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 Wake County No. COA 17-367 No. 16-CVS-15636

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JOINT BRIEF OF AMICI CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW [1] AND DEMOCRACY NORTH CAROLINA 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.

INTRODUCTION

Amici come before the Court to emphasize that the reorganization of North Carolina's electoral machinery in Session Law 2017-6 is no ordinary encroachment by one branch of government on another, but the centerpiece of a sweeping effort by the General Assembly to entrench one political party in power regardless of its loss of voter support. That would foster precisely the sort of unchecked, unaccountable government dominated by one faction that separation of powers exists to prevent.

Political entrenchment is more than partisan or factional advantage. It reflects the manipulation of electoral rules and governmental structures to make it so that the rule-making party prevails irrespective of the voters' will. The rules governing democracy may at times benefit one side. Entrenchment happens when the group in power tries to make that advantage permanent. That is the case here.

Political entrenchment clashes with bedrock principles underlying the constitutional order of this state and our nation, such that the General Assembly's previous attempts have drawn rebuke from federal courts up to the U.S. Supreme Court. This latest gambit similarly merits invalidation.

To be sure, attempts by factions to entrench themselves in power are older than the Republic itself. As the late Justice Antonin Scalia put it, "[t]he first instinct of power is the retention of power . . . ." *McConnell v. FEC*, 540

U.S. 93, 263 (2003) (concurring in part and dissenting in part). But the fact that entrenchment has long been with us does not render it a constitutionally valid government interest.

To the contrary, both the U.S. Constitution and the North Carolina Constitution were structured to prevent officeholders and political factions from manipulating rules to shield themselves from democratic accountability. Building on this constitutional history, courts have interpreted the law to thwart entrenchment efforts in many circumstances involving the electoral and political processes.

Our constitutional system's innate hostility toward political entrenchment is key to resolving this case. Opposition to entrenchment is exactly the sort of "fundamental principle[] . . . absolutely necessary to preserve the blessings of liberty" to which North Carolina's Constitution requires "frequent recurrence," N.C. Const. art I, § 35, especially when the constitutional text affords no clear answer. *See* John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 92 (2014) (article I, § 35 guides courts in deciding "cases within the spirit, but without the letter of the Constitution") (quoting *Kamper v. Hawkins*, 1 Va. Cas. 20, 40 (Va. 1793)).

Amici recognize that political entrenchment in North Carolina has been a bipartisan phenomenon. The Democratic Party also sought to manipulate the political process to frustrate the will of North Carolina voters when it had

the chance. But "they did it too" is not a legal defense, especially when the real losers from the escalating series of violations are not North Carolina's political class, but the rest of this state's citizens. "We the people" are entitled to a political system in which elected leaders are responsive to citizens and can be held accountable for their decisions.

Where, as in this case, the other branches abdicate or otherwise cannot fulfill their duty to safeguard the people's fundamental interest in representative government, it is incumbent upon this Court to intervene. We urge the Court to do so.

ARGUMENT

I. Political Entrenchment Is the Key Goal and Effect of Session Law 2017-6.

Despite references to "bipartisan cooperation" in its preamble, Session Law 2017-6's provisions show that it was designed to—and will—entrench the Republican Party in control of North Carolina's election machinery.

Briefly, the law transforms the State Board of Elections, which has been controlled by the Governor's party for more than a century, *see* 1901 N.C. Sess. Laws 244, by combining it with the State Ethics Commission, creating one Board with an equal number of Republicans and Democrats appointed from names submitted by the state party chairs. Session Law 2017-6 § 4(c). Because all decisions of the new Board require at least a

majority vote, Session Law 2017-6 gives Republican appointees the power to veto any matter under consideration, including changes to the rules or procedures adopted by the previous Republican-controlled Board. (R 9 p 54-55, 705 ¶ 3, 713 ¶¶ 14, 19). The new law also provides for evenly divided partisan membership on county Boards of Elections. This gives Republican appointees veto control over local election administration decisions, thereby similarly cementing past decisions by local Republican election administrators. Testimony in the record demonstrates that party-line deadlocks may be used to curtail early voting, prevent satellite polling locations, and make other changes likely to benefit Republican candidates. (*See* R 9 p 56, 61, 707-08 ¶¶ 16-20, 712 ¶ 10).[2]

