

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

SANDRA LITTLE COVINGTON, *et al.*,

Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, *et al.*,

Defendants.

No. 1:15-cv-00399-TDS-JEP

[PROPOSED] BRIEF OF AMICUS CURIAE
OF THE NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
IN SUPPORT OF PLAINTIFFS

The North Carolina State Conference of the National Association for the Advancement of Colored People (“NC NAACP”) submits this proposed brief as amicus curiae in support of Plaintiffs’ Statement in Response to this Court’s June 9, 2017 Notice.

STATEMENT OF INTEREST

The NC NAACP is a grassroots-based, non-profit, civil rights organization with the mission of ensuring the rights of all persons to political, educational, social, and economic equality, and eliminating racial discrimination. As the oldest and largest civil rights organization in the state,¹ the NC NAACP dedicates significant organizational resources to protecting and advancing hard-won equal voting rights and promoting voter and civic participation of African Americans, people of color, and other groups of people historically denied their constitutional rights in North Carolina. For decades, the NC NAACP has led the work of engaging and inspiring a non-partisan multi-racial coalition, or “fusion” electorate in the state. This fusion electorate in North Carolina reaches across racial lines and is based not on the color of voters’ skin, but on the voters’ common interests in the important issues of the day and on a shared commitment to racial justice and civic participation. The NC NAACP is thus uniquely situated to provide the Court with information contextualizing the severity of the injury imposed by the racial classification of voters and racially gerrymandered legislative maps, the harm that has been caused by the resulting unconstitutionally-constituted state legislature, and the

¹ The NC NAACP was established in 1938 and today has over 20,000 members, the largest membership of any NAACP state conference in the South, and the second largest in the country. The NC NAACP has more than 100 active branches in urban centers and rural communities throughout the state of North Carolina.

dangerous consequences to the public interest of permitting this unconstitutional legislature to remain in power.

The NC NAACP also has a special interest in this case because it is a plaintiff in consolidated state court case *Dickson v. Rucho*, 766 S.E.2d 238 (N.C. 2014), *vacated*, 135 S. Ct. 1843 (2015) (mem.), *remanded to* 781 S.E.2d 404 (N.C. 2015); *vacated and remanded*, 198 L. Ed. 2d 252 (U.S. 2017) (mem.), that raise parallel claims, both federal and state, challenging North Carolina’s Rucho-Lewis 2011 legislative and congressional redistricting plans as unconstitutionally based on race. *Dickson*, on remand from the United States Supreme Court, is currently pending before the North Carolina Supreme Court.²

SUMMARY OF THE ARGUMENT

District courts have broad, flexible discretion when shaping equitable remedies for constitutional violations. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971) (“Once a right and a violation have been shown, the scope of a district court’s equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.”). Few constitutional violations justify broader or swifter exercise

² Much of the factual record that the NC NAACP developed in *Dickson* was relied upon by the Court in the present case. See First Joint Stipulation at 1-2, Nov. 5, 2015, ECF No. 28 (jointly stipulating that all testimony, documents, and other exhibits contained in the *Dickson* record be received into evidence in the present case). The North Carolina Supreme Court’s 2015 decision in *Dickson* was vacated by the United States Supreme Court on May 30, 2017, and remanded for further consideration in light of *Cooper v. Harris*, 137 S. Ct. 1455 (2017). *Dickson v. Rucho*, 198 L. Ed. 2d 252 (U.S. 2017) (mem.). Oral argument in *Dickson* is scheduled for August 28, 2017 before the North Carolina Supreme Court.

of this discretion than violations of the most fundamental right in our democracy: the right to vote. North Carolinians have lived for nearly six years under a state legislature that was constructed, as this Court held and the U.S. Supreme Court summarily affirmed, from unconstitutional, racially gerrymandered 2011 legislative maps. The new maps segregated white and black voters by mechanically adding black voters to election districts in concentrations not authorized or compelled under the Voting Rights Act of 1965, thereby “bleaching” adjacent districts of voters of color and frustrating their ability to vote in alliance with a growing, multiracial fusion electorate that bridges racial divides and mitigates the effects of racially polarized voting.³ As the Supreme Court has instructed: “once a State’s . . . apportionment scheme has been found to be unconstitutional, it would be the unusual case in which the court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The only way in which the current case is “unusual” is the unusually grievous nature and extent of the constitutional harm caused by the aggressive racial gerrymandering scheme at issue here.

