No. 52PA17-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff-Appellant, 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, Defendants-Appellees.	From the Court of Appeals P17-101 P17-412 COA17-694 From Wake County 16-CVS-15636 17-CVS-5084

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AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AND DEMOCRACY NORTH CAROLINA'S SUPPLEMENTAL AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW[1] AND DEMOCRACY NORTH CAROLINA'S SUPPLEMENTAL AMICUS BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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[1] This brief does not purport to convey the position, if any, of the N.Y.U. School of Law.

The Brennan Center for Justice at NYU School of Law and Democracy North Carolina ("Amici") supplement their 3 August 2017 brief to this Court ("Amici Br.") with the following brief response to the three-judge panel's 31 October 2017 order.

INTRODUCTION

As Amici have noted, this is no ordinary separation of powers case. The challenged legislation is a clear effort to entrench one party's effective control of North Carolina's electoral machinery.

It is also but one of a series of attempts by that party to convert its temporary legislative dominance into permanent insulation from the consequences of lost political support. Amici Br. at 9-10. As described in Amici's initial brief, federal courts—including the U.S. Supreme Court—have already invalidated several of the General Assembly's other gambits, including efforts to racially gerrymander congressional and state legislative districts and manipulate other voting rules to target African-American voters. *Id.*

Yet the General Assembly continues undeterred. In the three months since Amici filed their initial brief, the General Assembly has proposed—and in some cases passed—a range of additional measures to further entrench one party in control of government decision-making, even with respect to the judiciary. *See* note 2, *infra*. This is not the ordinary "rough-and-tumble of

politics," Amici Br. at 15, but an assault on "fundamental principles" of democracy that guide this Court's constitutional interpretation. N.C. Const. art. I, § 35.

Amici respectfully disagree with the three-judge panel's 31 October 2017 order in its entirety. This supplemental brief, however, is limited to two issues:

First, the three-judge panel's rationale for dismissing this case under the "political-question doctrine" is flawed. It is especially inappropriate for courts to invoke that already narrow doctrine when, as here, the challenged law is the product of a larger breakdown in ordinary democratic processes.

Second, the three-judge panel erred by suggesting that a constitutional injury could only arise if the reconstituted Board of Elections fails to function in a bipartisan fashion. Any effort to maintain a grasp on political power that is contrary to the will of the voters offends core constitutional principles, regardless of how that power is ultimately used.

As described below, these and other infirmities in the three-judge panel's decision warrant this Court's intervention.

ARGUMENT

I. There is a pressing need for this Court to intervene, and no basis for abstention.

The three-judge panel's rationale for dismissing this case as a non-justiciable "political question" is a misapplication of the doctrine.

The political-question doctrine is narrow, and only "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed" to the political branches. *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (quotations omitted). The doctrine does *not* allow courts to dismiss "a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962). It has *never* prevented courts from adjudicating disputes over legislative encroachments on the executive branch; indeed, this Court does so routinely. *See, e.g., State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016).

Instead of looking to this history and precedent, however, the three-judge panel appears to have relied primarily on a law review article. Order at 7.

Moreover, the three-judge panel's abstention was particularly unjustified given that political entrenchment was the primary motive for the challenged legislation. Amici Br. at 4-10. Political entrenchment is

pernicious because it disrupts the ordinary give-and-take of representative democracy "to freeze the political status quo" contrary to the will of the voters. *Jenness v. Fortson*, 403 U.S. 431, 438 (1971); Amici Br. at 10-14. Where entrenchment is at issue, there is a great "responsibility" for this Court to weigh in "as ultimate interpreter of the Constitution." *Baker*, 369 U.S. at 211 (rejecting application of political question doctrine to one-person, one-vote case); *see also* Amici Br. at 16; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* at 86-88 (1980) (noting that judges have important role in reinforcing norms of representative democracy). Courts around the country—including in North Carolina—routinely seek to curb political entrenchment, especially when it involves manipulation of the electoral process. Amici Br. at 15-18.

The three-judge panel declined to grapple with—or even acknowledge—this reality. While the three-judge panel rightly noted that the people exercise their power though the General Assembly (Order at 10-11), an act of the General Assembly loses any presumption of validity when "it conflicts with the Constitution." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001). Furthermore, under the North Carolina Constitution, all political power remains vested in the people, from whom "government . . . is instituted solely for the good of the whole." N.C. Const. art. I, § 2. As the final arbiter of the North Carolina Constitution, this Court is the last line of defense and

ultimate guarantor of the Constitution's promise of representative self-government. Simply put, the three-judge panel failed to recognize that in circumstances like these, the courts are often the only recourse.

