STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18-CVS-014001

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF BY FORMER NORTH CAROLINA GOVERNORS JAMES G. MARTIN, JAMES B. HUNT, JR., MICHAEL F. EASLEY, AND BEVERLY E. PERDUE

The Honorable James G. Martin, the Honorable James B. Hunt, Jr., the Honorable Michael F. Easley, and the Honorable Beverly E. Perdue (collectively, the "Former Governors") respectfully move this Court for leave to file the attached *amici curiae* brief in support of the plaintiffs. In support of this Motion, the Former Governors show the Court as follows:

1. The Former Governors seek permission to participate as *amici curiae* to share their singular perspective, derived from a combined 36 years as Governors of North Carolina, on the issues before this Court.

2. During their times in office, the Former Governors learned from personal experience that good government depends on communication and cooperation among state officials from different branches and political parties, and on a healthy respect for the separation of powers. They also saw firsthand how partisan gerrymanders of the past had begun to obstruct good government and

threaten the separation of powers. Aided by advancing technology, partisan gerrymandering has since grown far more extreme—and so have its dangers. The partisan gerrymanders of today ultimately jeopardize our entire system of government.

3. If permitted to participate as *amici curiae*, the Former Governors will document the damage that partisan gerrymandering inflicts to our governmental system and argue that the courts should root out this destructive and unconstitutional practice.

WHEREFORE, the Former Governors respectfully request that this Court:

a. Grant them leave to submit the attached *amici curiae* brief in support of the plaintiffs; and

b. Grant such other and further relief as the Court deems just and proper.

This 7th day of August, 2019.

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CERTIFICATE OF SERVICE

I certify that today, I caused the foregoing Motion for Leave to File *Amici Curiae* Brief and the attached brief to be served on all counsel by email and U.S. mail, addressed to:

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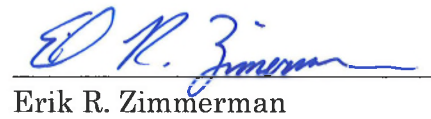
This 7th day of August, 2019.



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STATE OF NORTH CAROLINA

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BRIEF OF FORMER NORTH CAROLINA GOVERNORS JAMES G. MARTIN, JAMES B. HUNT, JR., MICHAEL F. EASLEY, AND BEVERLY E. PERDUE AS *AMICI CURIAE* SUPPORTING PLAINTIFFS

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INTRODUCTION

Amici served as Governors of North Carolina for 36 straight years. During that time, we experienced highs and lows in the functioning of state government. The highs came when members of different political parties worked together to move our State forward, and when all three branches respected the separation of powers at the core of our constitutional system. The lows came when progress took a back seat to partisanship, and when the legislature sought to expand its own power at the expense of the executive and judicial branches.

Fortunately, the highs outnumbered the lows during our tenures. Legislators from both parties collaborated with us to pass bipartisan legislation that advanced the interests of the entire State on matters ranging from education to jobs to the environment. And although our administrations were not immune from episodes of partisanship or legislative overreach, those episodes were temporary. The voters were able to temper partisan excesses by taking a stand at the ballot box, and the checks and balances embedded in our constitutional design—including the courts' exercise of judicial review—were able to reorient the legislature to its proper role under the separation of powers. *See, e.g.*, *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982).

Regrettably, the highs do not nearly outnumber the lows today. Partisan rancor and legislative attacks on the other branches are no longer temporary. They have become the new normal. The reason is partisan gerrymandering. Increasingly sophisticated gerrymanders produce increasingly partisan legislators—legislators who are beholden to the sectarian interests of the party leaders who draw their

district lines and the very small number of voters who are most likely to vote in primary elections. These legislators have no real choice but to pursue hyper-partisan agendas without regard for the separation of powers. And today's gerrymanders are impervious to the measures that constrained these partisan forces and kept our government on track in the past. By design, partisan gerrymandering impedes the voters from exerting their will and rooting out partisanship in the voting booth. And at the extreme, partisan gerrymandering licenses a legislative supermajority to pursue its most zealous impulses, trampling any other branch that stands in its way.