Plaintiffs argued in their response to this Court’s June 9, 2017 Notice, that the scope of the 2011 gerrymander is extensive: Legislative Defendants’ unconstitutional race-based decision-making has infected at least 77 out of North Carolina’s 100 counties,

³ Amicus has argued in other forums and maintains here that, among other factors, the districts produced by these racially gerrymandered maps are so “highly irregular” as to evince intent on the part of the General Assembly to “segregate . . . voters’ on the basis of race.” *Shaw v. Reno* (“*Shaw I*”), 509 U.S. 630, 646-47 (1993) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

and impacted 83 percent of the state’s population. Pls.’ Statement at 5-6, ECF No. 156 (citing Decl. of Thomas Hofeller, Oct. 28, 2016, ECF No. 136-1). Moreover, “the overriding priority of the redistricting plan,” as this Court found, “was to draw a predetermined race-based number of districts, each defined by race.” *Covington v. North Carolina*, 316 F.R.D. 117, 135 (M.D.N.C. 2016), *aff’d*, 137 S. Ct. 1624 (2017) (per curiam). And, as this Court held, “race was the predominant criterion in drawing all of the challenged districts.” *Id.* at 141-42. This racial classification scheme, with no legal justification, thus denied millions of voters equal protection under the law, and created a governing majority wholly unresponsive to black voters.

Since 2012, the state legislatures elected under these unconstitutional maps, and more specifically the all-white Republican caucus that maintains supermajority power over the General Assembly, have used their illegitimately-gained power to further a legislative agenda steeped in racial discrimination. Permitting this General Assembly to remain in power for one more year — or even one more special session — increases the high likelihood that additional discriminatory laws, as well as measures further expanding its power beyond constitutional bounds, will be enacted. The dignitary harm in this case is also heightened by the flagrant nature of the racial gerrymander at issue here.

Equity demands immediate special elections and other urgent relief, and this Court is justified in taking such action. Accordingly, the NC NAACP respectfully requests that the Court order Special Elections in 2017; retain a Special Master to oversee the drawing of constitutional maps; and enjoin all further legislative action by the illegitimate General

Assembly. These remedies are warranted and required where the injury is this severe, the impact across the state is so extensive, and where, in the absence of these remedies, further harm is all but guaranteed.

ARGUMENT

I. THE SEVERITY AND NATURE OF THIS CONSTITUTIONAL VIOLATION IS PARTICULARLY EGREGIOUS AND ONGOING

Having maneuvered a veto-proof supermajority out of now-invalidated, constitutionally-infirm, apartheid-like districts, the resultant all-white Republican caucus in control of the General Assembly has proceeded to spend six years in power passing legislation that is tainted with racial discrimination and egregiously non-responsive to black voters. Permitting the current General Assembly to remain in power any longer poses a high risk that additional racially discriminatory laws will be enacted. “As with any equity case, the nature of the violation determines the scope of the remedy.” *Swann*, 402 U.S. at 26. Here, the severity and nature of the constitutional violation at issue is egregious, and the dignitary harm so severe that the remedy requested is the only appropriate relief.

A. The existing unconstitutionally-drawn apartheid-like districts have created a General Assembly unresponsive to black voters and steeped in explicit and implicit racial discrimination.

As the Supreme Court has explained, the nature of the harms in a racial gerrymandering claim are “personal.” *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015). They include being “‘personally . . . subjected to [a] racial classification,’ as well as being represented by a legislator who believes his ‘primary

obligation is to represent only the members' of a particular racial group.” *Id.* at 1265 (quoting *Bush v. Vera*, 517 U.S. 952, 957 (1996) and *Shaw v. Reno*, 509 U.S. 630, 648 (1992)). The state legislatures that came into power as creatures of racially gerrymandered maps that targeted black voters and mechanically placed them into apartheid-like districts have proceeded in legislative session after legislative session to pass laws that are racially and otherwise discriminatory and unconstitutional, and that are non-responsive to voters of color.

In the term immediately following its election under the 2011 racially-gerrymandered maps, the General Assembly *intentionally* sought to suppress and discourage voting by black voters by enacting North Carolina Session Law 2013-381 (“S.L. 2013-381”), which has come to be known by the people of North Carolina as the “monster voter suppression law.” Among other provisions, the omnibus S.L. 2013-381 put in place a restrictive photo ID requirement, eliminated same-day registration, severely reduced the early voting period, eliminated out-of-precinct voting safeguards, and eliminated pre-registration for 16- and 17-year olds. 2013 N.C. Sess. Laws 381. “[W]ith race data in hand,” the General Assembly crafted a photo ID requirement that excluded the specific types of photo IDs that it knew black voters disproportionately lacked, and enacted other provisions after learning that black voters used early voting at a much higher rate than whites, black voters specifically used the first week of early voting more heavily than whites, black voters disproportionately benefited from same day registration as compared to whites, black voters voted out-of-precinct at higher rates than whites and

thus benefitted more from the partial counting of those ballots, and black youth used preregistration at higher rates than whites. *NC NAACP v. McCrory*, 831 F.3d 204, 216-17 (4th Cir. 2016) (citing *NC NAACP v. McCrory*, 182 F. Supp. 3d 320, 372, 384 n.74, 398, 404, 408, 491 (M.D.N.C. 2016)), *cert. denied*, 137 S.Ct. 1399 (2017). In short, as the United States Court of Appeals for the Fourth Circuit held, these provisions “target[ed] African Americans with almost surgical precision” and “imposed cures for problems that did not exist,” leaving no doubt that they were “enacted . . . with discriminatory *intent*.” *Id.* at 214-15.

