No. 267P18 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff-Appellee, v. PHILLIP 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, *et al.*, Defendants-Appellants.	)	From Wake County No. 18-CVS-9805

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AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AND DEMOCRACY NORTH CAROLINA'S AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE ROY A. COOPER, III

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INTRODUCTION

Amici are nonpartisan organizations committed to furthering democracy and democratic values in North Carolina and across the nation. They come before the Court to emphasize two fundamental points about the General Assembly's use of affirmatively misleading ballot language for the constitutional amendments it has put before the voters.[1]

First, the effort to entrench one party in power by misleading voters clashes with bedrock principles of democratic accountability that form the basis of the North Carolina and U.S. Constitutions. This case involves no ordinary effort to deceive voters, but a continuation of the General Assembly's years-long effort to entrench its majority party in power. Political entrenchment happens when the party in power changes the rules to lock in its political dominance and insulate itself from loss of popular support. As Amici argued to this Court in *Cooper v. Berger*, 809 S.E.2d 98 (N.C. 2018), government action that is designed to entrench one party in power is inconsistent with democratic principles, and it is inherently suspect under both the North Carolina and U.S. Constitutions.

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[1] This brief takes no position on whether, absent these efforts to mislead, it was permissible for the General Assembly to place the two amendments on the ballot.

Here, there is no other plausible explanation for the General Assembly's actions. The constitutional amendments it has put before the voters of North Carolina would materially restructure state government to give the General Assembly significant new powers: filling judicial vacancies, appointing state election officials, and naming the heads of executive agencies. Rather than allow voters to carefully consider these changes, the General Assembly is attempting to present to the voters this substantial rebalancing of power using affirmatively misleading ballot language. And it has barred the Constitutional Amendments Publication Commission ("CAPC")—the body previously charged with producing ballot language (two of whose three members are statewide elected officers from the opposing party)—from drafting accurate captions.

Second, the General Assembly's attempt to mislead voters also negates their fundamental right to vote protected by the United States and North Carolina Constitutions. The right to vote means nothing unless voters know what they are voting on. The requirement that the ballot be free from government deception is implicit in any framework requiring constitutional amendments to be submitted to the people for approval. For that reason, too, the General Assembly's actions should not be allowed to stand.

Amici readily acknowledge that both major parties in North Carolina have manipulated the political process to frustrate the will of the voters when they had the chance. But as Amici argued in *Cooper v. Berger*, "they did it too"

is not a valid defense when the political rights of all North Carolinians are on the line. After all, political power in North Carolina "is vested in and derived from the people" and "founded on their will only." N.C. Const. art. I, § 2. And there is hardly a more important expression of the people's sovereignty than a vote to amend the state constitution.

If the legislative branch will not abide by basic guardrails that safeguard the people's right to self-government, it is incumbent on this Court to vindicate those "fundamental principles" to which "frequent recurrence" is "absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

For these reasons, Amici urge the Court to intervene.

ARGUMENT

I. The General Assembly's ballot language is affirmatively misleading.

It cannot be denied that the ballot language for both proposed amendments is affirmatively misleading.

First, the ballot language for the judicial-selection amendment (hereinafter, the "Judicial Vacancies Amendment") fundamentally mischaracterizes what the amendment would do. This amendment will appear on the ballot as a measure to "implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence" for filling judicial vacancies. 2018 N.C. Sess. Law 118 § 6. There is no mention of

the critical fact that the amendment would give the lion's share of the power to fill vacancies not to a nonpartisan commission, but to the General Assembly.[2] 2018 N.C. Sess. Law 118 § 6.

Simply put, this is not a "merit-based" system. The North Carolina Senate's Select Committee on Judicial Reform and Redistricting invited the Brennan Center to present extensive testimony on this issue last year. *See Hearing Before the S. Select. Comm. on Judicial Reform and Redistricting*, 2017-2018 Leg. Sess. (N.C. 2017), https://goo.gl/hg8yd1 (testimony of Alicia Bannon) [hereinafter, "Bannon Testimony"].

