No. COA 18-870 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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COMMON CAUSE, DAWN BALDWIN GIBSON, ROBERT E. MORRISON, CLIFF MOONE, T. ANTHONY SPEARMAN, ALIDA WOODS, LAMAR GIBSON, MICHAEL SCHACHTER, STELLA ANDERSON, MARK EZZELL, and SABRA FAIRES, Plaintiffs, v. DANIEL J. FOREST, in his official capacity as President of the North Carolina Senate; TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; and PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, Defendants.	)	From Wake County

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PLAINTIFFS-APPELLANTS'
OPENING BRIEF

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ISSUE PRESENTED

I. DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS SUMMARY JUDGMENT AND DENYING PLAINITFFS SUMMARY JUDGMENT.

STATEMENT OF THE CASE

On 19 April 2017, plaintiff Common Cause and ten individual plaintiffs filed this declaratory judgment action against defendant legislative leaders in their official capacities. (R pp 3-27) On 12 June 2017, plaintiffs filed a motion for summary judgment, with supporting affidavits. (R pp 28-173) On 18 July 2017, the Wake County Superior Court by Judge W. Osmond Smith, III denied defendants' motion to dismiss and granted their motion to transfer the case to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure. (R pp 179-81)

On 21 February 2018, a three-judge panel heard argument on plaintiffs' motion for summary judgement and defendants' motion to dismiss and motion for judgment on the pleadings. (R p 280) On 29 May 2018, the court issued a Memorandum of Opinion and Order granting summary judgment to defendants and denying plaintiff's motion for summary judgment. (R pp 280-301) On 22 June 2018, plaintiffs timely appealed the court's decision. (R p 302-04)

On 19 September 2018, plaintiffs filed a petition for discretionary review requesting the North Carolina Supreme Court review this appeal before a determination by this Court. The Supreme Court denied the petition on 30 October 2018.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiffs appeal as of right from the final judgment of the Superior Court of Wake County under N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF FACTS

I. The 2016 Fourth Extra Session.

On 8 November 2016, Democrat Roy Cooper defeated then-Governor Pat McCrory, a Republican, in the election for North Carolina Governor. (R pp 9, 192) McCrory remained the Governor until 31 December 2016. (R pp 9, 192) In October 2016, Hurricane Matthew hit North Carolina and caused catastrophic flooding in the eastern part of the state. (R pp 10, 192) On 30 November 2016, Governor McCrory announced that he would call the General Assembly into an extra session to provide relief to those affected by Hurricane Matthew. (R pp 10, 192) On 9 December 2016, McCrory issued a proclamation calling an extra session on 13 December 2016 to address aid for recovery from the hurricane. (R pp 10, 192)

Pursuant to McCrory's proclamation, the General Assembly convened the Third Extra Session on 13 December 2016. (R pp 11, 194) A bill providing for hurricane relief was passed in the House and Senate on December 14. (R

pp 11, 194) On December 14, the Senate and House adjourned the Third Extra Session at 2:02 and 2:05 p.m. (R pp 11, 194)

At approximately noon on 14 December 2016, Defendants Moore and Forest announced that a Fourth Extra Session was being called based on the request of three-fifths of the members of the House and Senate. (R pp 129-30) They issued a proclamation convening the extra session at 2:00 p.m. on December 14 "to consider bills concerning any matters the General Assembly elects to consider." (R pp 129-30) The proclamation included no notice as to the possible legislative subjects of the session, nor any explanation for why an extra session was needed.

The secrecy surrounding the Fourth Extra Session was so complete that Democratic leaders in the General Assembly had no inkling that the session was being contemplated, no notice of the possible subjects, and no opportunity to prepare. (R pp 138-39, 144) They did not learn the contents of the proposed legislation until the bills were introduced. (R pp 138, 144)

At 2:00 p.m. on 14 December 2016, the House convened the Fourth Extra Session. (R p 129) The House adopted House Resolution 1 ("HR 1"), modifying the permanent rules of the House for the extra session. The rule changes permitted the House to pass bills on an expedited basis. (R pp 12-13,

196) Twenty-one bills were introduced in the House on the evening of December 14, including House Bill 17 ("HB 17"). (R pp 13, 196)

At 2:00 p.m. on 14 December 2016, the Senate convened the Fourth Extra Session. The Senate adopted Senate Resolution 1 ("SR 1"), modifying the permanent rules of the Senate for the extra session. (R pp 221-22) The rule changes permitted the Senate to pass bills on an expedited basis. (R pp 221-22) On the evening of December 14, seven bills were introduced in the Senate, including Senate Bill 4 ("SB 4"). (R pp 14, 197)

