No. 261A18-3 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCATION FOR THE ADVANCEMENT OF COLORED PEOPLE, Plaintiff-Appellant, v. TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, Defendants-Appellees.	From Wake County No. COA19-384

****

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA IN SUPPORT OF PLAINTIFF-APPELLANT

****

Pursuant to North Carolina Rule of Appellate Procedure 28(i), amicus curiae American Civil Liberties Union of North Carolina respectfully requests leave to file the accompanying brief in support of Plaintiff-Appellant.

STATEMENT OF INTEREST

The American Civil Liberties Union of North Carolina ("ACLU of North Carolina") is a statewide, nonprofit, nonpartisan organization with over 30,000 members across North Carolina. It is a state affiliate of the national American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil rights laws. Since 1965, the ACLU of North Carolina has been at the forefront of efforts to protect the federal and state constitutional and civil rights of North Carolinians, particularly of those who have been historically marginalized, including people of color and LGBTQ people. Among the ACLU of North Carolina's core priorities is the protection of constitutional and civil rights such as the right to vote, freedom of speech and religion, and the right to reproductive health. As an organization that has long been dedicated to protecting the rights of North Carolinians under both the state and federal Constitutions, the ACLU of North Carolina has a strong interest in the proper resolution of this controversy.

WHY THE *AMICUS CURIAE* BRIEF IS DESIRABLE

Amicus brings to this case additional perspective based on its half-century of experience fighting for the constitutional rights of North Carolinians. In particular, the proposed brief discusses how permitting a legislature that lacks popular sovereignty to amend the state Constitution would be particularly harmful for vulnerable North Carolinians seeking protection of their individual rights, and why the majority of the Court of Appeals panel erred in refusing to affirm the relief the trial court granted Plaintiff-Appellant.

ISSUES OF LAW TO BE ADDRESSED

Amicus seeks to brief the Court on the following issues. *First*, amicus explains why the North Carolina Constitution is an important shield against incursions on individual rights for vulnerable North Carolinians. *Second,* amicus explains why the precedents of this Court that safeguard individual rights provide the legal authority to grant relief for the constitutional harms at issue. *Third*, amicus argues that it is necessary for this Court to correct the errors of the Court of Appeals to preserve the Constitution's protections.

POSITION OF *AMICUS CURIAE*

Amicus takes the position that the trial court correctly ruled for Plaintiff-Appellant on the question of whether a legislative body that lacks popular sovereignty also lacks the legal authority to amend our state's most

foundational document. The answer to that question is yes, and this Court should reverse the Court of Appeals panel's majority decision.

CONCLUSION

For the foregoing reasons, amicus respectfully requests that the Court grant this motion to file the accompanying proposed brief of amicus curiae in support of Plaintiff-Appellant.

Respectfully submitted this the 2nd Day of December, 2020

/s/ Jaclyn Maffetore*

*I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Jaclyn Maffetore
North Carolina Bar No. 50849
jmaffetore@acluofnc.org
Leah J. Kang
North Carolina Bar No. 51735
lkang@acluofnc.org
Kristi L. Graunke
North Carolina Bar No. 51216
kgraunke@acluofnc.org
ACLU of North Carolina Legal Foundation
P. O. Box 28004
Raleigh, NC 27611-8004
Tel: 919-834-3466
Fax: 919-869-2075

Counsel for Amicus Curiae/Movants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE** was served this day upon all parties via electronic mail, in accordance with N.C. App. P. R. 26(c), addressed to the following:

Kimberley Hunter
David Neal
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
khunter@selcnc.org
dneal@selcnc.org

Irving Joyner
P.O. Box 374
Cary,NC 27512
ijoyner@nccu.edu

Daryl V. Atkinson
Forward Justice
400 w. Main Street, Suite 203
Durham, NC 27701
daryl@forwardjustice.org

Attorneys for Plaintiff-Appellant

D. Martin Warf
Noah H. Hufstetler III
Nelson Mullins
Glenlake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
martin.warf@nelsonmullins.com
noah.huffstetler@nelsonmullins.com

Attorney for Defendant-Appellees

This the 2nd day of December, 2020

/s/ Jaclyn Maffetore
Jaclyn Maffetore

Counsel for Amicus Curiae/Movants

No. 261A18-3 TENTH DISTRICT

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Pursuant to North Carolina Rule of Appellate Procedure 28(i), the American Civil Liberties Union of North Carolina submits this brief as amicus curiae in support of Plaintiff-Appellee North Carolina State Conference of the National Association for the Advancement of Colored People.[1]