As the Brennan Center explained in its testimony, a merit-based judicial appointment system—typically called "merit selection"—takes concrete steps to insulate judicial selection from politics, usually by giving an independent commission the role of screening and evaluating judicial candidates and requiring that the governor choose from a short list created by that commission. *See id.* at 5.

Here, by contrast, the amendment would establish a commission to merely assess whether a candidate has the basic qualifications to serve—for

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[2] The power to fill vacancies is a significant one. The Brennan Center has found that in states that elect supreme court justices, nearly half of all justices were initially appointed due to an interim vacancy. Kate Berry and Cathleen Lisk, *Appointed and Advantaged: How Interim Vacancies Shape State Courts*, Brennan Center for Justice, https://goo.gl/JkiKtp.

example, to confirm that they are old enough and have a law license. It would assign the actual power to evaluate qualified candidates to the General Assembly, which could select as few as two candidates to send to the Governor. Nothing would prevent the selection of candidates based on party loyalty or other political factors, as has occurred in the two states with similar systems.[3]

The ballot language for the other proposed amendment (hereinafter, the "Separation of Powers Amendment") is equally misleading. This amendment would award the General Assembly the power to appoint members of the State Board of Elections and every other state "board or commission," 2018 N.C. Sess. Law 117 § 2, nullifying this Court's decisions preventing the General Assembly from doing so. *See Cooper v. Berger*, 809 S.E.2d at 116; *McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 258 (2016). Yet it will appear on the ballot as nothing more than a proposal to "establish a bipartisan Board of Ethics and Elections" and "clarify the appointment authority of the Legislative and Judicial Branches[.]" 2018 N.C. Sess. Law 117 § 5. Indeed, despite the

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[3] Only two states currently give their legislatures as much authority to select supreme court justices. Douglas Keith & Laila Robbins, *Legislative Appointments for Judges: Lessons from South Carolina, Virginia, and Rhode Island*, Brennan Center for Justice (Sept. 29, 2017), https://goo.gl/rAK9uK. Far from "nonpartisan," those processes have been highly politicized. In 2000, every member of the South Carolina Supreme Court was a former legislator, and aspiring judges reportedly waited on the capitol steps or in the parking garage to greet legislators. *Id.*

fact that this ballot measure strips away the Governor's appointment authority for hundreds of critical positions, the ballot language does not even mention the Governor.

The General Assembly's proposed ballot language for both amendments does not remotely convey to voters the substance of the major constitutional changes they are being asked to make. Nor will the General Assembly allow the CAPC to add any clarity to the ballot by drafting accurate captions. *See* 2018 N.C. Sess. Law 131.

In sum, the intent to affirmatively mislead North Carolina voters is clear.

II. The General Assembly's effort to mislead voters is designed to entrench its majority party in power in violation of bedrock constitutional principles.

The case for invalidating the proposed ballot language here is especially strong because the General Assembly's deception is plainly intended to further the goal of entrenching its majority party in power. As Amici argued to this Court in *Cooper v. Berger*, political entrenchment is inconsistent with bedrock principles of both the North Carolina and U.S. Constitutions. *See generally* Amici Curiae The Brennan Center for Justice at N.Y.U. School of Law and Democracy North Carolina's Amicus Brief in Support of Plaintiff-Appellant, *Cooper v. Berger*, No. 52PA17-2 (filed Aug. 3, 2017) [hereinafter, "Amici's 2017 Brief"].

A. Political entrenchment violates bedrock principles under the North Carolina and U.S. Constitutions.

Both the North Carolina and U.S. Constitutions are deeply hostile to political entrenchment. Both constitutions are animated by a strong suspicion of unchecked political power, coupled with an overriding emphasis on the accountability of rulers to the people. *See* Amici's 2017 Brief at 10-11. And both constitutions contain a number of provisions designed to restrain temporary officeholders from overriding the people's will in order to stay in power.