When introduced, HB 17 was 18 pages long and SB 4 was 25 pages long. (R pp 14, 197) The drafting of SB 4 had been first requested of legislative staff in March 2016, a full nine months before the Fourth Extra Session, yet it was not made public until the evening of December 14. (R p 47) Similarly, the drafting of HB 17 had begun well before the Fourth Extra Session. (R pp 47-49) During the drafting process, the legislators who requested the bills and their party caucus had numerous discussions about the bills. (R pp 44-46)

After discovering that the requests for the extra session were dated two days before the call of the session on 14 December 2016, 37 representatives took the exceptional step of entering a formal protest in the House Journal. (R pp 139-42) In doing so they specifically claimed that the absence of notice

deprived their constituents of the constitutional right to instruct their representatives. (R p 141)

On 15 December 2016, committees convened in the House and the Senate to consider HB 17 and SB 4, respectively. (R pp 15, 198-99, 223-25) The House and Senate held simultaneous committee hearings so truncated that debate and meaningful public participation were impossible. (R p 159) By the end of December 15, the bills had passed committee, been adopted by their respective full chambers, and sent to the other chamber for approval. (R pp 15, 198-99, 223-25)

In the morning of 16 December 2016, the House passed an amended version of SB 4 and the Senate passed an amended version of HB 17. (R pp 15-16, 199-200, 223-25) At 12:39 p.m., the Senate concurred in the House's changes to SB 4, and the bill was ratified and sent to the Governor. (R pp 15-16, 199-200, 225) The House then concurred in the Senate's changes to HB 17, and that bill was ratified and sent to the Governor. (R pp 15-16, 200, 224)

At approximately 3:27 p.m. on December 16, the Senate adjourned the Fourth Extra Session. (R pp 16, 200) At approximately 3:49 p.m., the House adjourned the Fourth Extra Session. (R pp 16, 200) Governor McCrory signed the 27-page SB 4 at 1:19 p.m. on December 16. (R pp 16, 200) He signed the 20-page HB 17 at 4:30 p.m. on December 19. (R pp 16, 200)

SB 4 (Session Law 2016-125) enacted significant changes in the structure of North Carolina government and election administration, including merging the State Board of Elections with the State Ethics Commission into a new "Bipartisan State Board of Elections and Ethics Enforcement," which was to have four members appointed by the Governor and four members appointed by the General Assembly. (S.L. 2016-125, ss. 1-24.) HB 17 (Session Law 2016-126) enacted significant changes in the structure of North Carolina government, including transferring from the State Board of Education to the Superintendent of Public Instruction the authority to supervise and administer the public schools, and to administer the funds appropriated for the public schools. (S.L. 2016-126, ss. 1-38.)

II. The History of Extra Sessions.

There have been 30 extra sessions of the General Assembly from 1940 through 2016. (R pp 55-57) An extra session may be called in either of two ways. First, pursuant to Article III, Section 5(7), the Governor, with advice of the Council of State, may call a special session "on extraordinary occasions." Second, since 1970, the president of the Senate (the Lieutenant Governor) and the speaker of the House of Representatives must convene an extra session under Article II, Section 11(2) when requested by three-fifths of the

members of each house. All but three of the 30 extra sessions have been called by proclamation of the Governor pursuant to Article III. (R pp 57-58)

Until the 2016 Fourth Extra Session, the unbroken practice has been to notify the public whenever the General Assembly is going to meet, in either a regular, reconvened, or extra session, and to specify the agenda. (R pp 54-55) For extra sessions called by the Governor, Article III, Section 5(7) requires that the Governor issue a proclamation "stating therein the purpose or purposes for which they are thus convened." (R pp 57-58) Until the 2016 Fourth Extra Session, the practice for the few extra sessions called by the Senate president and House speaker pursuant to Article II, Section 11(2) has been that their proclamation, like the Governor's proclamation, state the purpose of the session. (R pp 57-58) The 2016 Fourth Extra Session is the only extra session for which the proclamation provided no notice of the purpose of the session. (R pp 57-58)

The need for each of the 27 extra sessions called by the Governor was discussed publicly and reported in the news media ahead of the Governor's proclamation. (R pp 59-65) The timing of the Governor's proclamation for an extra session has varied over the years but has never left citizens without adequate notice. (R pp 59-60)

For each extra session other than the 2016 Fourth Extra Session the actual work of the General Assembly has been conscribed by the stated purpose of the session — legislators stuck to the reason the session was called. (R pp 65-67) Even when an extra session enacted laws on multiple subjects, the laws concerned only the subjects identified in the proclamation calling the session. (R p 67)

