

SUPREME COURT OF NORTH CAROLINA

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.

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

INDEX

TABLE OF CASES AND AUTHORITIES.....iii

INTRODUCTION.....1

ARGUMENT.....2

I. THIS COURT'S DUTY IS TO ENFORCE THE
CONSTITUTION—THE "WILL OF THE PEOPLE".....2

II. THE ACT IS UNCONSTITUTIONAL, AND IT
IS NOT A CLOSE CASE.....3

III. THE CONSEQUENCES OF UPHOLDING THE
ACT ARE GRIEVOUS.....7

CONCLUSION.....7

CERTIFICATE OF COMPLIANCE.....9

CERTIFICATE OF SERVICE.....10

TABLE OF CASES AND AUTHORITIES

CASES

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S.Ct. 2252 (2009).....9

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 120 S.Ct. 1291 (2000).....7

In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).....3

Moore v. Knightdale Bd. of Elections, 331 N.C. 1, 413 S.E.2d 541 (1992).....4

Perry v. Stancil, 237 N.C. 442, 75 S.E.2d 512 (1953).....6

State v. Knight, 169 N.C. 333, 85 S.E. 541 (1915).....4

State v. Williams, 146 N.C. 618, 61 S.E. 61 (1908).....3

State ex rel. Higgins v. Dunn, 496 S.W.2d 480 (Tenn. 1973).....7

Stephenson v. Bartlett, 355 N.C. 354, 562 S.E.2d 377 (2002).....6

Williams-Yulee v. Florida Bar, ___ U.S. ___, 135 S.Ct. 1656 (2015).....8,9

OTHER AUTHORITIES

N.C. Const., art. II, § 3.....2,5

N.C. Const., art. II, § 5.....2,5

N.C. Const., art. II, § 22(2).....2,5

N.C. Const., art. III, § 2(1).....2,5

N.C. Const., art. III, § 7(1).....2,5

N.C. Const., art. IV, § 9(3).....2,5

N.C. Const., art. IV, § 10.....2,5

N.C. Const., art. IV, § 16.....2,5

N.C. Const., art. V, § 2(5).....2,5

N.C. Const., art. V, § 3(1).....2,5

N.C. Const., art. V, § 3(2).....2,5

N.C. Const., art. V § 3(4).....2,5

N.C. Const., art. V, § 4(2).....2,5

N.C. Const., art. V, § 4(3).....2,5

N.C. Const., art. V, § 14.....2,5

N.C. Const., art. VI, § 2.....2,5

N.C. Const., art. XIII, § 1.....2,5

N.C. Const., art. XIII, § 3.....2,5

N.C. Const., art. XIII, § 4.....2,5

Brian T. Fitzpatrick, *“Election as Appointment: The Tennessee Plan Reconsidered,”* 75 TENN. L. REV. 473 (2008).....8

Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America,* pp. 177-180 (2012).....6

Samuel Latham Grimes, *“Without Favor, Denial, or Delay: Will North Carolina Finally Adopt the Merit Selection of Judges?”*, 76 N.C. L. REV. 2266 (1998).....6, 7

SUPREME COURT OF NORTH CAROLINA

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.

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

INTRODUCTION¹

Article IV, § 16 of the North Carolina Constitution mandates that justices of the Supreme Court “shall be elected.” A retention referendum is not an “election” under the North Carolina Constitution.² Because the Constitution provides that Supreme Court justices “shall be elected,” a retention referendum for Supreme Court justices is unconstitutional absent a constitutional amendment.

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.

¹ A detailed statement of the interests of *Amici Curiae* is included in their concurrently filed Motion for Leave to File a Brief *Amici Curiae*.

² 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.

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

ARGUMENT

I. THIS COURT'S DUTY IS TO ENFORCE THE CONSTITUTION—THE "WILL OF THE PEOPLE."

"The North Carolina Constitution expresses the will of the people of this State and is, therefore, the supreme law of the land." *In re Martin*, 295 N.C. 291, 299, 245 S.E.2d 766, 771 (1978). This Court's duty is to enforce the Constitution. See *State v. Williams*, 146 N.C. 618, 622, 61 S.E. 61, 62 (1908) ("No higher duty rests upon this Court than to exert its full authority to prevent all violations of the principles of the Constitution").