The North Carolina Constitution is clear on this point. It provides that "[a]ll political power is vested in and derived from the people[,]" for whom "government . . . is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Elections must not only be "free," but "often held" to ensure prompt "redress of grievances" committed by incumbent officeholders. N.C. Const. art. I, §§ 9-10; *see also* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 56 (2d ed. 2013) (quoting *Proceedings and Debates of the Convention of North-Carolina*, 197 (Raleigh, J. Gales 1836)) (noting that the North Carolina Constitution provides for elections to enable "redress of monstrous grievances").

To prevent entrenchment by incumbent legislators, the North Carolina Constitution also contains several provisions limiting legislative discretion in

apportionment. N.C. Const. art. II, §§ 3, 5; Orth & Newby, *supra*, at 37, 96-98. The U.S. Constitution contains many similar provisions.[4]

Courts have long built on this constitutional foundation, applying "more exacting judicial scrutiny" to "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation[.]" *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). They have been particularly attuned to the threat of entrenchment in cases, like this one, that deal directly with the electoral process. *See*, *e.g.*, *Jenness v. Fortson*, 403 U.S. 431, 438 (1971) (ballot access restrictions may not be used to "freeze the political status quo"); *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (population disparities between legislative districts may not be used to preserve existing seat distributions); *DeLaney v. Bartlett*, 370 F. Supp. 2d 373, 377 (M.D.N.C. 2004) (candidate eligibility requirements may not unduly limit the ability of independent voters to "associate in the electoral arena to enhance their political effectiveness" and "impact the State's political

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[4] The provisions of the U.S. Constitution designed at least partly to foreclose entrenchment include its limitation on Congress's ability to impose additional qualifications on members; the requirement that congressional seats be reapportioned every decade; the provisions of the Elections Clause that allow Congress to override state efforts to manipulate federal elections; the prohibition on bills of legislative bills of attainder, which could be used by the faction in power to disenfranchise its enemies; and the Fourteenth and Fifteenth Amendment protections for voting rights. *See* Amici's 2017 Brief at 10-13.

landscape") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983)); *Whitford v. Gill*, 218 F. Supp. 3d 837, 886 (W.D. Wis. 2016) (three-judge panel) (invalidating state legislative districting plan that "entrench[ed] a political party in power"), *rev'd on other grounds*, 138 S. Ct. 1916 (2018); Amici's 2017 Brief at 15-18 (collecting other cases).

In a recent case challenging patronage appointments of government officials, the North Carolina Court of Appeals aptly stated why excessive limits on executive appointment power in particular can be as problematic as leaving that power unfettered:

> While acts of old school political patronage that turn the highest levels of State government . . . are perhaps more publicized, on an abstract level the prospect of the old guard embedding itself bureaucratically on its way out the door in order to stall its successors' progress strikes us as potentially being every bit as corrosive to the goal of representative self-governance.

N.C. Dep't of Pub. Safety v. Ledford, 247 N.C. App. 266, 300-301, 786 S.E.2d 50, 72 (2016).

In short, hostility to political entrenchment has shaped our constitutional order, and it has guided courts in safeguarding the people's right to representative government in this state and this nation. These fundamental principles are at play here, where one party hopes to mislead voters into changing the state constitution as a means of locking in its political dominance and insulating itself from the loss of popular support.

B. Political entrenchment is the key goal and effect of the proposed amendments.

The proposed amendments are clearly designed to entrench the Republican party in power.

Both amendments will greatly increase the power of the General Assembly—the only branch that Republicans currently control (with supermajorities in both houses)—relative to the other branches. As described above, if the amendments pass, the Republican majority will gain vast new power that it will be able to exercise even if it loses the supermajorities that allow it to override the Governor's vetoes.

Unfortunately, this is not an isolated controversy. Rather, it is the latest chapter in the General Assembly's multi-year effort to change longstanding legal rules to benefit its Republican majority.