INTRODUCTION

This Court should affirm the trial court's decision, which correctly reasoned that a legislative body without popular sovereignty lacks the legal authority to amend our state's most foundational document. The North Carolina Constitution provides that amending the Constitution is the "*inherent, sole, and exclusive right*" of the *people* of North Carolina. N.C. Const. art. I, § 3 (emphases added). By design, the requirements for amending the Constitution are uniquely heightened, to ensure that it cannot be easily tampered with, and may only be changed by the will of the people and their duly-elected representatives. As discussed below, for people of color, LGBTQ people, and other traditionally marginalized communities that ACLU-NC regularly represents, the Constitution stands as a bulwark against incursions on their individual liberties. Affirming the decision of the Court of Appeals

[1] Pursuant to N.C. R. App. P. 28(i)(2), Amici state that no other person or entity other than their members and counsel of record contributed to the writing of this brief.

would signal that there are no checks on stolen legislative power, leaving vulnerable the many North Carolinians for whom the Constitution is a last refuge.

ARGUMENT

I. The Constitution is a Refuge for Vulnerable Minorities.

State constitutions are a "font of individual liberties,"[2] and none more so than the North Carolina Constitution. "The North Carolina Constitution is the people's timeless shield against encroachment on their civil rights."[3] Unlike the federal Constitution, to which the Bill of Rights is appended, the North Carolina Constitution enshrines a Declaration of Rights in Article I, placing a constitutional commitment to individual rights "logically, as well as chronologically, prior to the constitutional text."[4]

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[2] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 Harv. L. Rev. 489, 491 (1977).

[3] Justice Harry Martin, *The State As a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C.L. Rev. 1749, 1757 (1992); *see also Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 783, 413 S.E. 2d 276, 290 (1992) ("[O]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens.").

[4] John V. Orth, *"The Law of the Land": The North Carolina Constitution and State Constitutional Law: North Carolina Constitutional History*, 70 N.C.L. Rev. 1759, 1762 (1992).

The North Carolina Constitution "offers especially fertile ground" for those most vulnerable to violations of their rights "because the document itself provides certain protections that do not appear in the federal counterpart."[5] North Carolina's Constitution establishes not only the right to be free from government actions, but includes affirmative rights that promote equality, such as the right to a free public education. *See* N.C. Const. Art. I, § 15.[6] In addition, this Court has repeatedly found that individual rights under the North Carolina Constitution are more expansive than their federal corollaries.[7]

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[5] Martin, *supra*, at 1752.

[6] *See also* Judge Robert N. Hunter, Jr., *The Past as Prologue: Albion Tourgee and the North Carolina Constitution*, 5 Elon L. Rev. 89, 92, 97-98 (2013) (explaining that the post-Reconstruction Constitution of 1868, the foundation of the current Constitution, "shifted the Constitution from a document that restrained government power over its citizens to a document that required affirmative governmental power to enhance equality").

[7] *See, e.g.*, *State v. Carter*, 322 N.C. 709, 723-24, 370 S.E.2d 553, 561-62 (1988) (holding that under the state Constitution, the exclusionary rule barring admission of evidence obtained by unconstitutional search and seizure is not subject to federal constitution's good-faith exception); *Jackson v. Housing Authority*, 321 N.C. 584, 364 S.E.2d 416 (1988) (finding exclusion from *civil*, not just criminal, jury service on account of race unconstitutional under the state Constitution before same established under federal Constitution).

Indeed, in recent history, North Carolina courts have issued many important decisions recognizing or vindicating the North Carolinians' civil rights under the state Constitution. *See, e.g.*, *State v. Burke*, 374 N.C. 617, 620, 843 S.E.2d 246, 249 (2020) (holding that applying repeal of the North Carolina Racial Justice Act retroactively to defendant was unconstitutional); *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 792, 785 S.E.2d 255, 266 (2016) (affirming lower court ruling striking as unconstitutional provisions of state law that retroactively revoked "career status" from public school teachers); *Holmes v. Moore*, 840 S.E.2d 244, 265-67 (N.C. Ct. App. 2020) (preliminarily enjoining 2018 voter ID statute as likely unconstitutional); *Community Success Initiative v. Moore*, 19CVS15941 (Wake Cty. Super. Ct. Sept. 4, 2020) (striking as unconstitutional statute preventing people on probation, parole, or post-release supervision from voting in elections); *NC NAACP v. Cooper*, 20CVS500110 (Wake Cty. Super. Ct. June 16, 2020) (ordering preliminary relief upon finding that conditions of confinement in state prisons during the COVID-19 pandemic are likely unconstitutional).