The 2016 Fourth Extra Session is the sole exception. Of the 30 extra sessions since 1940, it is the only one that was open-ended, both in the proclamation calling the session and the substantive legislation considered. (R p 67) It is the only one for which no advance notice was given either by formal proclamation or by the news media. (R pp 67-68) It is the only one that concerned significant substantive changes in the structure of state government. (R p 68) It is the only one for which the legislation to be considered, and even the subject of the legislation, was unknown to the public until it was ready to be acted upon. (R p 68)

III. Plaintiffs' Experiences with the Fourth Extra Session.

Plaintiff Common Cause and ten individual plaintiffs submitted affidavits describing their previous interactions with legislators, and their

exclusion from the legislative process in the Fourth Extra Session. (R pp 32-51, 133-36, 146-73, 273-75)

Plaintiff Common Cause is a nonprofit and nonpartisan organization dedicated to encouraging citizen participation in democracy with over 700,000 members. Common Cause NC, a state affiliate of Common Cause, educates its members and allies about important legislation and encourages them to contact and instruct their representatives. (R pp. 157-58)

Common Cause NC's Executive Director, Robert Phillips, is a registered lobbyist for the organization, and regularly speaks with legislators and at committee meetings about proposed legislation. (R pp. 157-58) Phillips was present at the General Assembly on 13 and 14 December 2016 for the third extra session. At noon on December 14, legislative leaders issued a proclamation convening a fourth extra session at 2:00 p.m. that day. Before this announcement, no legislator had told Phillips, the public, or the media that there would be a Fourth Extra Session, or even that such a session was being considered. Like other members of the public, Phillips had no advance notice of the fourth extra session, and no idea what issues it would address. (R pp. 158-59)

Phillips went to the General Assembly the morning of December 15 to find out what issues the extra session would address. He read SB 4 and HB

17, and found them to be lengthy, complex bills that fundamentally altered the balance between the executive and legislative branches, and made major changes affecting the appellate courts. With no advance notice and a radically accelerated schedule between introduction of the bills on the afternoon of December 14 and enactment on December 16, there was no time for Phillips to have meaningful conversations with lawmakers. Phillips and others at Common Cause NC did not have enough time to review the bills and offer insight and analysis to its members, its allies, and the media, nor to offer specific suggestions to legislators on how the bills could be improved. With sufficient notice and time, Phillips and Common Cause would have taken all of these steps. (R pp. 158-59)

The ten individual plaintiffs were similarly prevented from exercising their right to instruct their representatives. Each plaintiff is familiar with the legislative process, has communicated regularly with legislators on a variety of issues, and knows how to learn about and track pending legislation. (R pp 32-51, 133-36, 146-73, 273-75) Each plaintiff closely followed legislative developments in December 2016 and had a strong interest in the subjects of the Fourth Extra Session. (Id.) Defendants succeeded in preventing each plaintiff from exercising their right to instruct their representatives. (Id.)

For example, Plaintiff Dana Baldwin Gibson of Bladen County, was "stunned" to learn that a new special session had been called after the hurricane relief session to address unspecified issues. She immediately called her representative and spoke with his legislative assistant, who told Gibson that she did not know the purpose of the session, thereby preventing Gibson from voicing her opposition to what was actually being considered. (R pp 133-35)

Similarly, Plaintiff Robert Morrison of Randolph County live-streamed the extra legislative sessions on the internet and tried to call his representative immediately after learning of the substance of the legislation proposed during the new extra session, but had his call go unanswered. Despite his efforts, he was unable to communicate with his representatives until after they had voted. (R pp 154-55)

Plaintiff Alida Woods of Buncombe County immediately attempted to contact Representative Moore and Senator Berger with her concerns about the secrecy of the session as soon as she learned it had been called. Her attempts were unsuccessful. Because Woods lives in the mountains, she was unable to travel to Raleigh for face-to-face meetings with her legislators. (R pp 170-71)

ARGUMENT

The three-judge panel erred in concluding that the process of the 2016 Fourth Extra Session did not violate plaintiffs' rights under Article I, Sections 12 and 19. The right to instruct in Article I, Section 12 guarantees citizens the meaningful opportunity to inform their representatives about legislation during the legislative process. The unprecedented manner in which the General Assembly convened the 2016 Fourth Extra Session and enacted SB 4 and HB 17 denied citizens that opportunity, violating plaintiffs' constitutional rights to instruct their representatives and to due process. This Court should reverse the panel's award of summary judgment in favor of defendants, and direct that it grant plaintiffs summary judgment.

I. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56. "A trial court's grant of summary judgment receives *de novo* review on appeal, and evidence is viewed in the light most favorable to

the non-moving party." *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007).

II. THE LEGISLATIVE PROCESS DENIED PLAINTIFFS THEIR "RIGHT … TO INSTRUCT THEIR REPRESENTATIVES," IN VIOLATION OF ARTICLE I, SECTION 12 OF THE NORTH CAROLINA CONSTITUTION.