In the court below, Defendants-Appellants relied heavily on the presumption that acts of the General Assembly are

constitutional. That reliance is unsurprising given how clearly the Act violates the Constitution. But that presumption does not, of course, end the matter, and this Court has a duty to act when a law is unconstitutional:

The presumption of constitutionality is not, however, and should not be conclusive:

[I]t is not only within the power, but . . . it is the duty, of the courts in proper cases to declare an act of the Legislature unconstitutional, and this obligation arises from the duty imposed upon the courts to declare what the law is.

The Constitution is the supreme law. It is ordained and established by the people, and all judges are sworn to support it. When the constitutionality of an act of the General Assembly is questioned, the courts place the act by the side of the Constitution, with the purpose and the desire to uphold it if it can be reasonably be done, but under the obligation, if there is an irreconcilable conflict, to sustain the will of the people as expressed in the Constitution, and not the will of the legislators, who are but agents of the people.

Moore v. Knightdale Bd. of Elections, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992) (quoting *State v. Knight*, 169 N.C. 333, 351-52,

85 S.E. 418, 427 (1915)). Here, the presumption does not save the Act.

II. THE ACT IS UNCONSTITUTIONAL, AND IT IS NOT A CLOSE CASE.

A retention referendum is not an "election" under the Constitution. That is true mainly because 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. On the other hand, 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. Because the Constitution provides that Supreme Court justices "shall be elected," they must be voted into office in a contest between candidates, not in a for/against referendum.

In the court below, Defendants-Appellants disputed that what the Act institutes is a "referendum." Whether the Act institutes a "referendum" is not the question. Whether you call it a "referendum," a "yes/no vote," a "for/against" vote, or even a "retention election" as Defendants-Appellants suggest,

the point is that it is not an "election" as that term is used in the Constitution—because it is not a contest between candidates but a for/against proposition.

Furthermore, "[a]s part of our constitutional interpretation, it is fundamental to give effect to the intent of the framers of the organic law and of the people adopting it." *Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002) (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)) (internal quotations omitted). The framers of the constitutional provisions at issue, and the people adopting those, could not have intended for judges or any other officials to be subject to retention referendums because the concept did not even exist when the Constitution was adopted in 1868; the idea was first raised and adopted decades later. See Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America*, pp. 177-180, 197-206 (2012).

Not only that, but North Carolina legislators and governors, various commissions, and the North Carolina Bar Association have recognized for over 50 years that a constitutional amendment is required to institute judicial retention referendums. See Samuel Latham Grimes, Comment, *"Without Favor, Denial, or Delay: Will North Carolina Finally*

Adopt the Merit Selection of Judges?”, 76 N.C. L. REV. 2266, 2300 (1998) (recounting the history up through 1998). When legislators have tried for 50 years to amend the Constitution, only to then claim that no amendment is necessary, it suggests rather strongly that the Act is unconstitutional—and that history can and should inform how this Court interprets the Constitution. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144-61, 120 S.Ct. 1291, 1306-16 (2000) (striking down the FDA’s exercise of jurisdiction over tobacco, even though the plain text of the underlying statute would seem to provide such jurisdiction, because Congress had tried and failed for decades to pass legislation specifically authorizing FDA jurisdiction over tobacco, demonstrating its belief that such a statute was necessary).

Finally, it is telling that every one of the other 19 states that have judicial retention referendums has amended its constitution specifically to allow for them. While Defendants-Appellants have relied on the history of the issue in Tennessee, that history in fact strongly supports Plaintiffs. In Tennessee, the state supreme court ruled in 1973 that retention referendums were allowed under the state constitution’s requirement that judges be elected. *State ex rel. Higgins v.*

Dunn, 496 S.W.2d 480, 491 (Tenn. 1973). But that ruling did not end the matter, and controversy swirled for decades about whether the retained judges held office unconstitutionally. See Brian T. Fitzpatrick, "Election as Appointment: The Tennessee Plan Reconsidered," 75 TENN. L. REV. 473, 476 (2008). The Tennessee legislature, to end the controversy—and presumably out of its belief that an amendment was necessary all along—put the matter to the voters in 2014, who approved the amendment. In short, Tennessee ultimately decided that an amendment was necessary; it simply paid the price in confusion for 40 years before that. This Court should follow Tennessee but skip the confusion.

III. THE CONSEQUENCES OF UPHOLDING THE ACT ARE GRIEVOUS.

Defendants-Appellants have not and cannot point to any principled reason why, if the Act is constitutional, the General Assembly could not 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.

