws 118, § 6.

26. Section 1 of S.L. 2018-119 proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 2. State and local taxation.

...

(6) Income tax. The rate of tax on incomes shall not in any case exceed ~~ten~~ seven percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

....

2018 N.C. Sess. Laws 119, § 1.

27. Section 2 of S.L. 2018-119 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-119 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-119 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).

2018 N.C. Sess. Laws 119, § 2.

28. Section 1 of S.L. 2018-128 proposes to amend Article VI, Section 2 of the North Carolina Constitution by adding a new subsection to read:

(4) 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.

2018 N.C. Sess. Laws 128, § 1.

29. Section 2 of S.L. 2018-128 proposes to amend Article VI, Section 3 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 3. ~~Registration.~~Registration; Voting in Person.

(1) Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

(2) 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.

2018 N.C. Sess. Laws 128, § 2.

30. Section 3 of S.L. 2018-128 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-2 of S.L. 2018-128 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-128 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to require voters to provide photo identification before voting in person.

2018 N.C. Sess. Laws 128, § 3.

Guiding Legal Principles

31. The analytical framework for reviewing a facial constitutional challenge is well-established. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016). Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when "it [is] plainly and clearly the case." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. Of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E. 2d 887, 889 (1991). "This is a rule of law which binds us in deciding this case." *Id.*

32. In considering these facial constitutional challenges, this panel understands and applies the following principles of law to the analysis: We presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt. The constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the

constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

33. Article I of the North Carolina Constitution declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Article I also declares that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." N.C. Const. art. I, § 3. Article I also preserves the right to due process of law, declaring that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Finally, Article I declares that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

34. Article XIII of the North Carolina Constitution provides that "[t]he people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way." N.C. Const. art. XIII, § 2. The two permitted methods to amend the Constitution require an amendment to be proposed by a "Convention of the People of this State," or by the General Assembly. N.C. Const. art. XIII, §§ 3, 4.

35. An amendment to the Constitution "may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the

proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly." N.C. Const. art. XIII, § 4.

36. These provisions of the North Carolina Constitution make plain and clear a number of points: first, the power to govern in this State, including the power to write, revise, or abolish the Constitution is vested in the **people** of this State, founded upon the **will of the people**; second, the General Assembly may initiate a proposal for one or more amendments to the Constitution, by adopting an act submitting the proposal to the voters. The General Assembly has exclusive authority to determine the time and manner in which the proposal is submitted to the voters, but ultimately the issue must be submitted to the voters for ratification or rejection, whereupon the will of the people, expressed through their votes, will determine whether or not the proposal becomes law.

37. Finally, while not a Constitutional provision, or standard for interpretation of the North Carolina Constitution, the State Board of Elections is required by our State's general statutes to "ensure that official ballots throughout the State have all the following characteristics: (1) Are readily understandable by voters. (2) Present all candidates and questions in a fair and nondiscriminatory manner." N.C.G.S. § 163A-1108. We note that while the State Board of Elections has asserted a cross-claim based upon these statutory requirements in N.C.G.S. § 163A-1108, such a claim is not within the jurisdiction of a three-judge panel constituted under N.C.G.S. § 1-267.1. The undersigned three-judge panel has therefore not considered this statutorily-based claim.

Issue Presented

38. The ultimate question presented to this three-judge panel by the facial constitutional challenges requires this panel to decide whether or not the language contained in the ballot questions adopted by the General Assembly satisfies the constitutional mandate that proposed amendments be submitted to the voters for ratification or rejection.

39. In addressing this issue, the Legislative Defendants have argued that the issue might better be decided after the November election rather than before and that the issue might even become moot, depending upon the outcome of the vote. We are compelled, however, in conducting our analysis, to do so through a neutral lens and to do so without considering the wisdom or lack thereof of the proposed amendments. The question is not whether the voters *should* vote for or against the measures, but whether the voters in this State have had a fair opportunity to declare themselves upon this question. *Hill,* 176 N.C. at 584, 97 S.E. at 503.

Applicable Legal Standards When Examining Ballot Language

40. We are aware that our courts have not previously addressed a situation exactly like the one presented here. As a result, this panel must rely on principals of constitutional interpretation established by our courts, including the text of the Constitution and accepted canons of construction, as well as the historical jurisprudence of our courts on similar issues. Other courts provide persuasive, but not authoritative guidance in analysis of challenged ballot proposal language.

41. Since 1776 our constitutions have recognized that all political power resides in the people. N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § 1. Presently, our constitutional jurisprudence provides that "the General Assembly is checked and balanced by its structure and *its accountability to the people*." *State ex rel. McCrory*

v. Berger, 368 N.C. 533, 653, 781 S.E.2d 248, 261 (2016) (Newby, J. concurring in part and dissenting in part) (emphasis added). In order to amend the constitution, the amendment must "be submitted to the qualified voters of this State," N.C. Const. art. II, § 22. Notably, "the object of all elections is to ascertain, fairly and truthfully, the will of the people," *Wilmington, O. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895).

42. Legislative Defendants submit that this panel should apply a substantive due process standard in determining whether or not the language of the Ballot Questions satisfies constitutional requirements, *i.e.*, "When the ballot language purports to identify the proposed amendment by briefly summarizing the text, then substantive due process is satisfied and the election is not patently and fundamentally unfair so long as the summary does not so plainly mislead voters about the text of the amendment that they do not know what they are voting for or against, that is, they do not know which amendment is before them." *Sprague v. Cortes,* 223 F.Supp. 3d 248, 295 (M.D. Pa. 2016). A majority of this panel concludes that this standard, though relevant, is not determinative to an issue decided by state courts under our state constitution.