Article I, Section 12 of the North Carolina Constitution provides: "The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances . . ." The text, history, and purpose of the right "to instruct their representatives" demonstrate that the provision guarantees citizens a meaningful opportunity to inform their representatives about legislation during the legislative process. The unprecedented manner in which the General Assembly convened the Fourth Extra Session and enacted SB 4 and HB 17 denied citizens that opportunity, violating plaintiffs' constitutional right to instruct their representatives.

A. The Plain Language of the Right to Instruct Establishes a Right to Participate in the Legislative Process.

Although the right to instruct dates back to the founding of our state, the North Carolina appellate courts have yet to interpret the contours of the constitutional right. "To determine the people's will or intent all cognate

provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). "Constitutional terms must be given effect and not ignored as 'mere surplusage.'" *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 173, 594 S.E.2d 1, 10 (2004).

At the time of the founding, "instruct" meant "to teach; to form by precept; to inform authoritatively." Samuel Johnson, A Dictionary of the English Language (3d ed. 1768). In the context of citizens communicating with their representatives, "to inform" is the applicable meaning of "instruct." The right to "instruct their representatives" must safeguard conduct beyond the rights to exercise free speech, assemble, and petition the legislature. Otherwise, the language would be rendered mere surplusage.

The right to instruct representatives expressly protects the right of citizens to participate in the legislative process. It does so by guaranteeing that citizens have the opportunity to express their views of potential legislation to their representatives before the legislation is enacted. Together, the rights of assembly, petition and instruction are the essential "mechanics of popular sovereignty." John Orth and Paul M. Newby, The North Carolina State Constitution 58 (2d ed. 2013).

B. The Right to Instruct Goes Beyond Elections to Ensure North Carolina Representatives Consider and Respond to the Views of their Constituents.

The right to "instruct their representatives" has been part of the state constitution since 1776. Orth & Newby, The North Carolina State Constitution 58; Robert Luce, Legislative Principles: The History and Theory of Lawmaking by Representative Government 453 (1930). The right was a product of a long tradition and common understanding regarding the role citizens could play in government, with origins in English law. Before the American Revolution, the right to instruct played a prominent role in colonial politics, including in North Carolina. *See* Kris W. Kobach, *May 'We The People' Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1, 28-31 (1999). In the words of the leading treatise on the North Carolina Constitution, the "declaration of rights in 1776 presupposed this widespread view." Orth & Newby, The North Carolina State Constitution 58.

When the First Congress convened in 1789, five state constitutions recognized the right of the people to instruct their representatives: Pennsylvania, North Carolina, Massachusetts, New Hampshire, and Vermont. Christopher Terranova, *The Constitutional Life of Legislative Instructions in America*, 84 NYU L. Rev. 1331, 1350, n. 115 (2009). However,

the First Congress chose not to include the right in the federal Constitution, thereby limiting citizens' right to participate in the legislative process to their right to participate in elections.

Taking a different path, North Carolina included the right to instruct in its Constitution. Orth & Newby, The North Carolina Constitution 58. By doing so, North Carolina endorsed a system of representatives being responsive to their constituents' views not just through elections, but also by hearing and considering those views during the legislative process. North Carolina's legislators therefore act not just as elected representatives, but as "agents" of the people in the legislative process, with "the agency . . . necessarily subordinate to the superior authority of the constitution, which emanated directly from the whole people." *Hoke v. Henderson*, 15 N.C. 1, 7 (1833); *accord*, *State ex rel. Martin*, 325 N.C. at 448, 385 S.E.2d at 478 (recognizing that the legislature is "the agent of the people for enacting laws"); *see also Cooper v. Berger*, 370 N.C. 392, 428, 809 S.E.2d 98, 120 (2018) (Newby, J., dissenting) (recognizing that the legislature acts as "the agent of the people's sovereign power"). "[A] representative democracy, such as ours, depends upon the ability of the people to make known their views and wishes to the government." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human*

Servs., 174 N.C. App. 266, 275, 620 S.E.2d 873, 881 (2005) (internal quotation marks and citation omitted).

North Carolina regularly implemented the constitutional right to instruct during its early history. For example, the General Assembly required its members to travel back to their counties with copies of certain proposed bills so that constituents could "instruct their representatives with respect to the propriety of passing the same into a Law." Minutes of the North Carolina House of Commons 350 (Nov. 18, 1786 – Jan. 6, 1787) (calling upon representatives to consult constituents before voting on a canal construction bill). The right also ensured that the people were called upon when the legislature considered amendments to the State Constitution. Minutes of the North Carolina Senate 377 (Nov. 19, 1787 – Dec. 21, 1787). North Carolina has continued to respect the people's right to instruct their representatives for 240 years.