The solutions to this growing paralysis and dysfunction in our state government cannot be found in the political branches of state government. Those branches either cannot (in the case of the executive, who cannot veto redistricting legislation) or will not (in the case of the legislature, whose "first instinct . . . is the retention of power," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part)) bring an end to partisan gerrymandering. Nor can the solution come from the people alone—because they cannot amend the North Carolina Constitution to prohibit partisan gerrymandering without the legislature's consent.

Securing the long-term prosperity of our State requires a new solution—a judicial solution. Because partisan gerrymandering violates the North Carolina Constitution by depriving the voters of their foundational right to choose their representatives, the courts of our State should take action against it. Only in that

way can our courts fulfill their most fundamental duty: to save our constitutional system from destruction. *See, e.g.*, *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787).

ARGUMENT

I. Partisan gerrymandering poisons our system of state government.

The plaintiffs in this case have explained that partisan gerrymandering violates multiple provisions of our state constitution—including the Equal Protection Clause, the Free Elections Clause, and the Freedom of Speech and Freedom of Assembly Clauses—because it sacrifices bedrock democratic principles of popular sovereignty, fair representation, and political accountability for raw partisan gain. *See, e.g.*, Pl. Pretrial Mem. 1-2, 9-13. But the constitutional damage inflicted by partisan gerrymandering does not end there. Partisan gerrymandering also obstructs the functioning of state government and, in extreme circumstances, threatens the separation of powers on which our government is built.

While serving as Governor, *amici* saw these dangers begin to form under partisan gerrymanders of the past. But those gerrymanders paled in comparison to the gerrymanders of today—and tomorrow. The threats that partisan gerrymandering now pose to good government and our constitutional structure are unprecedented. And, absent judicial intervention against this unconstitutional practice, those threats will continue to grow.

A. Our constitutional design facilitates good government.

The separation of powers is the "cornerstone" of our constitutional system. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 258 (2016). The primary objective of this foundational principle is "the preservation of liberty." *Id.* at

635, 781 S.E.2d at 250; *see also, e.g.*, The Federalist No. 51 (James Madison). By keeping the legislative, executive, and judicial powers "forever separate and distinct," N.C. Const. art. I, § 6, our constitutional design aims to prevent any one branch from overrunning the others and imposing its agenda on the people without restraint.

Preserving liberty in this manner also has a gainful byproduct: It nurtures the communication, cooperation, and compromise that are keys to good government. As former Governors, *amici* know firsthand that our state government works best when state officials representing different constituencies and different interests work together. Faithful to the Founders' design, the separation of powers fosters this healthy give-and-take among the branches and between the parties. By dividing power among the branches, as well as between the two houses of the legislature, our Constitution requires the different branches and houses to collaborate to get things done—which facilitates government "for the good of the whole." N.C. Const. art. I, § 2. Dividing constitutional authority in this manner also diminishes the likelihood that any single political party will control all the levers of power—and thus provides opportunities for the parties to partner with each other to accomplish their goals.

For example, legislators come from a wide range of districts, while the Governor represents the entire State. By communicating about the interests of their different constituencies, legislators and the Governor develop common-ground solutions to the challenges that our State faces. Similarly, state officials come from different political parties. When those state officials communicate and cooperate

across the aisle, they develop bipartisan approaches to the issues that would otherwise divide us.

Amici know from personal experience what our state government can accomplish when the branches and the parties work together—because we did it. Although our time in state government involved its share of partisan sniping, we also joined forces with legislators of both parties to pass legislation for the good of our State as a whole. To name a few examples:

- For both of Governor Martin's terms, the Democratic majority in the General Assembly and the Governor held to strong differences in how state government should operate. Despite these differences, they recognized the value in working together to generate a level of success in industrial development that led the nation in new manufacturing. In particular, adopting the Highway Trust Fund and establishing the North Carolina Global TransPark required bipartisan collaboration. *See* 1989 N.C Sess. Laws 692; 1991 N.C. Sess. Laws 749 (creating the Air Cargo Airport Authority, later renamed the Global TransPark Authority). Likewise, Governor Martin and the Democratic majority had a distinct rivalry to see which could do more for our public schools. This rivalry was a clear positive for schools because both parties were pressing in the same direction.