In other words, this is a case in which an all-white caucus wrested a veto-proof legislative supermajority for itself using racially discriminatory maps that contaminated at least 77 out of North Carolina’s 100 counties, and impacted 83 percent of the state’s population, and then proceeded directly and immediately to entrench the advantage it gained from such illegal districts by legislating to intentionally suppress the political activity of black voters. Session Law 2013-381, moreover, was not an isolated incident. Since the election of 2012, the supermajority in the General Assembly has been consistent in enacting racially unjust laws.

In its 2013 inaugural term, for example, in addition to passing the “monster voter suppression law” with racially discriminatory intent, the General Assembly also repealed the North Carolina Racial Justice Act of 2009, N.C. Gen. Stat. §§ 15A-2010–2012 (2009) (repealed 2013), which prohibited seeking or imposing the death penalty on the basis of race. The General Assembly enacted its repeal, 2013 N.C. Sess. Laws 154, despite

overwhelming statistical evidence of race discrimination by North Carolina prosecutors during jury selection, and judicial findings that credited those studies and found that “[i]nstead of training on how to comply with *Batson v. Kentucky*, and its mandate to stop discrimination in jury selection, North Carolina prosecutors received training . . . about how to circumvent *Batson*.”⁴ *North Carolina v. Robinson*, File No. 91 CRS 23143, Order Granting Motion for Appropriate Relief, at 44 (N.C. Sup. Ct. April 20, 2012) (crediting expert testimony and published study by Barbara O’Brien and Catherine M. Grosso⁵); *id.* at 111 ¶ 227; *see also* Statement of Rep. Rick Glazier, Remarks on 2nd Reading S.B. 306 (June 4, 2013) (arguing that the House committee should vote down the bill and referencing both the statistical studies and judicial decisions).⁶

The General Assembly, on March 23, 2016, convened a surprise special session to pass, in a matter of hours, the sweeping Public Facilities Privacy and Security Act, which,

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986), a landmark Supreme Court decision, declared it unconstitutional for prosecutors to use peremptory challenges to dismiss jurors solely on the basis of race. *Id.*

⁵ BARBARA O’BRIEN & CATHERIN M. GROSSO, REPORT ON JURY SELECTION STUDY (Michigan University College of Law, revised September 29, 2011).

⁶ That same year, the General Assembly also enacted a law prohibiting local communities from adopting “sanctuary” ordinances that would be protective of immigrants’ rights, and invalidating any sanctuary ordinances that currently existed. 2015 N.C. Sess. Laws 294 (codified at N.C. Gen. Stat. §§ 153A-145.5, 160A-205.2). The law also greatly restricted what forms of identification government officials could accept to determine a person’s identity or residency, specifically targeting forms of identification used by Mexican Americans, *id.* §§ 15A-306, 58-2-164(c), 108A-55.3(b), and expanded E-Verify requirements to cover state contractors and subcontractors, *id.* § 143-133.3. North Carolina’s immigrant population is 51.6% Latinx and 22.3% Asian. U.S. CENSUS BUREAU, SELECTED CHARACTERISTICS OF THE NATIVE AND FOREIGN-BORN POPULATIONS: 2011-15 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, *available at* <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>.

among other provisions, prohibited local governments from passing anti-discrimination protections, including prohibiting protections for lesbian, gay, bisexual, and transgender (“LGBT”) people. 2016 N.C. Sess. Laws 3 (codified at N.C. Gen. Stat. §§ 115C-57, 115C-521.2, 143-760, 95-25.1, 143-422.2–422.3, 143-422.10–422.13) (repealed in part 2016). While “HB 2,” as the bill is known across the country, is most notorious for requiring people to use restrooms and locker rooms in schools and government buildings based on the sex listed on their birth certificates, the law also had far-reaching implications for racial justice. The law prohibited local governments from setting aside contracts for people-of-color and minority-owned businesses or raising the minimum wage. *Id.* It also removed a private right of action in the state’s nondiscrimination policy, eliminating recourse in state courts for victims of employment discrimination. *Id.* Even when the call for the bill’s repeal – which included decisions to boycott the state by the National College Athletics Association and the State and National NAACP – became thunderous, this General Assembly still ignored the demand by the NC NAACP and allied organizations for a clean repeal, enacting instead a “compromise” repeal bill that declared open season for discrimination by imposing a moratorium on local LGBT nondiscrimination ordinances until 2020. 2017 N.C. Session Law 4.