Because North Carolina citizens have the fundamental right to instruct their representatives, the General Assembly cannot abridge the legislative process to the degree that citizens have no practical opportunity to make their views known about potential legislation. And they cannot intentionally burden citizens' right to instruct their representatives absent some compelling government interest.

C. The Legislative Process for the 2016 Fourth Extra Session Violated Plaintiffs' Right to Instruct Their Representatives.

Among all the extra sessions of the General Assembly over the preceding 75 years, the 2016 Fourth Extra Session stands alone. It is the only extra session for which no advance notice was given either by formal proclamation or by the news media. (R pp 67-68) It is the only extra session that was open-ended, both in the proclamation calling the session and the substantive legislation considered. (R p 67) It is the only extra session that concerned significant substantive changes in the structure of state government. (R p 68) And it is the only extra session for which the legislation to be considered, and even the subject of the legislation, was unknown to the public until it was ready to be acted upon. (R p 68)

This extraordinary deviation from established legislative practice was not accidental. There was an orchestrated plan over many months to develop SB 4 and HB 17 in secret, without informing the public of the proposed legislation until the bills were introduced on the evening of 14 December 2016. Defendants first announced the session only two hours before it began despite having collected legislators' signatures for the session two days earlier. Defendants intentionally did not disclose the purpose of the session in their proclamation on 14 December 14 2016, departing from an unbroken line

of legislative practice. And defendants intentionally abridged the standard rules of the House and Senate to curtail debate and restrict the opportunity for members of the public to express their views.

Defendants' scheme had its intended effect. As shown by the affidavits of the ten individual plaintiffs, even citizens well-versed in the legislative process did not have a practical opportunity to communicate with their representatives about HB 17 and SB 4 before the bills were passed. (R pp 32-51, 133-36, 146-73, 273-75) Defendants' scheme also incapacitated citizen groups from meaningfully communicating their views to representatives, their members, or the press. (R pp 157-60)

By providing no advance notice of the Fourth Extra Session, by hastily convening the General Assembly after issuing the proclamation for the extra session, by failing to timely disclose the contents of SB 4 and HB 17, and by radically abridging the process of hearing and debate, defendants deliberately denied plaintiffs and other citizens their right to participate in the legislative process, in violation of Article 1, Section 12. This was legislation by ambush – a premeditated assault on democracy.

D. The Three-Judge Panel Ignored the Full Extent of the Obstacles to Plaintiffs' Participation in the Fourth Extra Session.

In its Memorandum of Opinion, the three-judge panel correctly concluded that the right to instruct in Article I, Section 12 is the "right to persuade one's representatives" and that "fulfillment of this right necessarily requires some degree of openness in government." (R pp 293-94) But the panel erred in finding that the Fourth Extra Session provided the requisite degree of openness.

The panel focused on the facts that the challenged bills were passed 44 hours after they were introduced, the bills were available online, legislative sessions were open to the public, and legislators could be contacted by phone or email. (R p 294) The panel, however, failed to account for the practical obstacles faced by plaintiffs, which show that there was in fact no meaningful opportunity for citizens to persuade their representatives.

For example, plaintiff Dawn Gibson called her representative and was unable to obtain any information about the purpose of the Fourth Extra Session. (R pp 134-35) Plaintiff Robert Morrison tried but was unable to reach any of his representatives until after they had voted. (R p 154) By the time plaintiff Cliff Moone was able to figure out the purpose of HB 17 and SB 4, the bills had already become law. (R p 148) Plaintiff Anthony Spearman

did not have enough time to mobilize the North Carolina Council of Churches and NAACP because of the condensed legislative process. (R pp 167-68) Plaintiff Michael Schachter did not learn of the contents of HB 17 and SB 4 until the bills had passed out of committee, by which point he had no ability to testify at hearings. (R pp 163-64) Even plaintiff Sabra Faires, who had 22 years of experience on the General Assembly staff, was unable to analyze the introduced bills and contact her representatives before the legislation was ratified. (R pp 50-51)

Defendants' scheme also prevented citizen groups from meaningfully communicating their views to representatives, their members, or the press. Common Cause NC's lobbyist was at the General Assembly on December 14 and 15, but was unable to engage in discussions with lawmakers due to the lack of advance notice and the radically accelerated schedule between introduction of the bills and their enactment. (R pp 159-60) Common Cause NC did not have enough time to review the bills and offer insight and analysis to its members, its allies, and the media, nor to offer specific suggestions to legislators on how the bills could be improved. (R p 159)

In addition, the panel failed to consider that defendants' conduct was especially egregious given the scope of the legislation they enacted. The General Assembly is only afforded authority because it acts as "the agent of

the people for enacting laws." *Baker v. Martin*, 330 N.C. 331, 336, 410 S.E.2d 887, 890 (1991) (citation omitted). Here, the General Assembly not only violated the constitutional requirements of that relationship – it did so as part of a plan to dramatically restructure state government, shifting power from the executive to the legislative branch. "All political power is vested in and derived from the people" and "all government of right originates from the people." N.C. Const. Art. I, Sec. 2. The right of the people to instruct their representatives applies with special force when the General Assembly is considering legislation such as SB 4 and HB 17 that will fundamentally change the structure of the people's government.