Perhaps most notably, the General Assembly's tactics have included extreme gerrymandering. Thanks to its efforts, North Carolina, a quintessential "purple state," now has one of the most skewed legislative maps in the country, ensuring that it is harder for Democrats to win back control even if they win more votes. *See* Expert Report of Simon Jackman, *Whitford v. Gill*, No. 3:15-cv-421 (W.D. Wis. Nov. 21, 2016), ECF No. 62 at 44, 63, 73 [relevant excerpts attached hereto as Exhibit 1]. Indeed, the expert who drew these districts is the same expert who admitted, in litigation over North

Carolina's Congressional districts, that the General Assembly had engaged in extreme political gerrymandering "to minimize the number of districts in which Democrats would have an opportunity to elect a Democratic candidate." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018).

The General Assembly has also engaged in unconstitutional racial gerrymandering. *See North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (per curiam). This racial gerrymandering has minimized the power of Democratic-leaning African-American voters, and its effects have still not been rectified. *Id.* Similarly, the General Assembly has tried to pass other measures to suppress African-American turnout, including a 2013 omnibus election law targeting black voters with what the Fourth Circuited dubbed as "almost surgical precision."[5] *NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied sub. nom North Carolina v. NAACP*, 139 S. Ct. 1399 (2017).

The proposed amendments are a continuation of this trend, which explains why the General Assembly prefers not to allow members of the opposing party on the CAPC to help draft caption language for the ballot.

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[5] The General Assembly now hopes to constitutionalize one of these measures, a strict photo identification requirement, in a separate amendment. 2018 N.C. Sess. Law 128. Like the other amendments described above, this proposed amendment affirmatively misleads voters by mandating "photo identification" while failing to define its scope and failing to even mention that this is a term that must be later defined. *Id.*

Notably, the amendments would not only aggrandize the majority's power generally, but they would also make future attempts at political entrenchment more likely to succeed.

For example, by overruling this Court's decision in *Cooper v. Berger* and enabling the General Assembly's takeover of the State Board of Elections, the Separation of Powers Amendment will once more give Republicans effective control of the state's electoral machinery, despite the longstanding allocation of authority to the Governor to fill the seats on that board. *See* Amici's 2017 Brief at 5-6. And while the Amendment purports to require a "bipartisan" board with no more than four Republicans out of eight members, nothing would require the other seats to go to Democrats, or even to be filled at all. 2018 N.C. Sess. Law 117 § 1. Furthermore, with the Judicial Vacancies Amendment, the new board's actions would be reviewed by a judiciary many of whose members the General Assembly's Republican leaders hand selected. *See supra* Part I.

In short, there is no plausible way to view the proposed amendments other than as part of a pattern of entrenchment that has already drawn intense criticism from the courts. *See* Amici's 2017 Brief at 10 n.8. As in those cases, this latest entrenchment attempt warrants this Court's intervention.

III. The General Assembly's misleading ballot language also unconstitutionally negates every North Carolinian's fundamental right to vote.

Apart from seeking to entrench Republicans in power, the misrepresentations on the ballot also negate the fundamental right to vote guaranteed to all North Carolinians by the United States and North Carolina Constitutions. *See generally Anderson*, 460 U.S. at 787-89; *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). The right to vote is "fundamental" because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *cf. Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009) ("The right to vote is one of the most cherished rights in our system of government").[6] This is especially true for the right to vote on changes to a state constitution, the highest expression of the voters' will.