43. A majority of this panel instead concludes that the requirements of our state constitution are more appropriately gleaned from the decisions of state courts, and in particular our own Supreme Court. In *Hill v. Lenoir County,* 176 NC 572, 97 SE 498 (1918), our Supreme Court said: "In elections of this character great particularity should be required in the notice in order that the voters may be *fully informed of the question they are called upon to decide*. There is high authority for the principle that even where there is no direction as to the form in which the question is submitted to the voters, it is essential that it be stated in such manner to enable

them *intelligently to express their opinion upon it*[.]" *Id.* at 578, 97 S.E. at 500-01 (emphasis added).

44. Drawing from the requirements expressed in *Hill*, as well as analyses from other jurisdictions, a majority of this panel find that relevant considerations include 1) whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon, 2) whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment, and 3) whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment. See *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 208, 34 A.3d 1164, 1191 (2012) (noting that ballot questions need to be determined on what would put an "average voter" on notice of "the purpose and effect of the amendment"); *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992) (establishing that the courts must "presume that the voters are informed" but the legislature should still "strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each . . . amendment"); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches,* 43 So. 3d 662, 668 (Fl. 2010) (noting that lawmakers, as well as the voting public, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be"); *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St. 3d 257, 978 N.E.2d 119 (2012) (finding that material omissions in the ballot language of a proposed amendment to the Ohio constitution deprived the voters of the right to know what they were voting upon).[3]

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[3] One of the cases cited by Legislative Defendants was *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974), which included the following language:

"Though we hold that the ballot language is not a proper subject for more than this minimal judicial review we must note that to the extent to which the legislature describes proposed amendments in any way other than through the most objective and brief of terms...it exposes itself to the temptation—yielded to here, we think—to interject its own value judgments concerning the amendments into the ballot language and thus to propagandize the voters in the very voting booth in denigration of the integrity of the ballot." 232 Ga. at 556, 208 S.E.2d at 100.

45. In the present case, as in *Hill,* there can be no doubt that our General Assembly has the exclusive power and authority to initiate a proposal for a constitutional amendment and to specify the time and manner in which voters of the State are presented with the proposal. But the proposal must be "**submitted**" to the voters. According to the Merriam-Webster Dictionary, "submit" means "to present or propose to another for consideration" or "to submit oneself to the authority or will of another." In order for the proposals to be submitted to the will of the people, the ballot language must comply with the constitutional requirements as expressed in *Hill.*

46. With those legal principles in mind, we now turn our attention to the particular issues presented by the present litigation.

INJUNCTIVE RELIEF

47. This panel is presented with two lawsuits, one filed by Governor Cooper, along with a cross-claim filed by the State Board of Elections, and a second filed by NC NAACP. Although the Governor contests only two of the proposed measures, it is helpful to our analysis to discuss all four of the measures in each lawsuit, as we find the application of the aforementioned legal principles to be substantially different with respect to each of the four proposed amendments and, specifically, the proposed Ballot Question pertaining to each.

48. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is

necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

The Tax Rate Proposed Amendment

49. S.L. 2018-119, as shown above, proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section. NC NAACP contend that the proposed Ballot Language in S.L. 2018-119 is misleading, suggesting that the currently-applicable tax rate will be reduced. We conclude otherwise. The language of the Ballot Question may not be perfect, but it is virtually identical to the wording of the amendment itself, referring clearly to "a maximum allowable rate." NC NAACP would prefer that the Ballot Question use the term "maximum tax rate cap," but the word "cap" appears nowhere in the amendment itself and we do not consider it necessary for the Ballot Question to explain all potential legal ramifications of the amendment, but only its purpose and effect.

The Photo Identification for Voting Proposed Amendment

50. S.L. 2018-128, as shown above, proposes an amendment requiring photo identification in order to vote in person. The proposed amendment would amend Article VI, Sections 2 and 3 of the North Carolina Constitution by adding identical language to each section, the pertinent provisions of which read as follows: "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." The language of the Ballot Question adopted by the General Assembly reads: "Constitutional Amendment to require voters to provide photo identification before voting in person."

51. NC NAACP contends that the ballot language is misleading by failing to define "photo identification" and failing to make clear that implementing legislation will be needed to establish which photo IDs would suffice. Again, we conclude otherwise. There can be little doubt whether or not the voters will be able to identify the issue on which they will be voting with respect to this proposed amendment. This panel takes judicial notice that Voter ID laws currently comprise a significant political issue in this country, on which an overwhelming majority of voters have strong feelings, one way or the other. The General Assembly has the exclusive authority to determine the details of any implementing legislation and it would be entirely inappropriate for this panel to speculate as to whether or not that legislation will comport with state and federal constitutional requirements. We have already noted that there is a presumption of constitutional validity afforded to every act of the General Assembly, and we must afford that same presumption to acts that may be enacted in the future.

52. In making the aforementioned observations, we are mindful of the fact that there has been ongoing litigation in the federal courts concerning similar legislation previously passed by this General Assembly. Indeed, NC NAACP has devoted much of its argument on this amendment to the reasons for their philosophical opposition to the Voter ID amendment itself. These arguments go well beyond the function of this three-judge panel in these cases. In determining facial constitutional challenges, this court should not concern itself with the wisdom

of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-128, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

The Board Appointments Proposed Amendment

53. S.L. 2018-117, as shown above, proposes to amend Article VI of the North Carolina Constitution by adding a new section, amend Article I, Section 6 by rewriting the section, amend Article II, Section 20 by rewriting the section, and amend Article III, Section 5 by rewriting the section. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

54. Governor Cooper, the State Board of Elections, and the NC NAACP complain that this ballot language is misleading in saying that the amendment "establishes" a bipartisan Board of Ethics and Elections, and will "prohibit" legislators from serving on boards and commissions exercising executive or judicial authority. While the language may not be the most accurate or articulate description of the effect of these provisions, we do not find that the language in these two parts of the Ballot Question is so misleading, standing alone, so as to violate constitutional requirements; although each of these provisions already exists under law, neither has previously been addressed specifically by our state constitution.