Crucially, the law also mandates that the Republican-appointed Executive Director ("ED") of the current State Board of Elections, Kimberly Strach—chosen on a 3-2 party-line vote[3]—*must* be named as the ED of the

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[2] *See, e.g.,* Julia Harte, *Insight: Emails show how Republicans lobbied to limit voting hours in North Carolina*, Reuters (Nov. 3, 2016), http://www.reuters.com/article/us-usa-election-northcarolina-insight-idUSKBN12Y0ZY; *Full Email Sent By Dallas Woodhouse*, WRAL (Aug. 17, 2016), http://www.wral.com/full-email-sent-by-dallas-woodhouse/15938449/. The "Court[ ] may take judicial notice of facts generally known from radio, television and press coverage . . . ." *State v. McDougald*, 248 S.E.2d 72, 77 (N.C. Ct. App. 1978) (citing *State v. Williams*, 140 S.E.2d 529 (N.C. 1965)).

[3] Mark Binker, *Elections board picks new director*, WRAL.com (May 1, 2013), http://www.wral.com/elections-board-picks-new-director/12399549/.

new combined state Board through the 2018 election. After this, she can be removed only with the consent of at least one Republican Board member. Session Law 2017-6 §4(c). This is significant because the ED is North Carolina's "chief State elections official." *Id.* As Ms. Strach herself testified, the ED has immense responsibility, including overseeing "all elections in the state," enforcing campaign finance laws, and supervising all county election boards. (R 9 p 17-18) (describing provisions of Session Law 2016-125 that were retained in 2017-6). Supervising county boards includes the power to suspend their executive directors. N.C. Gen. Stat. § 163-35.

Session Law 2017-6 also mandates that the rotating chairmanship of the state and all county boards go to Republican members during critical presidential and gubernatorial election years, allowing Republicans to preside over and set the time and agenda for board meetings during those years. Session Law 2017-6 § 7(i).[4]

In sum, by codifying the continued service of a Republican-appointed ED, the law ensures Republican control over the execution of all election laws, rules, and procedures, and over staffing and administration of the state

[4] The Chair must be from the party with the "second-highest number of registered affiliates," Session Law 2017-6, §§ 4(c), 7(h); despite their current dominance, this has always been the Republican Party and is projected to continue to be so. *See Voter Registration Statistics Statewide Total*, N.C. State Board of Elections (Jul. 29, 2017), https://vt.ncsbe.gov/RegStat/Results/?date=07%2F15%2F2017.

Board and, indirectly, the county Boards. By restructuring state and county Boards such that Republican members can block or veto any proposal, the law allows those members to freeze the status quo, preventing any alteration of rules or procedures adopted by the previous Republican-controlled state Board and county Boards. By providing that the state and county Boards be chaired by a Republican in vital election years, the law makes certain that the Republican members dictate when state and county Board meetings are called, and set their agendas, during the most crucial times for administering major elections.

This entrenchment of Republicans in control of the election system is no accident. Session Law 2017-6 is a slightly modified version of its predecessor, Session Law 2016-125, which a three-judge panel of the Wake County Superior Court struck down (R 9 p. 675-79, 691). The earlier law was passed just nine days after former Governor Pat McCrory conceded defeat to Governor Cooper,[5] and legislators made no bones about the fact that its passage was prompted by the outcome of the election. For instance, Senator Ralph Hise, chair of the Senate Select Committee on Elections, said the new

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[5] Matthew Burns, *McCrory concedes gubernatorial race to Cooper*, WRAL.com (Dec. 5, 2016), http://www.wral.com/mccrory-concedes-gubernatorial-race-to-cooper/16308570/; North Carolina General Assembly, Senate Bill 4 / S.L. 2016-125, DRS45001-STf-1, http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2015E4&BillID=SB+4&submitButton=Go

law was "something we feel is a necessity. This is about what we've done over six years as a legislature *and protecting those (accomplishments)*."[6] Likewise, Representative David Lewis, chair of the House Committee on Elections, declared the General Assembly's intent "to establish that [Republicans] are going to continue to be a relevant party in governing this state."[7]