In its most recent 2017 session, the General Assembly set out to ensure that the mostly-black victims of the health hazards and property damage caused by the fecal matter management practices of North Carolina’s industrial hog operations could not recover the damages to which they were legally entitled after winning their lawsuits

against the hog industry. H.B. 467, N.C. Gen. Assemb., Reg. Sess. (N.C. 2017) (enacted as amended 2017 N.C. Session Law 11).⁷ North Carolina’s industrial hog farms are “disproportionately located near communities of color,” *see* STEVE WING & JILL JOHNSTON, INDUSTRIAL HOG OPERATIONS IN NORTH CAROLINA DISPROPORTIONATELY IMPACT AFRICAN-AMERICANS, HISPANICS, AND AMERICAN INDIANS, (U.N.C. Chapel Hill Aug. 29, 2014), and this law makes it clear that the property rights of meritorious plaintiffs of color will not be protected under the same standards as those enjoyed by white plaintiffs for years.

B. Permitting the current General Assembly to remain in office for another year poses a high risk that additional racially discriminatory laws, as well as laws that violate the state and federal constitutions, will be enacted.

This General Assembly has proven that it is determined to use its ill-gotten power to enact a legislative agenda steeped in racial discrimination. It has likewise revealed itself to be a recalcitrant governing body: unwilling to be accountable to court rulings or the very people it purports to serve. Allowing this legislature to remain in power is thus a near guarantee of further constitutional violations.

Since a supermajority came to power in the General Assembly pursuant to the 2011 racially gerrymandered maps, courts have ruled against its laws no less than 11 times.⁸ Yet, no matter how many times it has been rebuked by the judicial branches of

⁷ The final law, which the General Assembly passed by overriding the Governor’s veto, applies only to future civil actions and not to currently pending lawsuits. *See* 2017 N.C. Session Law 11.

⁸ *N.C. NAACP v. McCrory*, 831 F.3d 204, 215 (4th Cir. 2016) (striking down as unconstitutional provisions of omnibus voter suppression law Session Law 2013-381, as

the federal and state governments, the General Assembly persists in pursuing its discriminatory agenda and attempting to expand its power beyond that allowed by the separation of powers.

For example, mere days after the Supreme Court issued its denial of the General Assembly's petition for certiorari in *NC NAACP v. McCrory*, the all-white Republican

enacted with racially discriminatory intent), *cert. denied*, 137 S. Ct. 1399 (2017); *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016) (striking down as unconstitutional provisions of Session Law 2013-110 and Session Law 2015-4, which separately enacted local redistricting plans for the Wake County Commission and School Board, as violating one person, one vote); *City of Greensboro v. Guilford Cty. Bd. of Elections*, No. 1:15-cv-559, 2017 U.S. Dist. LEXIS 50253, at *3 (M.D.N.C. Apr. 3, 2017) (striking down as unconstitutional provisions of Session Law 2015-138, which imposed a local redistricting plan for the Greensboro City Council, as violating one person, one vote); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 654 (M.D.N.C. 2016) (preliminarily enjoining the provisions of Session Law that required transgender individuals to use the bathroom or changing facility that matched their "biological sex"); *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 792 (2016) (affirming the lower court ruling striking down as unconstitutional provisions of Session Law 2013-995, which retroactively revoked "career status" from public school teachers who had already achieved career status); *City of Asheville v. State*, 794 S.E.2d 759, 762 (N.C. 2016) (striking down Session Law 2013-118, which involuntarily transferred city water system to a newly-created metropolitan district, as a violation of the state constitution); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 636 (2016) (striking down Session Law 2014-122, which created three administrative commissions and authorized the General Assembly to appoint a majority of the voting members of those commissions, as a violation of separation of powers under the state constitution); *Cooper v. Berger*, No. 16-cvs-15636 (Wake Cty. Super. Ct. Mar. 17, 2017) (three-judge panel) (striking down portions of Session Law 2016-125 and Session Law 2016-126, which restructured the State Boards of Elections and changed the appointment process for its members, as a violation of separation of powers under the state constitution); *Faires v. State Bd. of Elections*, No. 15-cvs-15903 (Wake Cty. Super. Ct. Feb. 29, 2016) (three-judge panel) (striking down Session Law 2015-66, which established retention elections for state supreme court justices, as a violation of the state constitution), *aff'd by an equally divided court*, 368 N.C. 825 (2016); *N.C. Ass'n of Educators, Inc. v. State*, 09-CVS-404 (Wake Cty. Sup. Ct. Dec. 18, 2012) (striking down Session Law 2012-1, which prohibited the NCAE from using payroll deductions to collect dues from its members, as "retaliatory viewpoint discrimination," in violation of the state constitution).

caucus – comprised largely of the same lawmakers found in that case to have engaged in intentional racial discrimination – announced that they would begin work on passing a new voter ID bill. Anne Blythe, *Supreme Court won't rescue NC voter ID law; GOP leaders say they will try again with new law*, THE NEWS & OBSERVER (May 15, 2017), available at <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article150554992.html>.