55. In addition to the two points described above, the Ballot Question says only: "to clarify the appointment authority of the Legislative and the Judicial Branches[.]" The Merriam-Webster Dictionary defines "clarify" as "to make understandable" or "to free of confusion." The concern here with this particular language in the Ballot Question is whether it describes the remaining portions of the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that this portion of the ballot language in the Board Appointments Proposed Amendment does not sufficiently inform the voters and is not stated in such manner as to enable them intelligently to express their opinion upon it. In particular:

a. The proposed amendment substantially realigns appointment authority as allocated previously between the Legislative and Executive branches, but makes no mention of how the Amendment affects the Executive branch.

b. The ballot language mentions clarification of appointment authority of the Judicial Branch, but the Amendment makes no mention of any changes to appointment authority of the Judiciary.

c. The Amendment makes significant changes of the duties of the Governor in exercising his powers pursuant to the Separation of Powers clause, but no mention is made of that change in the ballot language.

The Judicial Vacancies Proposed Amendment

56. S.L. 2018-118, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section, amend Article IV, Section 10 by rewriting the section, amend Article IV, Section 18 by adding a new subsection, repeal in its entirety Article

IV, Section 19, and amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

57. Governor Cooper, the State Board of Elections, and NC NAACP complain that this ballot language is misleading in saying that the amendment implements a "nonpartisan merit-based system" that instead of relying on "political influence" relies on "professional qualifications." A majority of this panel agrees and finds that the language in this Ballot Question misleads and does not sufficiently inform the voters. The concern here with the Ballot Question, again, is whether it describes the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that the ballot language in S.L. 2018-118 does not sufficiently inform the voters and is not stated in such manner to enable them intelligently to express their opinion upon it. In particular:

a. The ballot language indicates that the nonpartisan merit-based system will rely on "professional qualifications" rather than "political influence." The Amendment requires only that the commission screen and valuate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified, as prescribed by law. Aside from partisan affiliation, there is no limitation or control on political influence; the nominees are categorized only as qualified or not qualified rather than being rated or ranked in any order of qualification and

the General Assembly is not required to consider any criteria other than choosing nominees found "qualified" by the Commission. (As pointed out by Plaintiffs, current qualifications by law for holding judicial office in this state only require that the person be 21 years of age or more, hold a law license and, in some instances, be a resident of the District.)

b. The Amendment makes substantial changes to appointment powers of the Governor in filling judicial vacancies, but no mention is made of the Governor in the ballot language.

c. Perhaps most significantly, the ballot language makes no mention of the provisions of Section 5 of S.L. 2018-118, which adds two new provisions to Article II, Section 22, Subsection (5) of the North Carolina Constitution

    i. Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice in accordance with Section 23 of Article IV of this Constitution, or

    ii. Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution.

Each of these provisions omits the words "and containing no other matter" included in each of the other enumerated exceptions in Section 5, meaning that proposed Bills coupled with judicial appointments would be immune to a veto by the Governor. The ballot language makes no mention of any effect of the Amendment upon veto powers of the Governor.

58. We therefore find that there is a substantial likelihood that Governor Cooper, the State Board of Elections, and NC NAACP will prevail on the merits of these actions with respect to the constitutionality of the Ballot Question language pertaining to the Board Appointments Proposed Amendment and the Judicial Vacancies Proposed Amendment. We do not find that there is a substantial likelihood that NC NAACP will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Tax Rate Proposed Amendment and the Photo Identification for Voting Proposed Amendment.

59. We find that irreparable harm will result to Governor Cooper, the State Board of Elections, and NC NAACP if the Ballot Language included in S.L. 2018-117 and S.L. 2018-118 is used in placing these respective proposed constitutional amendments on a ballot, in that we conclude beyond a reasonable doubt that such language does not meet the requirements under the North Carolina Constitution for submission of the issues to the will of the people by providing sufficient notice so that the voters may be fully informed of the question they are called upon to decide and in a manner to enable them intelligently to express their opinion upon it.

60. Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regards to S.L. 2018-117 and S.L. 2018-118. The requested injunctive relief is denied in regards to S.L. 2018-119 and S.L. 2018-128. This court concludes that no security should be required of the Governor, as an officer of the State, but that security in an amount of $1,000 should be required of the NC NAACP pursuant to Rule 65 to secure the payment of costs and damages in the event that it is later determined that this relief has been improvidently granted.

61. This three-judge panel recognizes the significance and the urgency of the questions presented by this litigation. This panel also is mindful of its responsibility not to

disturb an act of the law-making body unless it clearly and beyond a reasonable doubt runs counter to a constitutional limitation or prohibition. For that reason, this Order is being expedited so that (1) the parties may proceed with requests for appellate review, if any, or (2) the General Assembly may act immediately to correct the problems in the language of the Ballot Questions so that these proposed amendments, properly identified and described, may yet appear on the November 2018 general election ballot. This panel likewise does not seek to retain jurisdiction to "supervise" or otherwise be involved in re-drafting of any Ballot Question language. That process rests in the hands of the General Assembly, subject only to constitutional limitations.

62. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

63. The Honorable Jeffrey K. Carpenter dissents from portions of this Order and will file a separate Opinion detailing his positions on each of the issues herein addressed.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Governor Cooper's motion for a preliminary injunction is hereby GRANTED as follows:
    a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.

b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

2. Cross-claimant State Board of Elections' motion for a preliminary injunction is hereby GRANTED as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

3. Plaintiff NC NAACP's motion for preliminary injunction is hereby GRANTED IN PART AND DENIED IN PART, as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

4. Except as hereinbefore described, all requests for injunctive relief are hereby DENIED.

5. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff Governor Cooper's claims is hereby DENIED.

6. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff NC NAACP's claims is hereby DENIED.

7. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff CAC's claims is hereby GRANTED.

8. The Motions for realignment of the Defendant Board of Elections is hereby remanded to the Wake County Superior Court for determination.

SO ORDERED, this 21st day of August, 2018.

Forrest D. Bridges, Superior Court Judge

Thomas H. Lock, Superior Court Judge

as a majority of this Three Judge Panel

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE;
TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON TEMPORARY MEASURES

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR DIVISION
18 CVS 9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and CLEAN AIR CAROLINA,

Plaintiffs,

v.

TIM MOORE, in his official capacity; PHILIP BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDREW PENRY, in his official capacity; JOSHUA MALCOLM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in his official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; JOHN LEWIS, in his official capacity,

Defendants.

ORDER ON TEMPORARY MEASURES

THIS MATTER came on for hearing on August 15, 2018, before the undersigned three-judge panel on the Motion for Temporary Restraining Order and Preliminary Injunction of Plaintiff Governor Roy A. Cooper, III and the Motion for Temporary Restraining Order and Preliminary Injunction of Defendants-Crossclaimants the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony (Andy) Penry (collectively the Board), regarding the inclusion on the November 2018 general election ballot of two ballot questions concerning proposed amendments to the North Carolina Constitution. Also before the Court are the Motion for Temporary Restraining Order and Preliminary Injunction and Request for an Expedited Hearing of the North Carolina State Conference of the National Association for the Advancement of Colored People and Clean Air Carolina regarding the inclusion on the November 2018 general election ballot of four ballot questions concerning proposed amendments to the

North Carolina Constitution. Also before the Court are Governor Cooper's and the Board's Unopposed Joint Notice and Request for Hearing on Motions for Preliminary Injunction, as well as Governor Cooper's Motion to Shorten Time for Filing and Service of Affidavit in Support of Governor Cooper's Motion for Temporary Restraining Order and Preliminary Injunction. All parties had notice and were represented at the hearing. The Court has considered all matters of record, including the pleadings and motions, the parties' briefs, the affidavits on file, and the arguments of counsel. The Court FINDS and CONCLUDES as follows:

1. Under North Carolina law, for a general election in an even-numbered year, the Board must make absentee ballots available to voters 60 days before the election—here, September 7. *See* N.C. Gen. Stat. § 163A-1305(a) (2017). Before these ballots can be made available, the Board must prepare and print the ballots and conduct testing on them. The Board has represented to the Court that this preparation, printing, and testing takes at least 21 days. Thus, under the circumstances of this year's election, in the absence of a court order to the contrary, the Board would expect to begin preparing, printing, and testing ballots on August 17.

2. The Court intends to enter its ultimate order on the parties' motions as soon as possible, but in view of the complexity of these cases and the shortness of time, the Court might not enter an order by August 17.

3. It would not serve the public interest for the Board to begin preparing, printing, and testing the ballots before this Court enters its ultimate order on the parties' motions. If the Board began preparing the ballots, then the Court later entered an order

that affected the content of the ballot, the Board would be required to restart its process, wasting the public resources that had been spent on the process before that time.

4. After the Court enters its ultimate order on the parties' motions, it would serve the public interest for the present order to remain in effect for three business days after the entry of the ultimate order. That short continuation of the present order would prevent confusion and a possible waste of public resources while any appellants from the ultimate order seek a stay of the ultimate order from the appellate courts.

5. The Court concludes that the parties have satisfied any requirement to ask this Court to stay, pending any appeal, the Court's ultimate order on the parties' motions. *See* N.C. Gen. Stat. § 1A-1, Rule 62(c); N.C. R. App. P. 8(a), 23(a)(1).

In view of the above findings and conclusions, the Court, in the exercise of its discretion and for good cause shown, hereby ORDERS as follows:

A. While this order is in effect, the Board, its officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, shall not take any action to authorize or approve any language to be placed on the official ballot for the November 2018 general election.

B. While this order is in effect, the Board, its officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, shall not prepare ballots, print ballots, or authorize any person or entity to prepare or print ballots for the November 2018 general election.

C. The relief provided by decretal paragraphs A and B of this order automatically expires on whichever of the following dates and events occurs first:

1. 11:59 p.m. Eastern Daylight Time on Friday, August 31, 2018.

2. 11:59 p.m. Eastern Daylight Time on the third non-weekend day after the entry of the Court's ultimate order on the parties' motions for preliminary injunction. For purposes of calculating this expiration date, the day of entry of the Court's ultimate order does not count as the first of the three business days allowed.

3. Any other expiration date that is explicitly stated in a later order of this Court or in an order of an appellate court.

SO ORDERED, this the 17th day of August 2018 at 5:30 p.m.

Forrest D. Bridges
Superior Court Judge Presiding

Signed on Behalf of and with Consent of:
Thomas H. Lock, *Superior Court Judge Presiding*
Jeffrey K. Carpenter, *Superior Court Judge Presiding*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

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This the 20th day of August, 2018.

Kellie Z. Myers
Trial Court Administrator, 10th Judicial District
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

AFFIDAVIT OF CRAIG M. BURNETT, Ph.D.

I, Craig M. Burnett, Ph.D., having been duly sworn by an officer authorized to administer oaths, depose and state as follows:

1. I am over twenty-one (21) years of age and am competent to testify to the matters contained herein.

2. I am an Assistant Professor in the Department of Political Science at Hofstra University in Hempstead, New York. I was previously an Assistant Professor of Political

Science at the University of North Carolina at Wilmington, and prior to that at Appalachian State University. My complete Curriculum Vitae is attached as Exhibit A.