The North Carolina Constitution thus provides critical protection, and is often a last refuge for people and communities whose civil rights are particularly vulnerable to arbitrary or malicious tampering by the politically powerful. So that these protections are not unduly vulnerable to shifting

political majorities, the Constitution mandates that it may only be amended through an exercise of popular sovereignty. *See* N.C. Const. art. I, §§ 2-3, 10, read *in pari materia* with art. XIII, § 2 ("The people of this State reserve the power to amend the Constitution and to adopt a new or revised Constitution."). A two-step procedure is intended to ensure the requisite popular sovereignty: a legislative proposal to amend the Constitution must first receive the approval of three-fifths supermajorities of duly-elected representatives in both houses of the legislature, and then must be ratified by a majority vote of the people. N.C. Const. art. XIII § 4.

These heightened procedural requirements are intended to ensure that a fully representative body engages in thoughtful deliberation and responsible decision-making on issues of greatest importance. *See, e.g., Allen v. City of Raleigh,* 181 N.C. 453, 453, 107 S.E. 463, 464 (1921). Given the high stakes, the Constitution's requirements for amendment must be strictly construed and enforced. Here, the amendments at issue were enacted in violation of these constitutional requirements, as they were enacted by an unrepresentative legislative body that illegally came to power and then knowingly used its illegal power to alter the ultimate guardian of the rights of North Carolinians. This Court should hold that the trial court correctly found the challenged proposed amendments void.

II. Courts Must Protect the Constitution, and Interpret Its Text in Favor of the People.

The judiciary plays a critical role in ensuring the will of the people as expressed in the Constitution, and the rights guaranteed therein, are not hollow pronouncements. *See Hoke v. Henderson,* 15 N.C. (4 Dev.) 1, 10 (1833) ("the preservation of the integrity of the constitution is confided by the People, as a sacred deposit, to the Judiciary.") (overruled on other grounds). Far from offending the constitutional principle of separation of powers, judicial review is crucial to its maintenance. *See State ex rel. McCrory v. Berger,* 368 N.C. 633, 653, 781 S.E.2d 248, 261 (Newby, J., concurring) (noting that judicial review guards against abuse of legislative power). Importantly, judicial review protects the individual, fundamental rights set forth in the Declaration of Rights. *See Corum,* 330 N.C. at 783, 413 S.E.2d at 290. Where, as here, government officials have acted in conflict with the intent of the framers of the Constitution, thus threatening the individual rights of the people, this Court is not only empowered but required to provide legal redress. *Maready v. City of Winston-Salem,* 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996); *see also Corum,* 330 N.C. at 784, 413 S.E. 2d at 291.

A. The Judiciary Is Empowered to Interpret the Powers Vested and Rights Reserved by the Constitution.

While the majority below acknowledges that "our judicial branch has the power to declare *a law* enacted by our General Assembly unconstitutional," Dillon Op. at 13, the duties and inherent powers of review committed to the courts by the Constitution are not so circumscribed. Rather, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison,* 5 U.S. 137 (1803).[8] In North Carolina, "[t]he will of the people as expressed in the Constitution is the supreme law of the land." *State v. Emery,* 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944). And "[t]his Court is the ultimate interpreter of our State Constitution." *Corum,* 330 N.C. at 783, 413 S.E.2d at 290; *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997).

North Carolina courts are obligated to interpret the Constitution's requirements, even where the power to effectuate those requirements has been committed to a coordinate branch of government. For example, in *Leandro,* plaintiffs challenged the system for funding public schools as failing to provide

[8] This federal principle has been adopted by this Court. *See, e.g., Stephenson v. Bartlett,* 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002).

a constitutionally adequate education. 346 N.C. at 342, 488 S.E.2d at 252. The defendants sought to dismiss the challenge as a nonjusticiable political question on the ground that article IX, § 2 assigns the legislature the duty to provide for a public-school system. *Id.* at 344-45, 488 S.E.2d at 253. Rejecting this justiciability argument, the Court recognized that the legislature "has inherent power to do those things reasonably related to meeting [its] constitutionally prescribed duty," and "acknowlege[d] that the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education." *Id. at* 353-55, 488 S.E.2d at 258-59. However, the Court emphasized that it — and not the legislature — must "be the final authority in interpreting" the Constitution, and deciding whether the legislature was complying with Constitutional requirements. *Id.*

The judiciary's duty to interpret the Constitution also requires that courts determine whether government action "exceeds constitutional limits." *Id.* at 345, 488 S.E.2d at 253; *see also State v. Harris*, 216 N.C. 746, 746, 6 S.E.2d 854, 866 (1940) ("Obedience to the Constitution on the part of the legislature is no more necessary to orderly government than the exercise of the power of the Court in requiring it when the Legislature exceeds its limitations."); *Howerton v. Tate,* 68 N.C. 546, 549 (1873).