Its disregard for constitutional checks on its power⁹ led the General Assembly to attempt to legislate a takeover of the powers of the state executive and judicial branches. The 2016 election saw the election of Democrat Roy Cooper to the Governor's seat and the election of Justice Michael Morgan to the North Carolina Supreme Court – the first elected, non-incumbent, African-American Supreme Court Justice in North Carolina's history.¹⁰ In response, within days of incumbent Republican candidate Pat McCrory finally conceding the governor's race, the General Assembly brazenly called yet another surprise special session to pass – again along partisan lines and with almost no debate –

⁹ With regard to the present case, the lead architects of the 2011 racial gerrymander, Representative Lewis and Senator Rucho, released public statements describing this Court's November 29, 2016 order for 2017 special elections as a "politically motivated court decision," exposing the disregard that the leadership caucus appears to feel for judicial checks on their power. David Lewis & Bob Rucho, *Rucho, Lewis Respond to Politically Motivated Court Decision Denying Voters Rights to Elect Representatives to Two-Year Terms*, DAVID LEWIS NORTH CAROLINA HOUSE (Nov. 29, 2016), available at http://www.davidlewis.org/rucho_lewis_respond_covington.

¹⁰ Election results show that 88% of black voters voted for the winning candidate Roy Cooper and only 12% voted for Patrick McCrory, whereas 37% of white voters voted for Cooper and 62% voted for McCrory. Data from CNN ELECTION 2016 EXIT POLLS FOR NORTH CAROLINA GOVERNOR, available at <http://www.cnn.com/election/results/exit-polls/north-carolina/governor> (last visited July 7, 2017).

several laws that, together, placed limits on the powers of both the incoming Governor¹¹ and the North Carolina Supreme Court.¹² These actions are not just attempted legislative *coups* that threaten North Carolina’s democratic government and system of checks and balances, but also must be understood as attempts to negate the will of black voters by incapacitating their candidates of choice.¹³

In response to the discriminatory and unconstitutional laws that the supermajority has passed during its tenure, the people of North Carolina – many of whom had been

¹¹ Specifically, the laws *inter alia* dissolved the State Board of Elections, reconstituting it by combining it with the State Board of Ethics and taking authority to appoint its members away from the Governor and giving it to the General Assembly; required that cabinet appointments be approved by the Senate; drastically cut the number of Governor-appointed positions; and took away the Governor’s power to appoint University of North Carolina Trustees and gave it to the General Assembly. 2016 N.C. Session Laws 125 & 126. Parts of both laws were struck down by a state court three-judge panel as a violation of the state constitution’s separation of powers. *Cooper v. Berger*, No. 16-cvs-15636 (Wake Cty. Super. Ct. Mar. 17, 2017) (three-judge panel) (striking down portions of Session Law 2016-125 and Session Law 2016-126 as a violation of separation of powers under the state constitution). The General Assembly responded to the court ruling by enacting a new law, which repealed the portions of the laws that the court had judged unconstitutional, only to re-enact similar provisions that again dissolved the State Board of Elections and combined it with the State Board of Ethics. See 2017 N.C. Session Laws 6. A lawsuit seeking to enjoin the new law is currently pending before the North Carolina Supreme Court. See Pl.-Pet’r’s Pet. Writ Supersedeas, *Cooper v. Berger*, No. 52P17-2 (N.C. June 30, 2017).

¹² Specifically, Session Law 126 limited appeals of right in any case with a dissenting opinion until *en banc* rehearing by the Court of Appeals, and changed judicial elections from non-partisan to partisan races. 2016 N.C. Session Laws 126.