3. As reflected in my CV, my academic research focuses on electoral institutions, elections practices, and behavioral influences on voters, including the influence of ballot language. I have conducted extensive research in the field and published widely in peer reviewed journals. My research examines how voters acquire and process political information, and, in turn, how they use that information to make decisions. My research has examined voting behavior on dozens of ballot measures, including numerous constitutional amendments. Indeed, I have dedicated much of my academic career toward studying how voters make decisions in a variety of informational contexts, but I have focused especially on lower information electoral events, that is, those in which voter interest and campaign spending are typically at low levels — namely local elections and ballot measures.

4. While a professor in North Carolina, my research included surveys of North Carolina voters concerning the constitutional amendment to define marriage during the 2012 primary elections. I have also studied how voters in North Carolina evaluated candidates for judicial office during the 2012 election, paying specific attention to how the absence of party labels influenced their votes. In addition to studying voters in North Carolina, I have studied voters in several states by collecting my own data, including Arkansas, California, Florida, Minnesota, and Washington. Through my research, I have developed extensive expertise on voters across the United States and can speak with specific knowledge of North Carolina voters and provide comparative analysis on the matter.

5. Attorneys for Governor Roy Cooper have asked me to provide an opinion regarding several questions that I understand are pertinent to pending litigation Governor Cooper has brought against the North Carolina legislative leaders and the Board of Elections challenging

ballot question language prescribed by the legislature pertinent to two proposed constitutional amendments. For purposes of providing context and understanding of the questions, I have reviewed the North Carolina Session Laws in issue, 2018-117 and 2018-118, affected sections of the North Carolina Constitution, and documents filed in the action, including the Complaint, the brief filed by the Governor in support of injunctive relief, and the brief in response filed by the legislative defendants.

6. I have no personal interest in the lawsuit, nor does Hofstra University, my employer.

7. The questions to which I have been asked to provide my opinions, and my responses, are below:

i. Whether the language chosen on a ballot to state the question for voter approval or disapproval of a proposition, such as a constitutional amendment, may influence voters in determining whether to vote for or against a proposal independent of the substance of the proposal.

Response: The answer to this question, in my opinion, is an unequivocal yes. In the fields of psychology and political science, there is an extensive body of peer-reviewed published research that explores the impact of language on how individuals arrive at a variety of decisions, including consumer choices and voting. The study of the impact of language on decision-making in these fields—which the literature has named "framing effects"—demonstrates with exceptional consistency that changing even just a few words in a description can induce widely different responses. Indeed, in my own research (Burnett and Kogan, 2015, "When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment" *Political Communication*, 31(1): 109-126), my coauthor and I examined the effect of real-world ballot measure texts of proposed constitutional amendments to see whether slightly different

descriptions produced divergent results at a statistically significant rate. For example, we tested the different responses to ballot titles and descriptions for the same proposition banning same sex marriage based on actual ballots used in California: the first, "Limit on Marriage. Constitutional Amendment" and the second, "Eliminates Right of Same Sex Couples to Marry. Constitutional Amendment," with corresponding variations in the ballot descriptions of the measure. [1] The results clearly showed that the way in which the ballot text described a measure mattered a great deal, and, in a live election, could push an election result in one direction or another depending on which text voters saw. In the experiment, support for the amendment dropped six percentage points when the ballot language indicated the measure would "eliminate the right to marry." Using an experimental research design allowed us to isolate the causal effect to be the description of the measure without any possible outside effect interfering with the results. Put another way, we used the "gold standard" of academic research to identify the cause of our observed outcome. It is important to note that our study used ballot language that varied only to a limited degree. If we had opted for more significant differences in the description, we would have predicted even more divergent responses to the texts.

ii. Whether ballot language is important in conveying to most voters the meaning of the proposal on which they are asked to vote.

Response:

a. Ballot text is a very important part of the electoral process. Understanding why this is true requires some background information. Voters can gather information about an upcoming election in a variety of ways. For instance, voters can gather information by duly researching each candidate and ballot question in advance of Election Day. Voters could, for

[1] The corresponding descriptions on the ballot were, first, "provide that only marriage between a man and a woman is valid or recognized in this state" and the second, "changes [the] state constitution to eliminate the right of same-sex couples to marry."

example, attend campaign rallies, follow various news sources, read candidates' websites, and download the proposed text of a constitutional amendment. In a normative sense, this is the democratic ideal: Voters gather their own information and make informed decisions about how to cast their votes. Another way a voter can gather information is from conversations or interactions with other members of the electorate. An individual voter, for example, may consult with their religious leader, a noted member of their community, or perhaps friends and family.

b. The degree to which individuals gather information about political contests is a function of several variables, two of which I focus on here. First, voter interest varies substantially by contest. Voters tend to care a great deal about the presidency, the governor, and their state's two senators. They tend to be somewhat interested in congressional elections and perhaps their mayor if they live in a populous city. As political offices become more local, the average voter has very little interest in the outcome (despite the fact that local representatives often have a larger impact on their constituents). When it comes to ballot measures, interest varies as well. Constitutional amendments that deal with social issues—such as abortion or gay rights—tend to attract the interest of voters. Ballot measures that deal with issues of governance—for example, the structure of government—are not especially interesting to most voters, save those who follow politics closely. Even ballot measures that propose to raise funds through the issuance of bonds—which usually equates to higher taxes—do not capture the attention of most voters. Second, the information environment associated with political contests varies significantly. Whereas presidential campaigns now seem to spend over a billion dollars and both senate and congressional campaigns spend in the tens of millions, spending on ballot measures varies depending on the type of measure. Ballot measures that deal with social issues or that have the potential to shape the fortunes of a large business enterprise (e.g., car insurance providers, pharmaceutical companies) tend to attract tens of millions of

dollars in campaign expenditures on both sides of the issue. Ballot measures concerning the details of governance often see limited campaign expenditures and sometimes no expenditures.