Moreover, the panel failed to consider that defendants proffered no legitimate rationale for the abridged process they employed. Defendants have not claimed their conduct is consistent with any historical practice. They have not claimed their conduct was motivated by anything other than a desire to exclude the public from the legislative process. And they have not claimed that their secretive, truncated approach was justified by any legitimate purpose.

Finally, the panel failed to recognize that the General Assembly can violate the Constitution even if it has not totally deprived every citizen of a given right. For example, in *Blankenship v. Bartlett*, 363 N.C. 518, 526, 681

S.E.2d 759, 765 (2009), the Supreme Court recognized that citizens' constitutional right to vote in Superior Court elections could be violated by a redistricting plan that permitted all citizens to vote, but which nevertheless weakened plaintiffs' voter strength.

Here, plaintiffs have shown that the General Assembly acted with the intent to prevent constituents from exercising their right to instruct. And they have demonstrated that the General Assembly's plan was largely successful. If the State had some legitimate, important, or compelling interest for its actions, perhaps it could show that the burdens it placed on the right to instruct did not run afoul of the constitution. But because the State failed to proffer any legitimate rationale for its conduct, the Court should have found that the defendants violated the right to instruct regardless of whether some citizens were able to overcome the obstacles intentionally placed in their paths.

In our system of government, there is a higher power than the legislature. "The will of the people as expressed in the Constitution is the supreme law of the land." *Martin*, 325 N.C. at 449, 385 S.E.2d at 478. Since 1776, the people of North Carolina have had the constitutional right to instruct their representatives. When the people amended the Constitution in 1970 to give the General Assembly the power to convene extra sessions, they

did not intend to provide the legislature a license to violate the Declaration of Rights or to block "the mechanics of popular sovereignty." Orth & Newby, The North Carolina Constitution 58.

Extra sessions cannot lawfully be used as a tool to circumvent the people's right to instruct their representatives. Yet that is exactly what defendants did, making a mockery of the "consent of the governed." In convening the Fourth Extra Session and securing the expedited passage of SB 4 and HB 17 without any meaningful opportunity for citizen participation, defendants deprived plaintiffs of their right to instruct their representatives, in violation of Article I, Section 12 of the Constitution.

III. THE LEGISLATIVE PROCESS DEPRIVED PLAINTIFFS OF THEIR RIGHT TO DUE PROCESS, IN VIOLATION OF ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

Article I, Section 19 of the North Carolina Constitution provides that "[n]o person shall…in any manner be deprived of his . . . liberty . . . but by the law of the land." The right of the people "to instruct their representatives" under Article I, Section 12 is a fundamental liberty interest protected by due process in the Law of the Land Clause of Article I, Section 19. The process by which SB 4 and HB 17 was enacted deprived plaintiffs of procedural and substantive due process, in violation of Article I, Section 19.

"The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *Rhyne v. K–Mart Corp.,* 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (citation omitted). Although the United States Supreme Court's decisions construing the federal due process clause are persuasive, they do not bind the North Carolina Supreme Court in interpreting North Carolina's law of the land clause. *State ex rel. Utils. Comm'n v. Edmisten*, 294 N.C. 598, 610, 242 S.E.2d 862, 870 (1978); *Lorbacher v. Hous. Auth. of City of Raleigh*, 127 N.C. App. 663, 675, 493 S.E.2d 74, 81 (1997). "[E]ven where provisions of the state and federal Constitutions are identical, 'we have the authority to construe our own constitution differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.'" *State v. Carter,* 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988).

A. Substantive Due Process

"'Substantive due process protection prevents the government from engaging in conduct that . . . interferes with rights implicit in the concept of ordered liberty.'" *Johnston v. State*, 224 N.C. App. at 294, 735 S.E.2d, at

869 (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)). The process by which the legislature convened the Fourth Extra Session and enacted SB 4 and HB 17 violated substantive due process.