¹³ It bears noting that the Supreme Court has recognized that the Equal Protection Clause may be triggered where the “purpose” of a state’s act is “invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.” *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980), *superseded on other grounds by statute* Pub. L. No. 97-205, § 3, 96 Stat. 134, *as recognized by Thornburg v. Gingles*, 478 U.S. 30, 35-37 (1986). Here, the General Assembly targeted black voters’ candidates of choice, and legislated to minimize the powers of their office after they had been duly elected.

silenced by the illegal maps that put the all-white, Republican caucus in power in the first place – have voiced a powerful dissent. In the spring and summer of 2013, thousands descended upon the General Assembly over the course of more than a dozen Moral Mondays led by the NC NAACP in protest of the “monster voter suppression law” and other unjust legislation that the General Assembly passed or attempted to pass in its 2013 session. *See, e.g.,* Jim Rutenberg, *A Dream Undone: Inside the 50-year campaign to roll back the Voting Rights Act*, N.Y. TIMES MAGAZINE, at 48-49 (July 29, 2015). The protests have continued unabated over the course of the half-dozen years that this unconstitutionally-constituted legislature has remained in power—one indicator of the extreme lack of public confidence in this legislature.¹⁴

This General Assembly has amassed a disturbing track record of passing unconstitutional, discriminatory laws in secretive and unusual processes, often without time for meaningful deliberation and in unabashed disregard for court rulings. Its actions of the past six years reveal a legislative body willing to entrench its power by any means, including by passing laws that suppress the black vote and have other discriminatory effects. In fact, when, in spite of efforts to suppress their votes, black voters have been able to elect candidates of their choice, the General Assembly has simply sought to legislate anew to circumvent the will of the black vote and thwart the increasingly effective electoral strength of people of color. The actions of the General Assembly thus

¹⁴ According to recent polling of registered voters in North Carolina, the General Assembly’s approval rating is a mere 28.8%. ELON POLL, OPINION OF NORTH CAROLINA VOTERS ON STATE ISSUES at 3 (April 18-21, 2017), *available at* <https://www.elon.edu/e/CmsFile/GetFile?FileID=850>.

suggest that it will resist, defy, or eliminate any check on its exercise of power, and that it cannot be permitted to continue to act illegally on behalf of the people of North Carolina.

C. The racial gerrymander in this case has caused especially great dignitary harm.

In this case, the State of North Carolina Defendants do “not dispute the severity of the harms that flow from unconstitutional gerrymandering.” State Defs.’ Statement at 3, ECF No. 162. Indeed, racially gerrymandered districts are “altogether antithetical to our system of representative democracy,” and always inflict serious harms. *Shaw I*, 509 U.S. at 648. When districts are drawn “solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole,” *id.*, and this “undermin[es] the electorate’s confidence in its government as representative of a cohesive body politic in which all citizens are equal before the law,” *Ala. Leg. Black Caucus*, 135 S. Ct. at 1275 (Scalia, J., dissenting).

The flagrant and extensive racial gerrymander in this case, however, makes the harm especially great. The racial gerrymander at issue, as this Court found, imposes “severe constitutional harms.” *Covington*, 316 F.R.D. at 177. Here, the General Assembly gave “clear instructions” to their technical advisor, Dr. Thomas Hofeller, that he was to draw the lines by “identifying geographically compact minority populations,” and then draw “majority-minority districts in those locations, where possible.” *Id.* at 126-27. The result was that the number of majority-black districts in North Carolina leapt from nine to twenty-three for house districts, and zero to nine for senate districts, *see id.*

at 132, such that 116 members of the current General Assembly come from districts made possible by an unconstitutional, race-based districting scheme.¹⁵

These “apartheid” districts were then used, despite opposition by African-American legislators and public outcry at a series of joint hearings where the NC NAACP, alongside districting experts and other grassroots organizations, repeatedly argued that these district lines “stacked and packed” the black vote and provided unequal voice to white voters, in violation of the United States Constitution and in contravention of the Supreme Court’s rulings in *Miller v. Johnson*, 515 U.S. 900 (1995), *Shaw v. Hunt*, 517 U.S. 899 (1996) and *Bush v. Vera*, 517 U.S. 952 (1996). See Aff. Rev. William J. Barber II in Support of Pls.’ Mot. Prelim. Inj. at ¶ 19, *Dickson v. Rucho*, No. 11-CVS-16896 (filed Jan. 6, 2012); Statement by Sen. Bob Rucho & Rep. David Lewis Regarding Proposed VRA Districts, Ex. M in Support of Pls.’ Mot. Prelim. Inj. At 2, *Dickson v. Rucho*, No. 11-CVS-16896 (filed Jan. 6, 2012) (quoting Senator Dan Blue (D-Wake) as saying, “It is illegal to arbitrarily pack minorities into the same districts just for the sake of doing it because you dilute the minorities’ voting strength in other districts”); see also Joe Schwartz, *Cracked, stacked and packed: Initial redistricting maps met with skepticism and dismay*, *Indyweek* (June 29, 2011), available at

¹⁵ Legislative Defendants argue that “the large number of districts that will likely have to be redrawn” weighs in their favor and against ordering special elections. Legislative Defs. Statement at 8-9, ECF No. 161. Legislative Defendants’ suggestion that its unconstitutional racial gerrymander was so aggressive that it should somehow insulate them from accountability is without merit, and in fact, is a troubling example of their indifference to the unconstitutional source of its power.

