No. 84A16 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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SABRA FAIRES, BENNETT COTTEN, and DIANE P. LAHTI,	)	
Plaintiffs-Appellees,	)	
v.	)	From Wake County
STATE BOARD OF ELECTIONS, A. GRANT WHITNEY, JR., Chair, and RHONDA K. AMOROSO, JOSHUA D. MALCOLM, MAJA KRICKER, and JAMES L. BAKER, members of the State Board (in their official capacities only), and KIM WESTBROOK STRACH, Executive Director of the State Board (in her official capacity only),	)	
Defendants-Appellants.		

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION and CIVITAS INSTITUTE, CENTER FOR LAW AND FREEDOM IN SUPPORT OF PLAINTIFFS-APPELLEES.

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Amici curiae American Civil Liberties Union of North Carolina Legal Foundation and Civitas Institute, Center for Law and Freedom, respectfully request leave to file the accompanying brief in support of Plaintiffs-Appellees.

INTERESTS OF *AMICI*

Amici are nonprofit public-interest organizations. Each organization is dedicated to defending and preserving the individual rights and liberties guaranteed by the United States and North Carolina Constitutions.

The American Civil Liberties Union of North Carolina Legal Foundation ("ACLU-NC") is a statewide, nonprofit, nonpartisan affiliate of the ACLU with approximately 8,500 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws, as well as protecting and defending the constitutional rights of all North Carolinians through educational programs, public statements, opinion letters to public officials, and litigation. ACLU-NC has long been committed to preservation and enforcement of the will of the people outlined in the North Carolina Constitution, which mandates the process by which public officials are elected to office and protects the public's participation in the electoral process.

Founded in 2015, the Civitas Institute Center for Law and Freedom (CLF) litigates constitutional and open government cases

in courts across North Carolina. CLF regularly brings suit under the North Carolina Constitution. It therefore sees any attempt to water down our state's fundamental document as injurious not only to the rights of all North Carolinians, but to its clients and mission in particular.

AMICI'S PROPOSED BRIEF

Amici Curiae have long been committed to work that safeguards and protects the electoral process, including having filed numerous briefs supportive of ensuring safeguards to the electoral process, under both the United States and North Carolina Constitutions are protected.

Amici's proposed brief presents three arguments. First, the North Carolina Constitution expresses the will of the people. *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978) Although as a general rule acts of the General Assembly are presumed constitutional, this presumption cannot save an act of legislature that is irreconcilable with the Constitution. *Moore v. Knightdale Bd. of Elections,* 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992) (citing *State v. Knight*, 169 N.C. 333, 351-52, 85 S.E. 418, 427 (1915)).

Second, Article IV, § 16 of the North Carolina Constitution mandates that justices of the Supreme Court "shall be elected." N.C. Const. art IV § 16. A retention referendum is not an

"election" under the North Carolina Constitution.[1] Because the Constitution provides that Supreme Court justices "shall be elected," a retention referendum for Supreme Court justices is unconstitutional absent a constitutional amendment.

Third, declaring Session Law 2015-66 (the "Act") constitutional has grievous consequences. For example, if the Act is constitutional, the General Assembly could also institute retention referendums for Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, Commissioner of Insurance, clerk of court, and sheriff. That simply cannot be the law, absent a constitutional amendment. Defendants-Appellants have proffered no principled reason why a constitutional amendment is not required.

Amici do not necessarily oppose the idea of retention referendums, and they do not contend that the General Assembly erred in choosing that policy. *Amici* agree with Plaintiffs-Appellees that the authorization of referendum elections for Supreme Court justices must be made by constitutional amendment.

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[1] The Constitution uses the word "elected" many times, and every time that word means a contest between candidates. N.C. Const., art. II, §§ 3, 5; *Id.*, art. III, §§ 2(1), 7(1); *id.*, art. IV, §§ 9(3), 10; *id.*, art. VI, § 2; *Id.*, art. XIII § 1. When the Constitution refers to a for/against or yes/no proposition of any kind, it uses the terms "submitted to the voters" or "approved by a majority." N.C. Const., art. II, § 22(2); *Id.*, art. V, §§ 2(5), 3(1), 3(2), 3(4), 4(2), 4(3), 14; *Id.*, art. XIII, §§ 1, 3, 4.

This Court should uphold the three-judge panel's decision that the Act is unconstitutional.

CONCLUSION

Amici curiae respectfully request that the Court grant this motion to file the accompanying brief in support of Plaintiffs-Appellees.

Respectfully submitted this the 31st day of March, 2016.

GRAEBE, HANNA & SULLIVAN PLLC

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Rule 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion for Leave to File Brief of *Amici Curiae* was this day filed in the North Carolina Supreme Court using the Court's electronic filing system, which will send notification of this filing to the parties. In addition, I also certify that I served upon counsel for the parties a copy of said brief by email as follows:

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This the 31st day of March, 2016.

By:

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