"When reviewing an alleged violation of substantive due process rights, a court's first duty is to carefully describe the liberty interest the complainant seeks to have protected." *Standley v. Town of Woodfin*, 362 N.C. 328, 331, 661 S.E.2d 728, 730 (2008). The type of right implicated by government action determines the level of scrutiny, or standard of review, a court will apply to its substantive due process analysis. "Fundamental rights are afforded the highest level of protection, and they can only be infringed upon if the state can show it has a compelling need to do so." *Comer v. Ammons*, 135 N.C. App. 531, 539, 522 S.E.2d 77, 82 (1999). "A fundamental right is a right explicitly or implicitly guaranteed to individuals by the United States Constitution or a state constitution." *Id.* Government action impairing fundamental rights is subject to strict scrutiny, and a challenged action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest. *Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 535-36, 571 S.E.2d 52, 59 (2002).

The North Carolina Supreme Court has recognized that some rights are "quasi-fundamental rights" that are subjected to a heightened, intermediate level of scrutiny, beyond rational basis review. *Blankenship v. Bartlett*, 363 N.C. 518, 526, 681 S.E.2d 759, 765 (2009) ("the right to vote in superior court elections on substantially equal terms is a quasi-fundamental right [that is] reviewed under intermediate scrutiny"); *King v. Beaufort Cty. Bd. of Educ.*, 364 N.C. 368, 374, 704 S.E.2d 259, 263 (2010) (infringement on right to alternative education for students who receive long-term suspensions is subject to intermediate scrutiny). When the State burdens a quasi-fundamental right, it is "the State's duty to demonstrate significant interests that justify" the burden, and to show that the burden "is not substantially greater than necessary to accommodate those interests." *Id.* at 528, 681 S.E.2d at 766; *see also King*, 364 N.C. at 377, 704 S.E.2d at 265 (recognizing that under intermediate scrutiny, it is the government's responsibility to "articulate an important or significant reason" for its action). Courts look to First Amendment jurisprudence when evaluating whether the State impermissibly burdened a quasi-fundamental right. *Id.*

Here, defendants deprived plaintiffs of their liberty interest under Article I, Section 12 of the North Carolina Constitution "to instruct their representatives." As in *Blankenship*, "the right asserted by plaintiffs is

literally enshrined in the North Carolina Constitution and, as such, is distinguishable from other citizenship privileges that receive rational basis review." *Blankenship*, 363 N.C. at 526, 681 S.E.2d at 765. The right to instruct, like the right of assembly and the right to petition, is fundamental. At a minimum, the right to instruct is a quasi-fundamental right. But regardless of which standard applies, the State bears the burden to show both that a sufficiently important interest justified the infringement, and that the challenged actions were sufficiently tailored to accomplish that objective.

Defendants have made no such showing. They have failed to offer *any* legitimate explanation for their conduct – let alone a reason that is "important or significant." Defendants therefore unconstitutionally impaired plaintiffs' liberty interest in instructing their representatives, in violation of substantive due process.

The three-judge panel correctly recognized that the right to instruct afforded plaintiffs the right "to persuade and interact with their representatives regarding legislation." (R p 299) But, without citation, the panel relegated that right to second-class status, holding that it was "not a fundamental or even quasi-fundamental right." (Id.) It therefore concluded

that the General Assembly could burden that right so long as the court could imagine a rational basis for the General Assembly's actions. (Id.)

This analysis was fundamentally flawed. Because the right to instruct is "literally enshrined in the North Carolina Constitution," it is at a minimum a "quasi-fundamental right." *Blankenship*, 363 N.C. at 526, 681 S.E.2d at 765. Therefore, at a minimum, the State bore the burden of proving that any infringement on the right to instruct advanced an important government interest, and did not burden the right any more than necessary to accomplish that interest. By relegating the right to instruct to the dustbin of rational basis review, the three-judge panel erroneously failed to place any burden on the State whatsoever.

Plaintiffs have shown that the General Assembly intentionally burdened their right to instruct their representatives. The General Assembly's actions must therefore survive either intermediate scrutiny or strict scrutiny – requiring the General Assembly to produce either an important or a compelling state interest to justify its actions, and to show that any burden created was sufficiently tailored to accomplish that interest. Because defendants failed to articulate *any* permissible rational for its conduct, it has not met its burden, and plaintiffs should be awarded summary judgment.

B. Procedural Due Process

By convening the Fourth Extra Session with no notice and providing citizens no meaningful opportunity to be heard, defendants impaired plaintiffs' fundamental right to instruct their representatives, in violation of their right to procedural due process.

"Procedural due process protection ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner." *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010). A "defect in the legislative process" may serve as the basis for a due process challenge. *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (citing *Atkins* to explain that "if plaintiff could show that the legislation here was arbitrary or irrational, or that the legislative process was defective, she would have a triable issue of fact as to whether she had been denied due process.").