- Governor Hunt partnered with a Republican majority in the House of Representatives (including Speaker Harold Brubaker) and a Democratic majority in the Senate (including President *Pro Tem* Marc Basnight) to enact the Excellent Schools Act. *See* 1997 N.C. Sess. Laws 221. That act increased teacher pay in North Carolina by almost 33% over four years, propelling our State to 19th in the national rankings in 2001.[1]

- Governor Easley worked with bipartisan coalitions in the General Assembly to enact the Job Development Investment Grant Program and the Clean Smokestacks Act. *See* 2002 N.C. Sess. Laws 172, Part 2; 2002 N.C. Sess. Laws 4. The Job Development Investment Grant Program provides performance-based incentives to new and expanding

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[1] *See* Kelly Hinchcliffe & Clay Johnson, *After inflation, NC teacher pay has dropped 13% in past 15 years*, WRAL.com (Apr. 26, 2016), https://tinyurl.com/y35tbeed; Jim Hunt, *Let's show real respect for teachers*, News & Observer, 2014 WLNR 26192357 (Sept. 20, 2014), https://www.newsobserver.com/opinion/op-ed/article10065875.html.

companies; it has produced more than 200,000 total jobs in North Carolina since 2003.[2] The Clean Smokestacks Act required North Carolina coal-fired power plants to reduce their emissions by about 75% over a decade; it has prevented thousands of premature deaths attributable to air pollutants and has measurably improved visibility at our treasured mountain attractions and across the rest of our State.[3]

- Then-Lieutenant Governor Perdue worked with legislators from both parties to enact the North Carolina Virtual Public School Program. *See* 2006 N.C. Sess. Laws 66, § 7.16. That program has served over 490,000 students across the State since 2007 and has been an exemplar for other states, growing in recent years to become the second largest state-led virtual school in the nation.[4]

A final example illustrates particularly well what cooperation born out of a mutual respect for the separation of powers can achieve. In 1995, the Republican majority in the House and the Democratic majority in the Senate worked with Governor Hunt to propose the constitutional amendment that granted our Governor the power to veto legislation. *See* 1995 N.C. Sess. Laws 5. In other words, the General Assembly recognized that the constitutional balance of power was too heavily weighted in its favor and therefore voted to *increase* the Governor's power. And it did so even when the Governor was a Democrat and the House was controlled by Republicans. More than 75% of the voters then ratified the veto amendment in 1996.[5]

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[2] *See* N.C. Dep't of Commerce, *Job Development Investment Grant: 2018 Annual Report*, Attachment B, https://tinyurl.com/y6fp7yy2.

[3] *See* Bruce Henderson, *NC clean air law saved lives, study finds*, Charlotte Observer, 2014 WLNR 24351550 (Sept. 3, 2014), https://www.charlotteobserver.com/news/local/article9160268.html; North Carolina Dept. of Env'l Quality, *Cleaner air benefits tourism as well as health and the environment* (July 26, 2016), https://tinyurl.com/yxujbqzh.

[4] *See* North Carolina Virtual Public School, *NCVPS Annual Report 2017-2018* https://tinyurl.com/y498nhtv.

[5] *See North Carolina Veto Power of the Governor, Amendment 1 (1996)*, Ballotpedia, https://tinyurl.com/y66u39le.

By elevating the separation of powers over partisan interests, state government gave the people what they wanted.