<https://www.indyweek.com/indyweek/cracked-stacked-and-packed-initial-redistricting-maps-met-with-skepticism-and-dismay/Content?oid=2583046>.

II. SPECIAL ELECTIONS WILL NOT SIGNIFICANTLY DISRUPT, BUT WILL INSTEAD ENSURE THE ORDINARY PROCESSES OF GOVERNANCE

Holding special elections in 2017 does not pose substantial disruption or other hardship on the state. To the contrary, State Defendants informed this Court that “should the Court decide that the nature and severity of the harms found in this case justify such a remedy, the State and the State Board stand ready to implement it.” State Defs.’ Statement at 3. Nor should the General Assembly be afforded additional opportunities to produce a remedial plan. The General Assembly has been under court order to “draw remedial districts in their next legislative session” since this Court issued its first memorandum opinion and order on August 11, 2016. *Covington*, 316 F.R.D. at 178. That decision was affirmed by the Supreme Court, *Covington*, 137 S. Ct. at 1624, and was not impacted by the Supreme Court’s January 10, 2017 stay, which stayed only the November 29, 2016 remedial order in this case, *see id.*, Order in Pending Case, 16A646 (Jan. 10, 2017). The General Assembly was in session from January to June 30, 2017, and had nearly half a year to comply with this Court’s August 11, 2016 order.¹⁶ Thus,

¹⁶ Moreover, after the Supreme Court’s *per curiam* affirmance of this Court’s merits decision, Governor Cooper exercised his state constitutional authority to issue a proclamation on June 7, 2017, calling upon the General Assembly to convene an extra session “for the purpose of enacting new House and Senate district plans for the General Assembly that remedy the legislative districts ruled unconstitutional.” Proclamation, “Extra Session of the North Carolina General Assembly” (June 7, 2017). The next day, the House and Senate each refused the Governor’s call.

any “hardship” posed by requiring new legislative maps be drawn in time for a 2017 special election is either a hardship of the General Assembly’s own making, or the product of an outright dilatory tactic employed by the General Assembly, and should not be rewarded by this Court.

As Plaintiffs have already detailed in their filing, there is ample case law, both state and federal, to support the ordering of immediate special elections where a legislative redistricting plan has been found unconstitutional. *See* Pls.’ Statement at 8, 10 & n.7. Citizens currently lacking a constitutionally adequate voice in the General Assembly “are entitled to have their rights vindicated as soon as possible so that they can vote for their representatives under a constitutional apportionment plan.” *Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996). In this case, nearly a year has passed since this Court issued its initial order outlining a timeline for remedial redistricting.

Moreover, the exceptional track record of coordinated delay by Legislative Defendants in this case, the scope of the ongoing harm to North Carolinians, and practical time constraints, all counsel in favor of appointment of an independent expert to assist the Court. As Plaintiffs lay out in their Statement, this Court has authority to adopt a court-ordered interim redistricting plan and order the appointment of an independent special master. *See* Pls.’ Statement at 16-18. The Court should appoint one here to commence immediate work on drawing remedial legislative maps that satisfy the constitutional “one person, one vote” principle, the requirements of the Voting Rights Act of 1965, and traditional redistricting principles, in accordance with state and federal law.

Finally, as described above, this General Assembly has a propensity for convening special sessions to pass, via sudden and irregular processes, legislation that is discriminatory or otherwise illegal. *See supra* Parts I.A-B. While the General Assembly has recessed its 2017 General Session, it has made it no secret that it intends to reconvene for special sessions in August and September, where it will be free to legislate on the very issues on which courts have found the General Assembly's past actions suspect. Resolution 2017-12, § 1.2 (4) (commencing special session on August 3); *id.* § 2.2(7) (commencing special session on September 6). Colin Campbell, *No Voter ID Revival Before Lawmakers Left Raleigh*, NEWS & OBSERVER (July 1, 2017), available at <http://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article159235729.html>. For example, this unconstitutionally-constituted General Assembly is likely to reconvene to enact a controversial and racially discriminatory gerrymander of state prosecutorial and judicial election maps or to pass a voter ID law, or both. *See* Colin Campbell, *Legislature adds extra sessions in August, September as it adjourns regular session*, THE NEWS & OBSERVER (June 29, 2017), available at <http://www.newsobserver.com/news/politics-government/state-politics/article158960934.html>.