Federal and North Carolina courts assess procedural due process claims in two steps, first determining whether there exists a liberty or property interest with which the State has interfered, and second determining "whether the procedures attendant upon the deprivation were constitutionally sufficient." *Johnston v. State*, 224 N.C. App. 282, 288, 735 S.E.2d 859, 865 (2012).

In this case, there can be no doubt that a constitutionally protected liberty interest is at stake. North Carolina courts recognize that the fundamental guaranties of liberty "are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights, including that of personal liberty." *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949); *see Nanny's Korner Care Center v. N.C. Dept. of Health and Human Services*, 234 N.C. App. 51, 63-64, 758 S.E.2d 423, 431 (2014). The manner in which defendants convened the Fourth Extra Session and enacted SB 4 and HB 17 impaired plaintiffs' right to instruct their representatives. Since 1776, the "right . . . to instruct their representatives" has been part of the Declaration of Rights in the North Carolina Constitution, given equal status with the rights of assembly and petition in Article I, Section 12.

Because the liberty interest is self-evident, the only question for the court is "whether the procedures attendant upon the deprivation were constitutionally sufficient." *Johnston*, 224 N.C. App. at 288, 735 S.E.2d at 865. The manner by which SB 4 and HB 17 were enacted failed to meet minimal standards of due process.

"The fundamental premise of procedural due process is notice and the opportunity to be heard." *Peace v. Employment Security Commission*, 349

N.C. 315, 322, 507 S.E.2d 272, 278 (1998) (citing *Cleveland Bd. of Educ. v Loudermill*, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 503, 105 S. Ct. 1487 (1985)). As for the notice requirement, "[t]he guarantee of due process is satisfied when notice is given which is reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of an action." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 9, 269 S.E.2d 142, 148 (1980) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). The notice must not be a sham: "when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing . . . might reasonably adopt to accomplish it." *Mullane*, 339 U.S. at 315.

Nor can the opportunity to be heard be an empty formality. "The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Poole*, 228 N.C. App. 248, 260, 745 S.E.2d 26, 35 (2013) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)); *State v. Cox*, 90 N.C. App. 742, 745, 370 S.E.2d 260, 261 (1988).

The convening of the Fourth Extra Session and the enactment of SB 4 and HB 17 violated both fundamental requirements of procedural due process. The notice was not "reasonably calculated, under all of the

circumstances, to apprise interested parties of the pendency of an action," *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. at 9, 269 S.E.2d at 148, and the people of North Carolina had no "opportunity to be heard at a meaningful time and in a meaningful manner." *State v. Poole*, 228 N.C. App. at 260, 745 S.E.2d at 35.

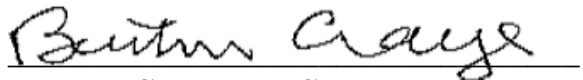
Instead, the "notice" of the Fourth Extra Session was deliberately calculated to keep interested parties in the dark. Defendants waited until noon on December 14 to announce that they would convene the extra session at 2:00 that afternoon. In their proclamation for the Fourth Extra Session – unlike the proclamations for every previous extra session – defendants provided no information about the subjects that would be addressed. The bills were first unveiled that evening – less than 48 hours before they were ratified and sent to the Governor. The House and Senate adopted a barrage of rule amendments to radically shorten the time for hearings and debate. Without notice or a meaningful opportunity to be heard, plaintiffs were completely excluded from the legislative process. Defendants therefore violated plaintiffs' right to procedural due process.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court reverse the three-judge panel's entry of judgment in favor of defendants and direct that the court grant plaintiffs' motion for summary judgment.

Respectfully submitted, this 5th day of November, 2018.

PATTERSON HARKAVY LLP



Burton Craige, N.C. Bar No. 9180
Narendra K. Ghosh, N.C. Bar No. 37649
Paul E. Smith, N.C. Bar No. 45014
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
919-942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for plaintiffs certifies that the foregoing brief, which is prepared using proportional font, is less than 8,750 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

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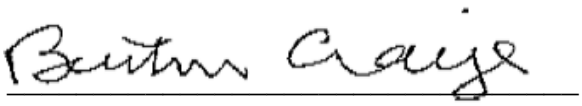


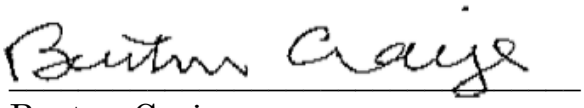
Burton Craige

CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs hereby certifies that Plaintiffs' Brief was filed with the Court today and a copy was served on counsel for defendants by first class mail, postage prepaid, addressed as follows:

Alexander McC. Peters
Matthew Tulchin
Ann W. Matthews
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
apeters@ncdoj.gov
mtulchin@ncdoj.gov
amatthews@ncdoj.gov

This the 5th day of November, 2018.



Burton Craige