B. Partisan gerrymandering disrupts the constitutional design.

The environment that produced these bipartisan accomplishments is so far removed from today's hyper-partisan environment that they might as well be in different galaxies. For example, the prospect of the current General Assembly agreeing to increase the Governor's power is beyond far-fetched. Indeed, the *modus operandi* of the legislative majority in recent years has been to strip the Governor of power—even when he was from the majority party. And as ongoing events in Raleigh confirm, it is also difficult to imagine today's legislature sacrificing its political agenda to achieve the types of major bipartisan legislation on matters such as education and the environment that we accomplished in the past.

To be clear, *amici* do not mean to cast blame on the current members of state government, or on any particular political party, for the dysfunction that has taken hold in state government today. We blame a tool that both parties have used when granted the opportunity, and that recent technological advances have sharpened into a far more dangerous weapon than ever before: partisan gerrymandering. Good government depends on collaboration and a shared respect for the separation of powers; the extreme partisan gerrymandering that we face today thwarts collaboration and threatens the separation of powers. *Amici* urge this Court to exercise its constitutional authority to stop it now.

1. Partisan gerrymandering contributes to polarization and impedes effective governance.

As *amici* know from experience, winning a competitive election requires a candidate to appeal to broad cross-sections of voters in the primary and general elections. That is not the case under gerrymandered maps, which create safe districts for each party. In a safe district, one party is guaranteed to prevail in the general election; the decisive election is therefore that party's primary. And primaries are typically low turnout elections dominated by the hardline wings of each party. Thus, rather than appealing to voters of both parties, or even to the moderate voters of their own parties, legislative candidates in safe districts "are driven to appeal to the most ideological members of their own parties, because those partisans turn out disproportionately in party primaries." G. Alan Tarr & Robert F. Williams, *Introduction*, 37 Rutgers L.J. 877, 878 (2006); *see also* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2335 (2006).

Partisan gerrymandering also strengthens the control of party leaders over their caucuses. Under a partisan gerrymander, "a representative may feel more beholden to the cartographers who drew her district than to the constituents who live there." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 470 (2006) (Stevens, J., concurring in part and dissenting in part). And the cartographers who draw gerrymandered districts do so at the direction of party leaders. *See, e.g.*, Pl. Ex. 601 at 23:3-5 (Representative Lewis stating that the map drawer was "working as a consultant *to the Chairs* [of the redistricting committees] with the approval of the Speaker and the President Pro Tem" (emphasis added)). Any legislator who might

otherwise be inclined to buck party leadership faces the prospect that the leadership will redistrict her out of office in retribution. To secure their political futures, therefore, legislators must toe the party line, surrendering their independent judgment to vote for the partisan agenda mandated by party leaders.

Partisan gerrymandering therefore produces hyper-partisan legislators. "[E]ither out of conviction or out of political prudence," the candidates elected in gerrymandered districts "tend to fall further from the ideological center than [those] who have to reach out to voters from both parties to get elected." Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. Pa. J. Const. L. 1001, 1068 (2005); *see also* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 306-307 (1991). A "perverse consequence" of partisan gerrymandering is thus to drive "the center out of [legislatures]." Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 574 (2004).[6]

That is the result we have seen in North Carolina. The gap between average ideological scores of Republicans and Democrats in the North Carolina General Assembly has increased *by more than 50%* over the last 20 years. *See* Boris Shor &

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[6] *See also, e.g.*, Perry Grossman, *Fixing Gerrymandering Doesn't Just Make Elections More Fair*, Slate (Mar. 20, 2017), https://tinyurl.com/y3ymb2ms (describing the polarizing effect of gerrymandering on legislators' votes in office—and the moderating effect of Florida's recent transition to non-gerrymandered elections); Earl Blumenauer & Jim Leach, *Redistricting, a Bipartisan Sport*, N.Y. Times (July 8, 2003), https://tinyurl.com/y6kuflzb (explaining that gerrymandering deters legislative compromise).

Nolan McCarty, *Measuring American Legislatures*, *May 2018 Update to Shor-McCarty Legislatures Data*, https://tinyurl.com/y3c3nwb5. Much of that increase flows from the rising ideological scores of Republican legislators. *See id.*; Expert Report of Christopher A. Cooper 3-13 ("Cooper Report") (showing that today's General Assembly is far more ideologically conservative than the state population).