c Taking the previous two subsections together implies one logical conclusion: a strong majority of voters will learn very little about ballot measures that deal with the structure of government. Voters are busy and in their free time choose to seek out entertainment. Most voters do not follow politics for the sake of entertainment. Unfortunately, this means they do not research each and every political contest carefully. It also means that they often do not seek out informed opinions from thought leaders in their community and social circles. While most voters tend to follow presidential, gubernatorial, and senatorial elections, many of the remaining contests fail to register on their radars. Interest is finite, and most voters focus on the major offices—not unlike individuals who fail to watch most games during the National Football League season but tune in during the Super Bowl. Voters' limited amount of interest in ballot measures that deal with governance coupled with the often limited spending to support or oppose such measures means that voters are living in an environment where, come Election Day, they will need to cast a vote on a constitutional question for which they have had limited, if any, exposure before seeing that question on the ballot. It is not the case that voters who are seeing the constitutional amendment questions for the first time simply choose to not vote on the issue—while some voters will abstain, the majority will not. Thus, what we know is that for many voters, the ballot text constitutes the first and only piece of information they will encounter before making a decision and marking their ballots. Voters can make informed decisions with limited information. For example, voters can rely on heuristics such as partisan identification to evaluate candidates they may have had limited or no information about. Ballot measures, however, are different. There are no easy-to-interpret heuristics to rely on. They will therefore rely on the ballot text to inform their choices. The defendants in this case cite

Donaldson v. Dep't of Transp., 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992), choosing to add emphasis to the following line: "We must presume that the voters are informed on the issues and have expressed their convictions in the ballot box." This is a naïve conclusion, detached from the reality of our representative democracy. Voters are not fools, but they can be fooled. Voters have delegated the sacred responsibility of governance—including the right to propose changes to the constitution that governs all citizens—to elected officials. As delegates of voters, it is incumbent on elected officials to be as precise and clear as possible when crafting ballot text, especially when it concerns a constitutional change that will govern all citizens.

iii. Whether, assuming ballot language is misleading concerning the true nature of the proposal, the availability of officially prepared summaries of the actual proposal external to the ballot is likely to counteract the misleading information on the ballot in voters' minds.

Response: Voters rarely go beyond what is immediately accessible. The degree to which states attempt to provide additional information about ballot measures varies, as one would expect. California, for example, sends to each voter's home a state-issued voter information guide that contains detailed information about the ballot measures that will appear on the ballot, including statements for and against each measure provided by interested parties. It also includes endorsements from prominent political groups and elected officials. Other states, such as Arkansas, provide very little information about the ballot measures that will appear (though it is worth noting that the ballots in Arkansas print the entirety of each proposed law). The question at hand, however, is whether an official summary will counteract any potential misinformation. Under the California model, there is the potential to help counteract misinformation as information literally arrives at their front door. Thus, it is easy for voters to access and consume the information. If a state does not mail the information to voters directly,

only a small percentage of voters will seek out additional information, including official summaries. In my research (see endnote 14 on page 123 of Burnett and Kogan (2015)), only six percent of our subjects accessed the actual legal language of the ballot measure, despite the fact that a link to the information was prominently located just under the title and summary on the ballot in the experiment. While this result is not at all surprising given the reasoning I outlined in previous sections, it should be a sobering statistic for those interested in learning how humans acquire information. The short answer is we often do not acquire additional information for a variety of decisions, including voting. Therefore, while an official summary can help improve voters' level of information, it will go largely unnoticed by the overwhelming majority of voters.

iv. Whether the use of words "merit-based" and "non-partisan" and "bipartisan" in the ballot questions in S.L. 2018-117 and 118 would tend to cause voters to vote for these questions more than if the questions were the same but lacked those words.

Response: Each of the words "merit-based," "non-partisan," and "bipartisan" will cause voters to view the constitutional amendments in a more positive way. One could empirically test the degree to which these words increase support amongst voters through an experimental framing study, but the general result is easy to predict. "Merit-based" implies that someone has earned their position fairly and correlates with the concept of the "American Dream"—an idea that enjoys widespread support in the United States. The positive framing effect of "merit-based" will be especially amplified in the proposed ballot text of S.L. 2018-118, as it immediately references "professional qualifications" at the expense of "political influence." Voters will undoubtedly read this description as a reform-minded amendment, as the text implies that the current process of choosing individuals to fill judicial vacancies is one wrought with "political influence." These positive terms and phrases in these ballot questions will cause voters to be more likely to support this measure.

Likewise, "non-partisan" and "bipartisan" are both positively charged words that will increase support for a proposed ballot measure. Both words are the antonyms of "partisan" and either imply cooperation ("bipartisan") or impartiality ("non-partisan"). As is the case with "merit-based," the presence of "professional qualifications" and "political influence" will amplify the framing potential of "non-partisan."

v. Whether the use of the word "clarify" with regard to the "appointment authority" in S.L. 2018-117 would be more likely to cause voters to vote for the proposal than if language were used that explicitly conveyed that appointment authority currently possessed by the Governor was being taken away from the Governor and granted to the General Assembly.

Response: In this context, the word "clarify" implies a minor change or a slight restructuring of a process. Most voters will interpret this to mean the measure is merely a bit of legislative housekeeping. Research demonstrates that voters will give greater support to a measure that is described in positive terms such as "clarifying" than one that is described as "removing" or "eliminating" an aspect of the status quo.

This ends the affidavit.

Craig M. Burnett, Ph.D.