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[6] The legislative defendants asserted to the three-judge panel that an individual's right to vote cannot be unconstitutionally infringed unless a voting law affects different classes of voters unequally. Def. Trial Ct. Reply Br. at 4-5. That assertion was mistaken. The U.S. Supreme Court has consistently recognized that an individual's right to vote is fundamental. *See Reynolds*, 377 U.S. at 561-62 ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society…any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined."); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters…to cast their votes effectively…[is] among our most precious freedoms[.]"). The Court has further recognized that this right derives not only from the Equal Protection Clause, but also from the First and Fourteenth Amendments. *Anderson*, 460 U.S. at 786 n.7 (expressly stating that the Court's analysis did not rely on the Equal Protection Clause); (footnote continued)

The General Assembly's attempt to use misleading ballot language—and, then, to prevent the CAPC from fulfilling its duty to provide a clear explanation to the voters—cannot be squared with that fundamental right. The misrepresentations it has put on the ballot will frustrate the ability of many North Carolina voters to make an authentic choice at the polls. As the U.S. Supreme Court has observed in another context, "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed choices . . . is essential[.]" *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Misleading voters about the nature of the choice they are making seriously burdens their right to vote by rendering their votes meaningless. *See Anderson*, 460 U.S. at 789.

That is why, as the Governor also argues, state courts across the nation have invalidated ballot language and, in some cases, excised constitutional amendments that were ratified under false pretenses. As the Florida Supreme

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see also id. at 788 (election laws "inevitably affect[ ]—at least to some degree—the individual's right to vote and his right to associate with others for political ends"). Thus, it is well-settled that states may not impose undue burdens on the right to vote, even if those burdens affect all voters equally. *See id.* at 789 (establishing balancing test for assessing constitutionality of burdens on the right to vote); *see also, e.g.*, *Norman v. Reed*, 502 U.S. 279, 288 (1992) (applying *Anderson* balancing test to ballot access law); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (applying test to prohibition on write-in voting); *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190-91 (2008) (applying test to voter identification law); *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49-50, 707 S.E.2d 199, 205 (2011) (adopting *Anderson-Burdick* balancing test in ballot access challenge under North Carolina Constitution).

Court recognized in one such case, if a matter is required to be submitted to the voters, there is an "implicit" accuracy requirement for ballot language; were it otherwise, voters would not know what they are voting on. *Armstrong v. Harris*, 773 So.2d 7, 11-12 (Fla. 2000).[7] Federal courts have dealt less frequently with these issues, but they too have admonished that "deception on the face of the ballot clearly debase[s] the rights of all voters in the election." *Smith v. Cherry*, 489 F.2d 1098, 1102 (7th Cir. 1973).

In sum, the right to vote means little if the state can use deceptive ballot language to mislead voters. For this reason, too, the Court should intervene.

CONCLUSION

Amici respectfully request that the Court allow the Governor's bypass petition and deny any forthcoming requests from the legislative defendants for a temporary stay or writ of supersedeas.

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[7] *See also, e.g., State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 129-31 (Ohio 2012); *Armstrong*, 773 So.2d at 21; *Kimmelman v. Burgio*, 204 N.J. Super. 44 (N.J. Super. Ct. App. Div. 1985); *Gormley v. Lan*, 438 A.2d 519, 525 (N.J. 1981); *Bradley v. Hall*, 251 S.W.2d 470, 471 (Ark. 1952); *Lane v. Lukens*, 283 P. 532 (Idaho 1929). The fact that some of these cases purport to apply a statutory framework, rather than a state constitutional framework, does not make them any less persuasive. As the *Armstrong* court explained, statutory provisions of this kind merely codify basic constitutional presumptions of ballot accuracy. *Armstrong*, 773 So.2d at 12. Indeed, North Carolina's own statutory requirement that ballots "[p]resent all candidates and questions in a fair and non-discriminatory manner" reflects this basic expectation. N.C.G.S. § 163A-1108(2).

Respectfully submitted the 23rd day of August, 2018.

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This the 23rd day of August, 2018.

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APPENDIX

Assessing the Current Wisconsin State Legislative Districting Plan

Simon Jackman

July 7, 2015

9.2 Over-time change in the efficiency gap

Are large values of the efficiency gap less likely to be observed in recent decades? This is relevant to any discussion of a standard by which to assess redistricting plans. If recent decades have generally seen smaller values of the efficiency gap relative to past decades, then this might be informative as to how we should assess contemporary districting plans and their corresponding values of the *EG*.