Extreme partisan gerrymandering also creates conflict between the executive and the legislature. Because the Governor is elected statewide, he or she must answer to a broad constituency of voters. Legislators from gerrymandered districts, by contrast, depend not on broad support—even in their own districts. Rather, their electoral prospects rest on their ability to satisfy the party leaders (who draw the districts) and a small minority of primary voters, who determine the outcome in districts so uncompetitive that the general election is a formality. When officials elected in this fashion come together as a legislative body, they do not represent the interests of the state as a whole—but they must work with a Governor who does.[7] This is a recipe for constant conflict, including legislative attempts to gain advantage by violating the separation of powers.

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[7] For the same reasons, extreme partisan gerrymandering exacerbates the divide between North Carolina's urban and rural populations. Gerrymandered maps, like the one at issue in this case, often work by packing and cracking urban voters into different districts, thus diluting their voting power. The maps therefore grant disproportionate voting strength to rural voters, further skewing the interests represented in the legislature. *See* Paul A. Diller, *Reorienting Home Rule: Part 2-Remedying the Urban Disadvantage Through Federalism & Localism*, 77 La. L. Rev. 1045, 1052-53 (2017) (explaining how partisan gerrymandering contributes to the under-representation of urban interests in state legislatures).

We have seen these problems intensify in recent years. Partisan gerrymandering has ground deliberation and cooperation to a halt in the General Assembly. Partisan agendas now obstruct bipartisan compromise, and ideological grandstanding has replaced pragmatic problem-solving. And it has become increasingly difficult for the Governor to work with the legislature to account for the interests of his constituents and get things done. The result is a legislature increasingly unable or unwilling to engage in effective governance.

These impediments to collaboration and compromise are further aggravated when partisan gerrymandering enables a single political party to seize supermajority control in both houses of the legislature without a supermajority of votes—which is what happened in North Carolina in the 2012, 2014, and 2016 elections. *See* Am. Compl. ¶ 84. In these circumstances, empowered to override the Governor's veto at will, the legislature has no incentive to work with a Governor of the opposite party. *See* N.C. Const. art. II, § 22. Set free to pursue only its own partisan agenda, the legislature governs—with no input from the executive branch.

This outcome turns the purpose of the veto override on its head. By requiring a supermajority vote to override a gubernatorial veto, our Constitution seeks to limit veto overrides to sound legislation that has broad public support. *Cf.* The Federalist No. 73 (Hamilton) (explaining that the U.S. Constitution requires a supermajority for veto overrides because a supermajority is less likely to have "improper views" than a bare majority). Partisan gerrymandering, however, facilitates veto overrides for unsound legislation that lacks such broad support. It even enables overrides when

legislation has only *minority* support among the public, so long as that minority forms the base of the party in power and thus drives the legislature's agenda. By empowering the use of veto overrides in this manner, partisan gerrymandering exalts partisan government, rather than government that serves the State as a whole.

2. Partisan gerrymandering threatens the separation of powers.

In addition to frustrating good government, partisan gerrymandering jeopardizes our entire governmental system. It does so by eroding a number of protections built into our constitutional scheme to preserve the separation of powers. For example, the veto power allows the Governor to block legislative efforts to diminish the powers of the executive or the judiciary. *Cf.* Federalist No. 73 (Hamilton) (explaining that this purpose motivates the presidential veto); Ran Coble, *PRO: North Carolina Should Adopt a Gubernatorial Veto*, North Carolina Insight 13, 16-17 (March 1990), https://tinyurl.com/y4tjla24 (arguing for the adoption of the veto in North Carolina on this ground, among others). Judicial review similarly permits the courts to limit the other branches to their proper spheres. *See Bayard*, 1 N.C. at 6-7. And the onerous requirements for amending the North Carolina Constitution—including the requirement that proposed amendments have supermajority support in the legislature, *see* N.C. Const. art. XIII, § 4—further guard against altering our foundational document in a way that would erode the separation of powers.