The majority below contended "nothing in the language of our state constitution" empowers the courts "to 'blue pencil' the powers of our legislative branch," Dillon Op. at 19. This ignores the courts' role, as "administrators of the public will," in enforcing the limits that the people have *already* placed on the legislature's power. *Southern Ry. Co. v. Cherokee Cty.,* 177 N.C. 86, 86, 97 S.E. 758, 763 (1919) (Walker, J. Concurring); *see also Harris,* 216 N.C. at 746, 6 S.E.2d at 862.

Since the State's founding, North Carolina courts have countless times scrutinized the authority granted to the legislature by the people, and have voided acts exceeding that authority. *See*, *e.g., City of Asheville v. State,* 369 N.C. 80, 105-06, 794 S.E.2d 759, 777-78 (2016) (invalidating an impermissible local law, and noting the power of the legislature is "expressly subject to the limitations set out in Article II, Section 24, which 'is the fundamental law of the State and may not be ignored.'") (citation omitted); *Simeon v. Hardin,* 339 N.C. 358, 373, 451 S.E.2d 858, 868 (1994) (holding "the General Assembly is not authorized to enact procedural rules that violate substantive constitutional rights" and noting the "trial court's conclusion that it was without authority to review" the provisions at issue was error); *Richmond Cty. Bd. of Educ. v. Cowell,* 243 N.C. App. 116, 118, 776 S.E.2d 244, 246 (2015) (holding the

"General Assembly exceeded its constitutional powers" by enacting legislation in contravention of Article IX § 7(a)).

Moreover, this Court has voided acts that exceeded the legislature's *procedural* authority, even where the *substance* of the act would have been otherwise constitutionally permissible. *See, e.g., Purser v. Ledbetter,* 227 N.C. 1, 5-6, 40 S.E.2d 702, 706 (1946) ("[W]hen the Constitution provides how orderly progress may be fostered and advanced, and the process involves political rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative"); *Allen,* 181 N.C. at 453, 107 S.E. at 465 (holding void a revenue bill that failed to comply with "mandatory" constitutional procedural requirements), *Foster v. N.C. Med. Care Comm'n,* 283 N.C. 110, 123, 195 S.E.2d 517, 526 (1973) (invalidating statute allowing local governments to enter into lease agreements with Medical Care Commission without a vote of the people, because the Constitution "declares that the people residing in such governmental unit, not its board of commissioners, shall have the power of decision.").

Here, the majority below presumed, without constitutional analysis, that the 2018 legislature possessed the authority to place constitutional amendments before the voters, because General Assemblies *ordinarily* possess the authority to do so, holding that it is "simply beyond our power" to rule

otherwise. Dillon Op. at 19. But "[w]hether, in any particular case, the Legislature was without authority under the Constitution to act is . . . plainly and palpably a question of law . . . ." *Southern Ry. Co.*, 177 N.C. at 86, 97 S.E. at 762, *see also Harris,* 216 N.C. at 746, 6 S.E.2d at 862. In holding that it lacked authority to consider whether the 2018 legislature, a product of unconstitutionally racially gerrymandered maps, was authorized to propose constitutional amendments to the people, the court below abdicated its duty to interpret the Constitution and say what the law is.

B. This Court Must Provide a Means to Redress the Constitutional Harms at Issue

As detailed above, "[t]he Constitution is intended to protect our rights as individuals from our actions as the government." *Corum,* 330 N.C. at 788, 413 S.E.2d at 293. Thus, the judiciary has a fundamental responsibility to exercise its powers of constitutional interpretation and judicial review to "protect the state constitutional rights of its citizens." *Id.* at 783, 413 S.E.2d at 290.