STATE OF CALIFORNIA
COUNTY OF San Mateo

Subscribed and sworn to (or affirmed) before me on this 10 day of August, 2018, by Craig M Burnett, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Notary Public Signature

ANJELO OCAMPO
COMM. # 2247325
NOTARY PUBLIC - CALIFORNIA
SAN MATEO COUNTY
MY COMM EXP. JUNE 23, 2022

Notary Public Seal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon each of the parties to this action by email and U.S. Mail to the addresses below on August 13, 2018:

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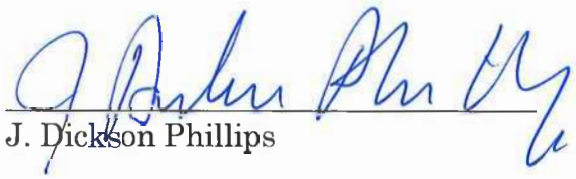
Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

This 13th day of August, 2018.



J. Dickson Phillips

EXHIBIT A

Craig M. Burnett

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Curriculum Vitae

Academic Appointments

Assistant Professor of Political Science, Hofstra University, 2016-present.

Assistant Professor of Political Science, University of North Carolina at Wilmington, 2013-2015

Assistant Professor of Political Science, Appalachian State University, 2010-2013

Education

Ph.D., Political Science, University of California, San Diego, 2010

M.A., Political Science, University of California, San Diego, 2006

B.A., Political Science and History, honors, University of California, Santa Barbara, 2003

Peer-Reviewed Publications

[19] "Parties as an Organizational Force on Nonpartisan City Councils." Forthcoming at *Party Politics*.

[18] "Is Political Knowledge Unique?," with Mathew D. McCubbins. Forthcoming at *Political Science Research and Methods*.

[17] "An Exploration of How Partisanship Impacts Council-Manager Systems," with Christopher R. Prentice. *Politics and Policy*, Volume 46, No. 3 (2018): 392-415.

[16] "The Politics of Potholes: Service Quality and Retrospective Voting in Local Elections," with Vladimir Kogan. *Journal of Politics*, Volume 79, No. 1 (2017): 302-314.

[15] "Reconsidering the Construct Validity of Political Knowledge." *Critical Review*, Volume 28, No. 3-4 (2016): 265-286.

[14] "Exploring the Difference in Participants' Factual Knowledge between Online and In-person Survey Modes." *Research and Politics*, Volume 3, No. 2 (2016): 1-7.

[13] "The Personal Politics of Same-Sex Marriage," with Aaron King. *Politics and Policy*, Volume 43, No. 4 (2015): 586-610.

[12] "Voter Knowledge and Candidates' Judicial Philosophies," with Lydia Tiede. *Justice System Journal*, Volume 36, No. 1 (2015): 49-62.

[11] "Party Labels and Vote Choice in Judicial Elections," with Lydia Tiede. *American Politics Research*, Volume 42, No. 2 (2015): 232-254.

[10] "When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment" with Vladimir Kogan. *Political Communication*, Volume 32, No. 1 (2015): 109-126.

[9] "Ballot (and Voter) 'Exhaustion' Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections," with Vladimir Kogan. *Electoral Studies*, Volume 37, No. 1 (2015): 41-49.

[8] "Local Logrolling? Examining the Impact of District Elections on Distributive Politics," with Vladimir Kogan. *Urban Affairs Review,* Volume 50, No. 5 (2014): 648-671.

[7] "Gubernatorial Endorsements and Ballot Measure Approval," with Janine A. Parry. *State Politics and Policy Quarterly*, Volume 14, No. 2 (2014) 178-195.

[6] "Sex and the Ballot Box: Perception of Ballot Measures Regarding Same-Sex Marriage and Abortion in California," with Mathew D. McCubbins. *Journal of Public Policy*, Volume 34, No. 1 (2014), 3-33.

[5] "Gaming Direct Democracy: How Voters' Views of Job Performance Interact with Elite Endorsements of Ballot Measures," with Mathew D. McCubbins. *California Journal of Politics and Policy*, Volume 5, No. 4 (2013), 627-643.

[4] "Does Campaign Spending Help Voters Learn About Ballot Measures?" *Electoral Studies*, Volume 31, No. 1 (2013), 78-89.

[3] "Familiar Choices: Reconsidering the Institutional Effects of the Direct Initiative," with Vladimir Kogan. *State Politics and Policy Quarterly*, Volume 12, No. 2 (2012), 204-224.

[2] "Do Blacks and Whites See Obama through Race-Tinted Glasses? A Comparison of Obama's and Clinton's Approval Ratings," with Marisa A. Abrajano. *Presidential Studies Quarterly*, Volume 42, No. 2 (2012), 363-75.

[1] "The Dilemma of Direct Democracy," with Elizabeth Garrett and Mathew D. McCubbins. *Election Law Journal: Rules, Politics, and Policy*, Volume 9, No. 4 (2010), 305-24.

Other Publications

[3] "Government and Politics in New York State." Custom Edition for CQ Press/Sage Publications, Thousand Oaks, CA. 2017.

[2] "Marriage on the Ballot: An Analysis of Same-Sex Marriage Referendums in North Carolina, Minnesota, and Washington During the 2012 Elections," with Mathew D. McCubbins. *Chapman Law Review*, Volume 16, No. 1 (2016): 1-34.

[1] "When Common Wisdom is Neither Common Nor Wisdom: Exploring Voters' Limited Use of Endorsements on three Ballot Measures," with Mathew D. McCubbins. *Minnesota Law Review*, Volume 97, No. 5 (2013), 1557-1595.

Working Papers

"What Do Voters Know About Ballot Measures?" Revise and resubmit at *Electoral Studies*.

"Direct Democracy's Educative Effects? The (Mis)Measurement of Ballot Measure Knowledge" with Jay Barth and Janine A. Parry. Revise and resubmit at *Political Behavior*.