When gerrymandered maps produce a legislative supermajority without supermajority support, however, these protections crumble. A veto-proof supermajority can enact legislation that strips the executive and judicial branches of

power without any check from the Governor. If the judiciary invalidates such legislation, an unrestrained legislature can seek revenge through legislation that attacks the independence of the courts. And, if all else fails, an ill-gotten legislative supermajority with the power to propose constitutional amendments can seek to write the separation of powers out of the North Carolina Constitution altogether.

This is not alarmism. It is exactly what we have seen in our own State in recent years. The Republican supermajority in the General Assembly repeatedly enacted legislation that sought to transfer power from the executive to the legislature. Even when the Governor was a Republican, the General Assembly passed legislation granting itself the power to control the appointments to commissions in the executive branch. *See McCrory*, 368 N.C. at 636-37, 781 S.E.2d at 250-51 (describing the 2014 legislation that created the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission). And when Governor Cooper was elected, the General Assembly accelerated its efforts to pass legislation that obstructed the Governor from carrying out his duty to ensure the faithful execution of the laws—including repeated legislative efforts to reorganize the state elections and ethics boards. *See Cooper v. Berger*, 370 N.C. 392, 395-400, 809 S.E.2d 98, 100-02 (2018).

The courts stood up to the General Assembly, ruling that these efforts to transfer authority from the executive to the legislative branch violated the separation of powers. *See, e.g.*, *McCrory*, 368 N.C. at 649, 781 S.E.2d at 258; *Cooper*, 370 N.C. at 395, 418, 809 S.E.2d at 100, 114. Rather than chastening the General Assembly, these rulings provoked it. The supermajority responded by attacking the independence of

the judiciary. For example, it reduced the size of the Court of Appeals, required partisan judicial elections, eliminated judicial primaries, and redrew judicial districts in Mecklenburg and Wake Counties to partisan ends. 2017 N.C. Sess. Laws 7, § 1; 2016 N.C. Sess. Laws 125, § 21; 2017 N.C. Sess. Laws 3, §§ 5-13; 2017 N.C. Sess. Laws 214, § 4; 2018 N.C. Sess. Laws 14. And it even threatened to require judges to run for office every two years. *See* 2017 N.C. Senate Bill 698.

Ultimately, in the waning days of their supermajority reign, the leaders of the General Assembly sought to deliver a permanent blow to the separation of powers by amending our Constitution. The General Assembly proposed an amendment that, among other things, would have rewritten the Separation of Powers Clause itself to grant the legislature control over appointments to boards and commissions in *all three branches* of government. *See* 2018 N.C. Sess. Laws 117, § 2. And it proposed another amendment that would have further attacked judicial independence by giving the General Assembly control over appointments to fill all judicial vacancies. *See* 2018 N.C. Sess. Laws 118, § 1. Making matters worse, the General Assembly sought to conceal the nature of these amendments from the voters by crafting ballot language that a three-judge panel of this Court ruled was misleading and therefore itself unconstitutional. *See Cooper v. Berger*, No. 18-CVS-9805, 2018 WL 4764150, at *2-3, *13-15 (N.C. Super. Aug. 21, 2018).

We spoke out against the real and present danger in these deceptive proposals at the time. We were relieved to see them fail. But the fact that the legislature even proposed them demonstrates the lengths to which a gerrymandered supermajority

will go in seeking to consolidate its grip on state government—and the grave threat that partisan gerrymandering poses to the separation of powers.

C. The worst of partisan gerrymandering is yet to come.

Amici acknowledge that partisan gerrymandering is not new. Indeed, legislative districts were gerrymandered when *amici* served as Governors. What is new, however, is the magnitude of the threat that partisan gerrymandering poses to our system of government. That is because advancing technology has made partisan gerrymandering far more sophisticated and precise today than it was in the past. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan J., concurring); Alan S. Lowenthal, *The Ills of Gerrymandering and Independent Redistricting Commissions As the Solution*, 56 Harv. J. Legis. 1, 14-15 (2019). And those trends promise to continue into the future.