The General Assembly's effort to manipulate the election law is part of a series of actions taken to entrench Republicans in power. The U.S. Supreme Court recently struck down the party's racially gerrymandered congressional and legislative district plans, which were admittedly developed to advantage Republicans by packing Democratic-leaning African-American voters into a limited number of districts. *Cooper v. Harris*, 137 S.Ct. 1455, 1476 (2017); *North Carolina v. Covington*, 137 S. Ct. 1624 (2017). In 2016, the Fourth Circuit struck down a separate attempt by the General Assembly to weaken Democrats by curtailing African-American voting power—this time, by manipulating voting hours, registration rules, and other variables after requesting racial voting data. *NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir.

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[6] Kirk Ross, *December surprises: Two special sessions pass bills, third one fizzles out*, Carolina Public Press (Dec. 20, 2016), http://carolinapublicpress.org/26306/december-surprises-two-special-sessions-pass-bills-third-fizzles/ (emphasis added).

[7] Craig Jarvis and Colin Campbell, *Lawmakers look to limit Cooper's power as governor*, Charlotte Observer (Dec. 14, 2016), http://www.charlotteobserver.com/news/politics-government/article120847418.html.

2016). Another Fourth Circuit panel invalidated the General Assembly's attempt to advantage Republicans by manipulating Wake County school board districts, holding that "the challenged redistricting here subverts political fairness and proportional representation and sublimates partisan gamesmanship." *Raleigh Wake Citizens Ass'n v. Wake County Bd. of Elections*, 827 F.3d 333, 347-48 (4th Cir. 2016).

In short, Session Law 2017-6 is part of a pattern of entrenchment, one so egregious that scholars at Harvard University's Electoral Integrity Project recently opined that North Carolina no longer qualifies as a full democracy.[8]

II. Political Entrenchment Runs Counter to Fundamental Principles Underlying the U.S. and North Carolina Constitutions.

Blatant political entrenchment of the sort described above is at odds with bedrock U.S. and North Carolina constitutional principles.

The generation that crafted both the U.S. Constitution and the original North Carolina Constitution was the product of an Enlightenment tradition concerned with the "encroaching nature" of political power. Bernard Bailyn, The Ideological Origins of the American Revolution 56 (1966). The great innovation of the American founders was to combine suspicion of unchecked

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[8] Andrew Reynolds, *North Carolina is No Longer Classified as a Democracy*, News & Observer (Dec. 22, 2016), http://www.newsobserver.com/opinion/op-ed/article122593759.html.

political power with a new emphasis on the accountability of rulers to the people. Whereas the British monarch, while somewhat constrained, was still the ultimate sovereign, the Declaration of Independence proclaims that republican government "derives its just powers from the consent of the governed." *See also* Gordon Wood, The Creation of the American Republic 1776-1787 26 (1967).

That consent must be frequently renewed. As James Madison explained, "the genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those entrusted with it should be *kept in dependence on the people*" by, among other things, having to stand regularly for election. The Federalist No. 37 (James Madison) (emphasis added).

The Framers were also highly attuned to the "mischief of faction," and argued that a system with strong checks and balances was the best way to keep any one group from achieving lasting dominance at the expense of other citizens. The Federalist No. 10 (James Madison).

Fears of unchecked power, lack of accountability, and factionalism all come into play any time a temporary governing majority seeks to manipulate democratic rules to entrench itself in power. Preventing such entrenchment is a central goal of many different constitutional provisions.