Figure 20 plots *EG* estimates over time, overlaying estimates of the smoothed, weighted quantiles (25th, 50th and 75th) of the *EG* measures (the weights capture the uncertainty accompanying each estimate of the *EG*). The distribution of *EG* measures in the 1970s and 1980s appeared to slightly favor Democrats; about two-thirds of all *EG* measures in this period were positive. The distribution of *EG* measures trends in a pro-Republican direction through the 1990s, such that by the 2000s, *EG* measures were more likely to be negative (Republican efficiency advantage over Democrats); see Figure 21.

There is some evidence that the 2010 round of redistricting has generated an increase in the magnitude of the efficiency gap in state legislative elections. For most of the period under study, there seems to be no distinct trend in the magnitudes of the efficiency gap over time; see Figure 22. The median, absolute value of the efficiency gap has stayed around 0.04 over much of the period spanned by this analysis; elections since 2010 are producing higher levels of *EG* in magnitude.

It is also interesting to note that the estimate of the 75th percentile of the distribution of *EG* magnitudes jumps markedly after 2010, suggesting that districting plans enacted after the 2010 census are systematically more gerrymandered than in previous decades. Of the almost 800 *EG* estimates in the analysis, spanning 42 years of elections, the largest, negative estimates (an efficiency gap disadvantaging Democrats) are more likely to be recorded in the short series of elections after 2010. These include Alabama in 2014 (-.18), Florida in 2012 (-.16), Virginia in 2013 (-.16), North Carolina in 2012 (-.15) and Michigan in 2012 (-.14); these five elections are among the 10 least favorable to Democrats we observe in the entire set of elections. Among the 10 most pro-Democratic *EG* scores, *none* were recorded after 2000. The most favorable election to Democrats in terms of *EG* since 2010 is the 2014 election in Rhode Island ($EG = .12$), which is only the 20th largest (pro-Democratic) *EG* in the entire analysis.

$EG \leq -.13$ is extremely reliable with respect to the districting plan that generated it, at least given the post-1990 record.

10.2 Conditioning on the first two elections in a districting plan

The difficulty with conditioning on the first two elections of a districting plan is that the data start to thin out. In the entire data set there simply aren't many districting plans that equal or surpass the two, relatively large values of *EG* observed in Wisconsin in the first two elections of the current plan. Indeed, the only cases with a similar history of *EG* measures like Wisconsin's in 2012 and 2014 are contemporaneous cases: Florida, Michigan, and North Carolina in 2012 and 2014.

We relax the threshold of what counts as a similar case to encompass plans whose first two efficiency gap measures are within 75% of the magnitude of Wisconsin's 2012 and 2014 *EG* measures; we now pick up 11 roughly comparable cases, 4 of which date from earlier decades. Again, this is testament to how recent decades have seen an increase in the prevalence of larger, negative values of the efficiency gap.

For the four prior cases we plot the sequence of *EG* estimates in Figure 31. With the exception of the last election in the highly unusual Delaware sequence (among the most volatile observed in the data set; see section 9.3), the other proximate cases all go on to record efficiency gap measures that are below zero over the balance of the plan. We stress that four cases doesn't provide much basis for comparison, but this only speaks to the fact that the sequence of two large, negative values of the efficiency gap in Wisconsin in 2012 and 2014 are virtually without historical precedent. We have little guidence from the historical record as to what to expect given an opening sequence of *EG* measures like the ones observed in Wisconsin. But the little evidence we do have suggests that a stream of similarly sized, negative values of the efficiency gap are quite likely over the balance of the districting plan.

10.3 An actionable EG threshold?

We now consider a more general question: what is an actionable threshold for the efficiency gap?