When Democrats gerrymandered our state legislative districts in 2001, AltaVista was a major search engine, Americans spent 67% of their home entertainment budget on VHS tapes, and smart phones did not exist.[7] By the time Republicans were in a position to gerrymander in 2011, Apple had released the iPhone 4 and the iPad, Facebook had more than 600 million users, and Netflix had

[7] *See* Nick Bilton, *AltaVista. What's That?*, N.Y. Times (July 1, 2013) https://tinyurl.com/y3epjzgq; Reuben Fischer-Baum, *What Tech World Did You Grow Up In*, Wash. Post (Nov. 26, 2017), https://tinyurl.com/y3e6j7jl.

more than 20 million subscribers.[8] Today, Apple has gone through ten further iterations of the iPhone, and we will soon have cars that drive themselves.[9]

This technology boom is a bonanza for partisan gerrymandering. Gerrymanders based on the technology of the past (including Democratic gerrymanders in previous decades) have been aptly described as "dummymanders" because they eventually worked to the *detriment* of the party that drew the maps. *See* Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictrictings on the Partisan Makeup of Southern House Seats*, Redistricting in the New Millennium, 183, 184, 192-93 (Peter F. Galderisi ed., 2005). But modern technology has done away with dummymanders. Increasing computing power and increasingly sophisticated computer models enable mapmakers to draw gerrymanders with enough precision to make them unbreakable in all but the most extreme circumstances. *See, e.g.*, Emily Bazelon, *The New Front in the Gerrymandering Wars: Democracy vs. Math*, N.Y. Times Mag. (Aug. 29, 2017), https://tinyurl.com/y4gyjrf7 (discussing the use of such a tool in Wisconsin). The explosion of big data also means that mapmakers can apply their increasingly

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[8] *See Timeline of Computer History*, https://tinyurl.com/yywjckbq; Associated Press, *Number of Active Users at Facebook over the Years*, Yahoo Finance (Oct. 23, 2012). https://tinyurl.com/y5lk8p9y; Jeff Dunn, *Here's How Huge Netflix has Gotten in the Past Decade*, Business Insider (Jan. 19, 2017), https://tinyurl.com/y6sfg9rk; Fischer-Baum, *supra*.

[9] *See* Brian X. Chen, *The iPhone XS and XS Max Review: Big Screens That Are a Delight to Use*, N.Y. Times (Sept. 18, 2018), https://tinyurl.com/yyjsru79; *A Timeline of Apple iPhone Launches*, AT&T (July 12, 2018), https://tinyurl.com/y23fr2ua; Doug DeMuro, *7 Best Semi-Autonomous Systems Available Rights Now*, Autotrader (Jan. 2018), https://tinyurl.com/y4hwbtws.

sophisticated tools to increasingly granular information about voters that allows them to predict (and control) election outcomes with pinpoint accuracy. *See* Dan Patterson, *How campaigns use big data tools to micro-target voters*, CBS News (Nov. 6, 2018), https://tinyurl.com/yy6hofrv (discussing how widely available raw voter data is analyzed and used to target individual voters); Civis Analytics, *Data science and the midterm elections: breaking down the results*, Civis Journal (Nov. 28, 2018), https://tinyurl.com/y2hhxqha ("We correctly forecasted the winner in 383 out of 394 contested races (97%), and our estimate of the national popular vote was accurate to within tenths of a percent.").

These technological advances mean that, no matter which party controls the legislature, the mapmakers charged with redrawing our state legislative districts in 2021 will have better tools at their disposal than ever before to draw those districts to favor the party in power at the time. And that will again be true in 2031, in 2041, and beyond. The consequence of this ever-growing sophistication of partisan gerrymandering will be an ever-growing threat to our system of government.