For instance, in Article I of the U.S. Constitution, the Framers "denied

Congress the power to impose additional qualifications upon its members . . . for fear that congressmen would endeavor to entrench themselves in office." Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 498 n.45 (1997). They also "mandated reallocation of congressional seats every ten years (after the decennial census) because they doubted whether congressmen whose states benefited from the status quo would voluntarily support changing it." *Id.*

Fear that legislators would manipulate rules to politically entrench their factions was the principal basis for the Elections Clause, one of the few provisions in the original Constitution to explicitly give the national government power over states. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S.Ct. 2652, 2672 (2015) (Congress empowered to set rules for federal elections "as a safeguard against manipulation of electoral rules by politicians and factions in the States," who might seek "to entrench themselves or place their interests over those of the electorate") (citation omitted). Indeed, in response to South Carolina's motion to exclude this federal power, Madison explained that absent the clause, "'[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.'" *Id.* (quoting 2 Records of the Federal Convention 241 (Max Farrand rev. 1966)).

Preventing entrenchment also motivated the Framers to forbid legislative bills of attainder finding individuals guilty of treason or other crimes ("attainted") without trial. As Alexander Hamilton put it, "[i]f the legislature can disfranchise any number of citizens at please by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy." *United States v. Brown*, 381 U.S. 437, 444 (1965) (citing John C. Hamilton, History of the Republic of the United States 34 (1959)). Almost a century later, Radical Republicans used similar arguments to justify protections for African-American voting rights that they later enshrined in the Fourteenth and Fifteenth Amendments. *See* Charles O. Lerche, Jr., *Congressional Interpretations of the Guarantee of a Republican Form of Government*, 15 J. Southern History 192, 198 (1949).

Hostility to political entrenchment also pervades the North Carolina Constitution, particularly the provisions that incorporate elements of the original Constitution of 1776 and the amendments of subsequent decades. *See* John V. Orth & Paul M. Newby, The North Carolina State Constitution 19, 37 (2014).

For example, the North Carolina Constitution 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 (emphasis added). Elections must not only be "free," but also "often held." N.C. Const. art. I, §§ 9-10. The latter requirement, first added in 1835, was intended to ensure that the electoral process could be used for prompt "redress of monstrous grievances" committed by incumbent officeholders. Orth & Newby, *supra*, at 56 (quoting Proceedings of the Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State 197 (1836)). Another provision ratified at the same time mandated popular election of the governor to "[break] the general assembly's monopoly on power," along with gubernatorial term limits to make sure the governor himself did not become too powerful. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1772 (1992); *see also* N.C. Const., art. III.[9]

The 1868 Constitution, the model for the current Constitution, incorporated these provisions and placed additional limits on the General Assembly's power still in effect—including requiring legislative apportionment by population and a ban on mid-decade reapportionments. Orth & Newby, *supra*, at 37; *id.* at 96-98; N.C. Const. art. II, §§ 3, 5.

As our constitutional tradition develops, it is fair to conclude that the

[9] The Governor still had far less power than the General Assembly, but the two have since moved towards parity. *See* Jack D. Fleer, Governors Speak 28-29 (2007).

enduring concern in the US and NC Constitutions about temporary officeholders overriding the people's will makes opposition to entrenchment one the "fundamental principles" whose "frequent recurrence . . . is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

III. Courts Routinely Seek to Curb Political Entrenchment in Cases Involving the Democratic Process, As Should This Court.

Building on our constitutional history, the U.S. Supreme Court and other courts routinely intervene in cases where political entrenchment threatens to distort democracy and deprive citizens of their right to responsive government. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) ("more exacting judicial scrutiny" appropriate for "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"). This Court should do the same.

To be sure, courts have recognized the need to avoid constant meddling with "the rough-and-tumble of politics." *Republican Party v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring). But there is a difference between ordinary politics and extraordinary violations of constitutional norms. *Rutan v. Republican Party*, 497 U.S. 62, 64 (1990) ("To the victor belong only those spoils that may be constitutionally obtained."). Nor has it ever been a sufficient defense to say an anti-democratic practice has long been tolerated.

See id. at 83 (The "'answer to [a] constitutional question is not foreclosed by the fact that the spoils system has been entrenched in American history for almost two hundred years.'") (Stevens, J., concurring) (citation omitted).