Furthermore, there is a "vital state interest in safeguarding public confidence in the fairness and integrity of the nation's elected judges." *Williams-Yulee v. Florida Bar*, ___ U.S. ___, 135 S.Ct. 1656, 1666 (2015) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889, 129 S.Ct. 2252, 2266 (2009)) (internal quotations omitted). The public's confidence in the justices of this Court, and in the Court itself as an institution, will be eroded if the Act is upheld.

CONCLUSION

Amici do not necessarily oppose the idea of retention referendums, and they do not contend that the General Assembly erred in choosing that policy. Rather, the General Assembly erred by violating the Constitution to enact that policy. In that sense, the legislature's error is one of form, not necessarily substance. But in any constitutional democracy, the basic "form" of law—the constitution—is ultimately the most important thing. This Court should protect the fundamental form of government in North Carolina.

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

GRAEBE, HANNA & SULLIVAN PLLC

Electronically submitted
Mark R. Sigmon
N.C. State Bar No. 37762

4350 Lassiter at North
Hills Ave, Suite 375
Raleigh, NC 27609
(919) 863-9094
msigmon@ghslawfirm.com

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.

AMERICAN CIVIL LIBERTIES UNION
OF NORTH CAROLINA LEGAL
FOUNDATION

/s/ Christopher Brook
Christopher Brook
ACLU of North Carolina
N.C. State Bar No. 33838
P.O. Box 28004
Raleigh, North Carolina 27611
(919)834-3466
cbrook@acluofnc.org

/s/ Jenifer Wolfe
Jenifer Wolfe
ACLU of North Carolina
N.C. State Bar No. 46511
P.O. Box 28004
Raleigh, North Carolina 27611
(919)834-3466
jwolfe@acluofnc.org

CIVITAS INSTITUTE,
CENTER FOR LAW AND
FREEDOM

/s/ Elliot Engstrom
Elliot Engstrom
N.C. State Bar No. 46003

-11-

Civitas Institute
Center for Law and Freedom
100 South Harrington Street
Raleigh, North Carolina 27603
(919) 834-2099
elliott.engstrom@nccivitas.org

Attorneys for *Amici Curiae*
American Civil Liberties Union
of North Carolina Legal
Foundation, and Civitas
Institute, Center for Law and
Freedom.

CERTIFICATE OF COMPLIANCE

This Brief complies with North Carolina Rule of Appellate Procedure 28(j). The Brief was prepared in Microsoft Word, using Courier New 12-point font. According to the word count function, the word count, including footnotes and headings, but excluding cover, index, table of authorities, list of counsel, and certificates, is less than 3,750 words.

By:

Electronically submitted
Mark R. Sigmon
N.C. State Bar No. 37762
4350 Lassiter at North
Hills Ave, Suite 375
Raleigh, NC 27609
(919) 863-9094
msigmon@ghslawfirm.com

By:

/s/ Christopher Brook
Christopher Brook
N.C. State Bar No. 33838
ACLU of North Carolina
P.O. Box 28004
Raleigh, North Carolina 27611
(919) 834-3466
cbrook@acluofnc.org

By:

/s/ Jenifer Wolfe
Jenifer Wolfe
ACLU of North Carolina
N.C. State Bar No. 46511
P.O. Box 28004

-13-

Raleigh, North Carolina 27611
(919)834-3466
jwolfe@acluofnc.org

By:

/s/ Elliot Engstrom
Elliot Engstrom
N.C. State Bar No. 46003
Civitas Institute
Center for Law and Freedom
100 South Harrington Street
Raleigh, North Carolina 27603
(919)834-2099
elliott.engstrom@nccivitas.org

Attorneys for *Amici Curiae*
American Civil Liberties Union of
North Carolina Legal Foundation,
and Civitas Institute, Center for
Law and Freedom.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing 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:

Attorneys for Plaintiff-Appellees:

Michael Crowell
Deborah Stagner
Stephen Rawson
Neal Ramee
THARRINGTON SMITH, L.L.P.
P. O. Box 1151
Raleigh, North Carolina 27602-1151
Email: mcrowell@tharringtonsmith.com
dstagner@tharringtonsmith.com
srawson@tharringtonsmith.com
nramee@tharringtonsmith.com

Attorneys for Defendant-Appellants:

John F. Maddrey
Elizabeth A. Fisher
Alexander McC. Peters
Melissa L. Trippe
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Email: jmaddrey@ncdoj.gov
efisher@ncdoj.gov
apeters@ncdoj.gov
mtrippe@ncdoj.gov

This the 31st day of March, 2016.

By:

/s/ Christopher Brook
Electronically submitted