II. The North Carolina courts should fulfill their constitutional duty and rule against partisan gerrymandering.

Amici had the honor to lead the executive branch of this State for nearly four decades. We have seen firsthand how destructive the effects of partisan gerrymandering can be, and despite the differing party allegiances we have, we share a profound reverence for the North Carolina Constitution, the people's right to control their government, and the separation of powers. We also have no doubt that the

prospect of resolving the monumental issues presented here weighs heavily on the Court. But the Court has a duty to resolve them.

Since 1787, our judicial branch has recognized that it has a solemn obligation to determine whether the actions of the legislature violate the North Carolina Constitution. *See Bayard*, 1 N.C. at 6-7. As the plaintiffs have explained, the legislative action at issue here violates multiple provisions of our Constitution, including the Equal Protection Clause, the Free Elections Clause, and the Freedom of Speech and Freedom of Assembly Clauses. *See, e.g.*, Pl. Pretrial Mem. 1-2, 9-13. Partisan gerrymandering is incompatible with the democratic principles that these provisions enshrine. The purpose of democratic politics is to give people a voice, as individuals and as a community. That purpose is cast aside when gerrymandering rigs the outcomes of elections and divides communities into different districts to pit them against each other for partisan ends.

Partisan gerrymandering also imperils "one of the fundamental principles on which state government is constructed"—namely, that "the legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.'" *Cooper*, 370 N.C. at 401, 407, 809 S.E.2d at 103, 107 (internal quotation marks and alterations omitted). These powers do not remain separate and distinct when a General Assembly hell-bent on entrenching its power strips the authority of the executive and judicial branches to check its actions as our founders intended they would.

"[I]t was impossible to foresee all the abuses that might be made of discretionary power" at the time the constitution was drafted, 2 *The Records of the Federal Convention of 1787*, 241 (Max Farrand ed., 1911), and there is no way that the framers could have foreseen the issues that partisan gerrymandering would cause when aided by modern technology. Even so, "by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, [it is clear that the people of North Carolina and its constitutional drafters were and continue to be] firmly and explicitly committed to the principle." *Advisory Opinion in re Separation of Powers*, 305 N.C. 767, 773, 295 S.E.2d 589, 592 (1982). Partisan gerrymandering threatens to turn that principle into a dead letter. Indeed, whatever else may be clear, recent experience in our State shows that the separation of powers and extreme partisan gerrymandering cannot coexist.

The North Carolina courts should play their essential role here and defend the North Carolina Constitution against partisan gerrymandering. It is particularly critical for our state courts to act in this instance because the other branches cannot or will not stop partisan gerrymandering, *see supra* at 2, and the voters cannot do so for themselves. Partisan gerrymandering itself thwarts the voters from voting the perpetrators of gerrymandering out of office, and any constitutional amendment to foreclose partisan gerrymandering in our State would require the legislature's consent. *See* N.C. Const. art. XIII, § 4. Nor do the federal courts offer a solution—they recently shut their doors to partisan gerrymandering claims under federal law. Even

in so doing, however, the U.S. Supreme Court invited state courts to take action against partisan gerrymandering, recognizing that state constitutions "can provide standards and guidance for state courts to apply." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

The courts of this State should take up that invitation and rule that the extreme partisanship distorting North Carolina's legislative districts must end now. *Amici* recognize that it is for the Court to fashion a remedy that can be implemented before the next election. But whether new districts are drawn by the General Assembly or a special master, this Court should ensure that they are drawn through an open, transparent, and non-partisan process. Only in that way can the Court fulfill its duty to enforce the Constitution and assure that North Carolina voters cast next year's votes for the General Assembly in an election free from partisan gerrymandering.

CONCLUSION

Competitive elections make our politics more civil and create an environment in which promising and pragmatic policies can emerge. Partisan gerrymandering eliminates competitive elections, poisons our politics, and corrupts our system of government. *Amici* urge this Court to root out this destructive practice.

This 7th day of August, 2019.

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