Courts are especially attuned to the threat of entrenchment in cases directly dealing with the electoral process. For instance, concerns about political entrenchment underlie our constitutional jurisprudence governing redistricting. Thus, the U.S. Supreme Court has long held that unreasonable population disparities between legislative districts designed to preserve existing seat distributions violate the U.S. Constitution by denying citizens an "equally effective voice." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Racially discriminatory districting plans raise similar concerns, because they insulate representatives from accountability to minority communities, to whose needs they become "unresponsive and insensitive." *Rogers v. Lodge*, 458 U.S. 613, 625 (1982).

The Supreme Court also recognizes that "partisan gerrymanders" seeking to "entrench … [one] party in power" "'are incompatible with democratic principles.'" *Ariz. State Legis*, 135 S. Ct. at 2658 (brackets omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality opinion)). Relying on the justices' reasoning, a federal three-judge panel recently invalidated a state legislative plan because it "entrench[ed] a political party in power, making . . . the state government [ ] impervious to

the interests of citizens affiliated with other political parties." *Whitford v. Gill*, 218 F.Supp.3d 837, 886 (W.D. Wis. 2016). That case will be before the Supreme Court in October.

Courts have also acted to curb ballot access restrictions that keep certain candidates off the ballot to "freeze the political status quo." *Jenness v. Fortson*, 403 U.S. 431, 438 (1971). Such restrictions harm not only the excluded candidates, but also voters locked into a political system that limits their choices. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972). Here in North Carolina, for example, a federal court invalidated heightened eligibility requirements for unaffiliated candidates for governor, reasoning that they "limit[ed] the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group . . . .[and] impact the State's political landscape." *DeLaney v. Bartlett*, 370 F.Supp.2d 373, 377 (M.D.N.C. 2004) (quotations omitted).

Similarly, one of the principal concerns in campaign finance cases is a suspicion that challenged regulations were adopted to entrench incumbent officeholders or major political parties in power. *E.g., Randall v. Sorrell*, 548 U.S. 230, 248-49 (2006) (Breyer, J., controlling opinion) (burdensome contribution limits "can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability"); *see also Green Party of Conn. v.*

Garfield, 616 F.3d 213, 234 (2d Cir. 2010) (discriminatory public financing "risks entrenching the major parties and shutting out the rare minor party candidate who can garner enough votes to win an election").

Finally, courts have pointed to anti-entrenchment principles as grounds to justify limits on patronage practices in civil service. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 369 (1976) ("Patronage can result in the entrenchment of one or a few parties to the exclusion of others."). Importantly, however, they have also recognized that entrenchment concerns go both ways in this area. As the N.C. Court of Appeals recently put it:

> 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, 786 S.E.2d 50, 72 (N.C. Ct. App. 2016); *Young v. Bailey*, 781 S.E.2d 277,281 (N.C. 2016) ("[E]mployees in policymaking positions legally can be dismissed . . . to the end that representative government not be undercut by tactics obstructing . . . a new administration . . . .") (quotation and brackets omitted).

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In sum, hostility to political entrenchment has shaped our constitutional order and the approach of courts looking to safeguard the people's right to

representative government. The same anti-entrenchment imperative weighs decisively against the challenged provisions of Session Law 2017-6.

Plaintiff relies primarily on the separation of powers doctrine, the basic purposes of which are to curtail unchecked power and reinforce the government's accountability to the people. Wood, *supra*, at 559; *see also State v. Berger*, 781 S.E.2d 248, 249 (N.C. 2016). The Framers also envisioned the executive as a safeguard "against the effects of faction" in the legislature. The Federalist No. 73 (Hamilton); *see also INS v. Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring) ("The supremacy of legislatures came to be recognized as the supremacy of faction and the tyranny of shifting majorities.") (quotations omitted).

It is difficult to imagine a situation that implicates those concerns more than one in which a party loses the governorship, then seeks to use its temporary dominance of the legislature to entrench itself in control of the state's electoral machinery.

For this reason and others, the Court can and should intervene to block the General Assembly's bald attempt at partisan entrenchment.

CONCLUSION

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

Respectfully submitted, this the 3rd day of August, 2017.

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