"Do Nonpartisan Ballots Racialize Candidates Evaluations in Low-Information Elections?" with Vladimir Kogan. Under review

"The Limits of Statehouse Endorsements on Opinions toward Referendums," with Janine A. Parry.

"Direct Democracy and Individual Level Educative Effects," with Janine Parry and Jay Barth.

Courses

Hofstra University
- Undergraduate Courses
  - Political Science 001 - American Government
  - Political Science 111 - Racial and Ethnic Politics
  - Political Science 115 - State and Local Government
  - Political Science 147 - Public Opinion and Political Communication
  - Political Science 148 - Scope and Methods
  - Political Science 149 - Political Analysis and Statistics

University of North Carolina at Wilmington
- Undergraduate Courses
  - Political Science 101 - American National Government
  - Political Science 201 - Intro to Political Science Methods
  - Political Science 206 - State Government and Politics
  - Political Science 208 - Politics and the Entertainment Media
  - Political Science 303 - Political Behavior and Participation
  - Political Science 401 - Senior Seminar
  - Political Science 403 - Public Opinion
- Graduate Courses
  - Political Science 592 - Bargaining, Decision-making, and Political Economy

Appalachian State University
Undergraduate Courses
Political Science 1100 - American National Government and Politics
Political Science 3115 - Research Methods
Political Science 3500 - Law and Politics
Political Science 3530 - Campaigns and Elections
Political Science 3535 - Washington at Work
Political Science 4175 - Public Opinion
Graduate Courses
Political Science 5030 - Pro-seminar in American Government and Politics
Political Science 5110 - Campaigns and Elections
Political Science 5135 - State Politics
Political Science 5530 - Political Economy

University of California, San Diego
Undergraduate Courses
Political Science 10 - Introduction to American Politics
Political Science 102F - Mass Media and Politics
Political Science 162 - Environmental Policy and Policymaking

Grants and Awards

Faculty Research and Development Grant, Hofstra University, $1,600, 2018

Diversity Research and Development Grant, Hofstra University, $2,500, 2017

Faculty Research and Development Grant, Hofstra University, $1,350, 2017

Global Citizenship Grant, University of North Carolina Wilmington, $6,000, 2015-2016.

Charles L. Cahill Award, University of North Carolina Wilmington, $2,000, 2014-2015.

Appalachian State University Undergraduate Research Grant, $1,000, 2012-2013.

Survey Experiment on Ballot Framing and Information Shortcuts, Time-sharing Experiments for the Social Sciences (TESS), 2010, NSF Grant 0818839

Mark Twain Fellowship, University of California, San Diego, 2004-2008

Conferences

Annual Meeting of the American Political Science Association (2008, 2010, 2012, 2013, 2014, 2015, 2016, 2017, 2018)
- Presenter (9x), Discussant (5x), Chair (4x)

Annual Conference on State Politics and Policy (2009, 2011, 2012, 2014, 2015, 2016, 2017, 2018)

- Presenter (8x), Discussant (5x), Chair (2x)

Duke-Oxford Conference on Cognition, Law, and Social Science (2015, 2017), Presenter

Annual Meeting of the North Carolina Political Science Association (2014, 2015)
- Presenter (2x), Discussant, Chair (2x)

Annual Meeting of the Midwest Political Science Association (2009, 2010, 2011, 2012, 2013)
- Presenter (5x), Discussant (2x)

Initiatives and Referendums in the Elections of 2012, University of Southern California, Los Angeles, CA, November 16, 2012
- Presenter

Annual Meeting of the Society for Political Methodology (2012)
- Presenter

World Congress of Political Science (2012)
- Presenter

Annual Conference on Empirical Legal Studies (2009, 2011)
- Presenter (1x), Discussant (2x)

The Past, Present, and Future of Election Law: A Symposium Honoring the Work of Daniel Hays Lowenstein, UCLA School of Law, Los Angeles, CA, January 29, 2010
- Presenter

University and Department Service

Hofstra University
- Senator, 2018-present
- Senator-at-large, 2016-2018
- Member, University Planning and Budget Committee, 2016-2018
- Chair, Ad-Hoc Committee to Develop Academic Calendar Religious Observance Policy, 2017-present
- Member, Ad-Hoc Committee on Graduate Program Evaluation, 2018-present
- Political Science Webmaster, 2016-present
- Director of the Albany Internship Program, 2016-present
- Honors Advisor: Anthony Iafrate (2017), Rita Cinquemani (2018)

University of North Carolina at Wilmington
- Faculty Review Committee, 2013-2015
- Political Science Days Committee, 2013-2015, Chair 2014-2015
- Co-coordinator for Campaign Management Minor, 2014-2015

Appalachian State University
- Judicial Politics Search Committee Member, 2011-2012

Public Administration Search Committee Member, 2011-2012
Department Personnel Committee, 2010-2011, 2012-2013
Honors Advisor: Melissa Witte (2012)
General Education Assessment Faculty Reviewer, 2010-2011
Lecturer, Appalachian Lifelong Learning, 2011

Service to the Discipline

Reviewer for *American Political Science Review*, *American Journal of Political Science*, *American Politics Research, California Journal of Politics and Policy, Election Law Journal, Electoral Studies, Local Government Studies, Journal of Politics, Journal of Political Science, Journal of Public Policy, Political Behavior, Political Research Quarterly, Public Opinion Quarterly, Revista Internacional de Sociología, State Politics and Policy Quarterly, Journal of Urban Affairs, Public Works Management and Policy, Publius: The Journal of Federalism, Policy Studies Journal*, *Politics*, *Society and Natural Resources*.

State Politics and Policy Section, American Political Science Association
- Secretary, 2018-present
- Council Member, 2014-present
- Newsletter Editor, 2016-2018

North Carolina Political Science Association
- Secretary, 2015-2016
- At Large Executive Board Member, 2014-2015