An asserted right is meaningless without a mechanism to enforce it. *Id.* at 786, 413 S.E.2d at 291 ("It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the

State cannot sue because of the doctrine of sovereign immunity."). This Court has thus recognized that it must not shy away from novel constitutional questions, but must instead carefully scrutinize the rights involved and ensure means of redress. *See, e.g., Craig ex. rel. Craig v. New Hanover Cty. Bd. of Educ.,* 363 N.C. 334, 342, 678 S.E.2d 351, 357 (2009) ("[I]ndividuals may seek to redress all constitutional violations, in keeping with the fundamental purpose of the Declaration of Rights . . . .").

Here, the Constitution provides that any amendment must be by the will of the people, and must undergo, as discussed above, two separate and distinct steps. But the 2018 legislative supermajorities that completed the first of these steps by enacting proposed constitutional amendments came to power by way of an illegal racial gerrymander that "interfered with the very mechanism by which the people confer their sovereignty on the General Assembly and hold the General Assembly accountable." *Covington v. North Carolina,* 270 F.Supp.3d 881, 897 (M.D.N.C. 2017). This violation of the principles of popular sovereignty, which the Constitution guarantees to the people of North Carolina, must be redressed.

Failure to do so would allow a legislature adjudged by the highest court in the nation to be the product of illegal, racial gerrymandering, *id.* at 891-92, and which thus lacked the requisite popular sovereignty, to nonetheless

engage in an act the Constitution says must only be done by the will of the people. Leaving such a violation without redress undermines *all* fundamental, individual rights. *See, e.g., Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937) (noting "consent of the governed . . . must be held inviolable to preserve our democracy.").

Protecting the procedural safeguards for constitutional amendment is particularly important because historically marginalized communities often rely on such procedural protections to secure their fundamental rights against tampering by political majorities. Contrary to the opinions below, it is insufficient, to say the statewide popular vote on the proposed constitutional amendments cured the defects in the first step of the amendment process.

Political majorities are inherently fallible. They are underinclusive, as those who are not entitled to vote on a constitutional amendment are nonetheless impacted by alterations to the State's foundational text.

Additionally, at-large popular votes have historically failed to protect, and in some instances, explicitly targeted marginalized groups. *See Thornburg v. Gingles,* 478 U.S. 30, 47 & n.13 (1986) ("[A]t-large voting schemes may operate to minimize or cancel out the voting strength of racial [minorities in] the voting population."); *General Synod of the United Church of Christ, et al.*

v. Cooper, 12 F.Supp.3d 790 (W.D.N.C. 2014) (invalidating N.C. Const. Art. XIV, § 6, prohibiting same-sex marriage, as unconstitutional).

Finally, political majorities are vulnerable to act on passing whims — or worse — fear. An eminent constitutional text, widely relied upon by this Court, explains both the risk and the remedy:

> [T]here is reason for concern, however, if too frequent amendments so habituate voters to constitutional change that they someday, in the grip of temporary passion or fear, tamper with the fundamental guarantees of due process. . . . The best guarantee of North Carolinians' basic rights must ever be what it has always been: not only a balanced institutional arrangement of government subject to wise restraints enforced when necessary by fearless judges, but above all a thoughtful and informed citizenry, conscious of its constitutional history and zealous to preserve the best for posterity.[9]

Just as judicial scrutiny of alleged "violations of free speech is essential to the preservation of free speech," *Corum* at 782, 413 S.E.2d at 289, property rights, *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 620, 89 S.E.2d 290, 297-98 (1955), and due process of law, *Bayard v. Singleton,* 1 N.C. (1 Mart.) 5, 7 (1787), scrutiny of violations of popular sovereignty is essential for the preservation of popular sovereignty. Without it, the rights of the most vulnerable are left unprotected from the whims of political majorities—and, in

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[9] John v. Orth & Paul Martin Newby, *The North Carolina Constitution* 109 (G. Alan Tarr ed., 2d ed. 2013).

this case, from an illegally-constituted and unrepresentative legislature. This is anathema to the framers' intent. If our Constitution's protections are to have any meaning, the courts must remedy these constitutional harms.

III. The Decision Below Incentivizes Legislative Abuse and Must be Reversed to Preserve the Constitution's Protections

By declining to provide redress, the court below turned a blind eye to its duty to protect the Constitution against legislative overreach and political whims.