To be sure, it might still make sense for this Court to "abstain[ ] when the political branches may be trusted to produce a sound constitutional decision." Jesse H. Choper, *The Political-Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1466 (2005). No such trust is warranted, however, in a dispute arising from an attempt by one party to use its momentary dominance of the legislature to change the rules to entrench itself in power. That is not only the reality of this case, but of the General Assembly's other ongoing efforts to manipulate the rules of the electoral process in North Carolina.[2]

For these reasons, the Court should reverse the three-judge panel's dismissal and hold that this case is justiciable.

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[2] As part of these efforts, the General Assembly has now begun targeting the judiciary. *See, e.g.,* Cash Michaels, *New Senate Bill Threatens Justice Morgan's Tenure*, Winston-Salem Chronicle (Oct. 26, 2017), *available at* http://www.wschronicle.com/2017/10/new-senate-bill-threatens-justice-morgans-tenure/; Gary D. Robertson, Associated Press, *Veto Override Means No Scheduled Judicial Primaries in 2018*, U.S. News (Oct. 17, 2017), *available at* https://www.usnews.com/news/best-states/north-carolina/articles/2017-10-17/house-considers-n-carolina-governors-veto-of-election-bill; Jess Clark, *General Assembly Overrides Cooper's Veto on Court of Appeals Reduction*, WUNC (Apr. 26, 2017), *available at* http://wunc.org/post/general-assembly-overrides-coopers-veto-court-appeals-reduction#stream/0.

II. Session Law 2017-6 creates a constitutional injury, and the three-judge panel erred by concluding otherwise.

The three-judge panel also erred in suggesting that, even though the General Assembly attempted to restructure the state's electoral machinery to ensure policy dominance by one party, there can be no ripe constitutional violation while there is a possibility that state and county election boards could still operate in a bipartisan fashion. Order at 18-19.

The Court will recall that Session Law 2017-6 does not simply change the composition of state and county boards; it also permits the current Executive Director of the State Board to serve *indefinitely*. Amici Br. at 5-7.[3] Thus, for the foreseeable future, whatever the new election boards do, the state's most powerful election administrator will be an individual who was appointed on a 3-2 party-line vote without any input from the state's elected Governor. *Id.*

This arrangement, coupled with the other provisions of Session Law 2017-6 that give one party a quasi-permanent upper hand on the state and county elections boards (Amici Br. at 5-7), denies the people of North Carolina "a just framework within which [] diverse political groups . . . may fairly compete[.]" *Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J.,

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[3] The three-judge panel's assertion that the "Bipartisan Board appoints its own Executive Director" in May 2019 is inaccurate, because it ignores that a deadlock on the board would permit the current Executive Director to serve indefinitely. Order at 4; Amici Br. at 5-7.

concurring). Thus, it is no less "incompatible with democratic principles" than other efforts to manipulate electoral rules for partisan advantage, like excessive partisan gerrymandering. *Vieth v. Jubilirer*, 541 U.S. 267, 316 (2004) (Kennedy, J., concurring).

As in these other contexts, the relevant inquiry here is whether the law places an unacceptable burden on some voters' "inalienable right to full and effective participation in the political processes" by, among other things, nullifying or diminishing their votes. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).[4] When that has occurred, as in this case, any possibility that the resulting unrepresentative body *might* govern fairly or effectively is irrelevant. The three-judge panel's contrary conclusion was erroneous.

CONCLUSION

Amici respectfully request that the Court reverse the three-judge panel and hold that the challenged provisions of Session Law 2017-6 are unconstitutional.

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[4] The Governor's "constitutional powers, duties, and obligations to the people of North Carolina generally" give him standing to vindicate those rights. *See State ex rel. Hunt v. North Carolina Reinsurance Facility*, 49 N.C. App. 206, 213, 271 S.E.2d 302, 305 (1980), *rev'd on other grounds*, 302 N.C. 274, 275 S.E.2d 399 (1981); Pl. Br. at 36.

Respectfully submitted the 16th day of November, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Court's 9 November 2017 order allowing Amici's motion for leave to file a supplemental amicus brief, the undersigned certifies that this brief is less than 1,500 words (excluding its cover, signature blocks, certificate of service, and this certificate of compliance), as reported by word-processing software.

s/ Andrew H. Erteschik
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of the foregoing by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses, which are the last addresses known to me:

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