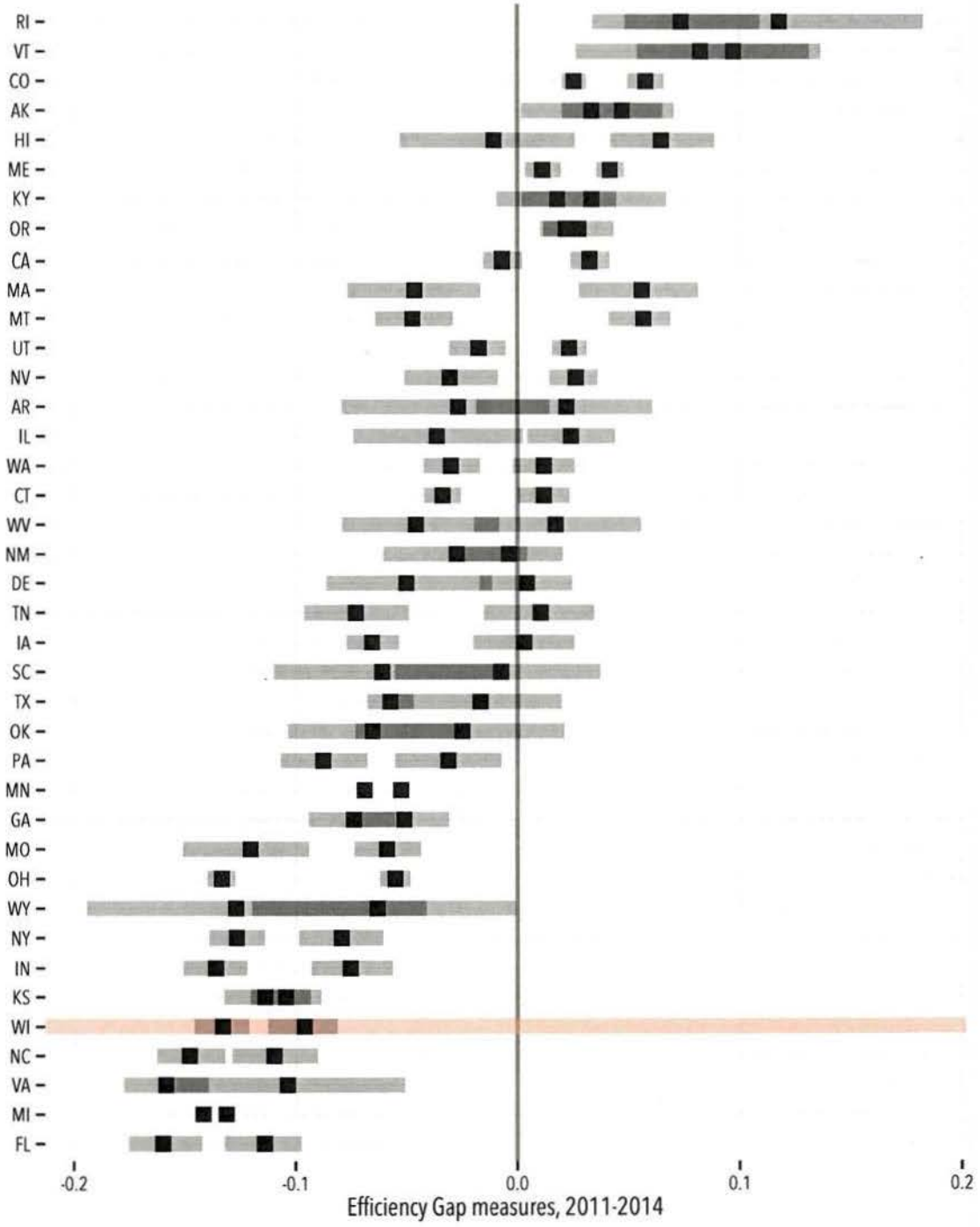

Figure 36: *EG* estimates in 2012 and 2014, grouped by state and ordered. Horizontal bars indicate 95% credible intervals.