In doing so, the majority opinion relied on dicta in *Leonard v. Maxwell,* 216 N.C. 89, 99, S.E.2d 316, 324 (1939), to conclude the question in this case is a nonjusticiable political question. Dillon Op. at 14. But significant developments in redistricting jurisprudence since 1939 undermine *Leonard*'s theory of nonjusticiability, *see* Young Op. at 1-2, and this Court's precedent does not allow for hasty dismissal of an important constitutional question based on the dicta of a single case. *See, e.g., State v. Ballance,* 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949).

The court below also erroneously applied principles of legislative deference and presumptive legality. *See*, *e.g.,* Stroud Op. at 2-3. But there is no presumption of constitutionality owed to the composition of the 2018 legislature: its *un*constitutionality has been conclusively determined by the

federal courts. Instead, the issue is whether a legislature tainted by an unconstitutional racial gerrymander "constitut[ing] one of the most widespread racial gerrymanders ever held unconstitutional by a federal court," "affecting over 80% of the state's voters," *Covington,* 270 F.Supp.3d at 896, may use its illegal power to amend the Constitution despite its broken link to popular sovereignty. It may not.

The concurrence also claims there is no precedent to support the trial court's grant of legal redress. Stroud Op. at 1 ("[T]his Court has no power to affirm the trial court's order because it is not based upon law"). This conclusion is "inconsistent with the spirit of our [courts'] long-standing emphasis on ensuring redress for every constitutional injury," *Craig ex. rel. Craig,* 363 N.C. at 342, 678 S.E.2d at 357, and their inherent authority to do so. This Court must "interpret the organic law in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." *Sneed v. Greensboro City Bd. of Educ.* 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980). The court's interpretation of the Constitution must favor protecting the people of the State. *Harris,* 216 N.C. at 746, 6 S.E.2d at 866.

If the Court of Appeals' avoidance of constitutional interpretation based on a claimed lack of precedent is allowed to stand, it would all but foreclose the ability of civil rights litigants to advance novel theories for the protection of individual rights under the State Constitution. Moreover, it would leave standing an act of unconstitutional legislative overreach. Our Constitution falters if judges refuse to be "fearless" in curbing these abuses.[10] The Court of Appeals' decision effectively means that a legislature that cheats its way into power, regardless of how egregiously it does so, and regardless of how many rights it violates along the way, nonetheless possesses *unquestionable* authority to act as the agent of the people's will and alter the supreme law of the land, perhaps irrevocably. Such a legislature, unaccountable to the people, could rest assured that no matter how it subverted the public will or illegally molded the electorate to support its proposed amendments, the amendments would nonetheless be valid.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

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[10] Orth & Newby, *supra,* at 109.

Respectfully submitted this the 2nd day of December, 2020

/s/ Jaclyn Maffetore*

*I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Jaclyn Maffetore
North Carolina Bar No. 50849
jmaffetore@acluofnc.org
Leah J. Kang
North Carolina Bar No. 51735
lkang@acluofnc.org
Kristi L. Graunke
North Carolina Bar No. 51216
kgraunke@acluofnc.org
ACLU of North Carolina Legal Foundation
P. O. Box 28004
Raleigh, NC 27611-8004
Tel: 919-834-3466
Fax: 919-869-2075

Counsel for Amicus Curiae/Movants

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief, which is prepared using a proportional font, is no more than 3,750 words (excluding covers, captions, indexes, table of authorities, certificate of service, this certificate of compliance, and counsels' signature block), including footnotes and citations, as reported by the word processing software.

This the 2nd day of December, 2020

/s/ Jaclyn Maffetore
Jaclyn Maffetore

Counsel for Amicus Curiae/Movants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this **BRIEF OF AMICUS CURIAE THE AMERICAN CIVIL LBERTIES UNION OF NORTH CAROLINA** was served this day upon all parties via electronic mail, in accordance with N.C. App. P. R. 26(c), addressed to the following:

Kimberley Hunter
David Neal
Southern Environmental Law Center
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516
khunter@selcnc.org
dneal@selcnc.org

Irving Joyner
P.O. Box 374
Cary,NC 27512
ijoyner@nccu.edu

Daryl V. Atkinson
Forward Justice
400 w. Main Street, Suite 203
Durham, NC 27701
daryl@forwardjustice.org

Attorneys for Plaintiff-Appellant

D. Martin Warf
Noah H. Hufstetler III
Nelson Mullins
Glenlake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
martin.warf@nelsonmullins.com
noah.huffstetler@nelsonmullins.com

Attorney for Defendant-Appellees

This the 2nd day of December, 2020

/s/ Jaclyn Maffetore
Jaclyn Maffetore

Counsel for Amicus Curiae/Movants