The Court has strong justification to enjoin the current General Assembly from further convening or enacting any more legislation. Citing citizens' rights "to vote as soon as possible for their representatives under constitutional apportionment plan[s]," federal courts have shortened the terms of those legislators who have been elected under

illegal maps. *Cosner v. Dalton*, 522 F. Supp. 350, 364 (E.D. Va. 1981); *see also Smith v. Beasley*, 946 F. Supp. 1174, 1212-13 (D.S.C. 1996) (shortening to one year the legislative session of a state legislature elected under unconstitutional districts). In this case, rightfully or not, the members of the current General Assembly have already served out their complete terms in the 2017 General Session. All the NC NAACP asks is that this Court ensures that this General Assembly cannot reconvene to do further damage than they have already done.

In its *per curiam* decision, the Supreme Court instructed that this Court consider “the extent of the likely disruption to the ordinary processes of governance if early elections are imposed.” *Covington*, 137 S. Ct. at 1624. As laid out above, it is the *status quo* under this General Assembly’s tenure that has posed the disruption to the “ordinary process of government.” The General Assembly adjourned its session on June 30, 2017, and in the ordinary course of government, the legislature should reconvene for its 2018 legislative session on May 16, 2018. Resolution 2017-12, §3.1. In fact, enjoining the current General Assembly from convening and enacting any further legislation and ordering remedial elections in 2017 is the only way to ensure that the “ordinary course of government” will be restored, and that North Carolina will have, for the first time in six years – and three election cycles – an election for state legislature untainted by racial discrimination. The integrity of the electoral process can only be righted by directing the immediate redrawing of district lines and mandating November elections for those seats,

so that legally elected representatives may convene for the regular and “ordinary process of government” in 2018.

CONCLUSION

For the foregoing reasons, NC NAACP respectfully ask that this Court:

1. Appoint an independent special master to begin immediate redrawing of remedial legislative maps that satisfy the constitutional “one person, one vote” principle, the requirements of the Voting Rights Act of 1965, and comply with traditional redistricting principles, in accordance with state and federal law.
2. Require that the remedial maps be completed as soon as practicable, such that special elections for state legislative seats may be held in 2017.
3. Enjoin the North Carolina General Assembly from convening and enacting any further legislation until new members elected under a remedial plan are sworn in and seated in the Assembly.

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Respectfully submitted,

/s/ Irving Joyner

Irving Joyner (NC SBN 7830)

P.O. Box 374

Cary, NC 27512

Telephone: (919) 319-8353

Fax: (919) 530-6339

Email: ijoyner@ncsu.edu

/s/ Penda D. Hair

Penda D. Hair (DC SBN 335133)
FORWARD JUSTICE
P.O. Box 42521
Washington D.C. 20015
Telephone: (202) 256-1976
Email: phair@forwardjustice.org

Caitlin A. Swain
Leah J. Kang
FORWARD JUSTICE
400 W. Main Street
Suite 203
Durham, NC 27701
Telephone: (919) 323-3889
Email: cswain@forwardjustice.org
lkang@forwardjustice.org

/s/ Al McSurely

Alan McSurely (NC SBN 15540)
415 West Patterson Place
Chapel Hill, NC 27516
Telephone: (919) 381-0856
Email: lawyers@mcsurely.com

CERTIFICATE OF SERVICE

I certify that on this day, I filed the foregoing **Proposed Brief of Amicus Curiae** with the clerk's office via the CM/ECF system, which will send notification of filing to the following counsel of record:

Anita S. Earls
Allison Jean Riggs
Southern Coalition for Social Justice
1415 W. Hwy 54, Ste 101
Durham, NC 27707
(919) 794-4198
Fax: (919) 323-3942
Email: anita@southerncoalition.org

Caroline P. Mackie
John Ward O'Hale
Edwin M. Speas, Jr.
Poyner Spruill, LLP
301 Fayetteville Street, Ste. 1900
Raleigh, NC 27601
(919) 783-1108
Fax: (919) 783-1075
Email: cmackie@poynerspruill.com

Alexander McClure Peters
N.C. Department of Justice
POB 629
Raleigh, NC 27602
(919) 716-6913
Fax: (919) 716-6763
Email: apeters@ncdoj.gov

Thomas A. Farr
Michael Douglas McKnight
Phillip John Strach
Ogletree Deakins Nash Smoak &
Steward, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27609
(919) 787-9700
Fax: (919) 783-9412
Email: thomas.farr@ogletreedeakins.com

Jim W. Phillips, Jr.
Brooks Pierce Mclendon Humphrey &
Leonard, LLP
POB 26000
Greensboro, NC 27420
(336) 373-8850
Email: jphillips@brookspierce.com

This the 11th day of July, 2017.

/s/
Irving Joyner
Attorney for NC NAACP