STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

FILE NO. 18-CVS-9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiff,

v.

TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity,

Defendants.

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' AMENDED MOTION FOR DISPOSITIVE RULING

INTRODUCTION

In August 2022, the North Carolina Supreme Court remanded this case with clear instructions: allow additional factual development and conduct an evidentiary hearing to determine if the tax-cap and photo voter-ID amendments met any one of three factors established by the Court. Disregarding this clear and unambiguous order, Defendants, stunningly, seek to erase not only the Supreme Court's mandate but everything that has occurred in this case over the past six-and-a-half years, by asking this Court to rule in their favor based only on the pleadings.

Requesting a judgment on the pleadings at this late juncture appears, from Plaintiff's research, to be unprecedented in North Carolina's legal history. And indeed, in reality Defendants point to basically everything *but* the pleadings to support their request. Ignoring basic rules of civil procedure, Defendants proffer various post-pleading events, request inferences be drawn in their

favor, cite to irrelevant cases and, most shockingly, ask this body to ignore our State's highest Court. This Court should swiftly deny Defendants' ill-timed and improper motion.

BACKGROUND

In 2022, the North Carolina Supreme Court ruled that a racially gerrymandered legislature does not have unlimited power to act. *N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, 382 N.C. 129, 876 S.E.2d 513 (2022). Specifically, the Court held that the North Carolina Constitution places limits on the powers of unconstitutionally gerrymandered legislatures "to initiate the process of altering or abolishing the constitution." *Id.* at 133, 876 S.E.2d at 519. The Court remanded the matter to Superior Court to allow for factual development and an evidentiary hearing applying the new test the Court developed to the challenged tax-cap and photo voter-ID amendments.

Specifically, the Supreme Court ordered that the Superior Court examine "whether there was a substantial risk that each challenged constitutional amendment would (1) immunize legislators elected due to unconstitutional racial gerrymandering from democratic accountability going forward; (2) perpetuate the continued exclusion of a category of voters from the democratic process; or (3) constitute intentional discrimination against the same category of voters discriminated against in the reapportionment process that resulted in the unconstitutionally gerrymandered districts." *Id.* at 133–34, 876 S.E.2d at 519 (emphasis added).

The Supreme Court noted that because the case was novel, and the test was new, the trial court had not yet had the opportunity to "engage these factual questions in the context of a proper understanding of the law governing the novel legal question presented," and that the parties had not yet had "the opportunity to present all evidence that may be relevant to resolution of this inquiry." *Id.* at 166, 876 S.E.2d at 540. For this reason, the Court directed the Superior Court to

hold "an evidentiary hearing" and enter "additional findings of fact and conclusions of law" regarding the three factors noted above. *Id.*, 876 S.E.2d at 540.

At the same time, the Supreme Court recognized that "some" of the trial court's previous "findings of fact" were "relevant" to the three "substantial-risk" factors. *Id.* at 165, 876 S.E.2d at 539. And as such, the Court stressed that "[o]n remand, the parties otherwise remain bound by the trial court's unchallenged findings of fact as contained in its prior order." *Id.* at 166, 876 S.E.2d at 540. These findings included several allegations from Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People ("NC NAACP") about the ways in which the tax-cap and photo voter-ID amendments could lead to discrimination and harm to racially marginalized groups—allegations that went unchallenged by Defendants and were subsequently incorporated by the trial court.

Following remand and transfer to this panel,[1] and after two years of procedural developments, Defendants filed a "Motion for Summary Judgment" on NC NAACP's claims on July 2, 2024. Defendants did not file a memorandum in support of this motion but noted their "intent" to file such a memorandum. More than two weeks later, Defendants filed an Amended Motion for Dispositive Ruling that abandoned the summary-judgment posture. Instead, Defendants invoked N.C. Rule of Civil Procedure 12(c) (judgment on the pleadings) in an amended motion. Amended Mot. at 2. On August 23, Defendants filed their accompanying memorandum in support of their amended motion, confirming they were now requesting a "judgment on the pleadings," more than six years after this case began. Mem. in Support at 15, 28.

[1] Defendants note that NC NAACP did not seek appellate review of the transfer to a three-judge panel, but such review is no longer available in North Carolina courts. *See Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 280 N.C. App. 309, 315, 867 S.E.2d 354, 359 (2021) (concluding that parties may not file an interlocutory appeal of an order to transfer a case to a three-judge panel because such a transfer does not "affect a substantial right"), *aff'd*, 384 N.C. 569, 887 S.E.2d 848 (2023).

In their memorandum, Defendants acknowledge their request does not "squarely fall within routinely timed dispositive motions in the Rules of Civil Procedure." *Id.*

ARGUMENT

The Supreme Court remanded this case to Superior Court for a specific and limited purpose: to conduct further factual development and hold an evidentiary hearing to determine whether there is a *substantial risk* that either of the two constitutional amendments at issue meet any one of the three factors set out in its opinion. Defendants seek to evade this clear remand by substituting new tests and inapplicable legal standards. Defendants' attempts must be rejected, for several reasons. First, Defendants' motion is an improper invitation for this Court to go beyond the narrow remand issued by the Supreme Court and ignores the applicable standard of review. Second, Defendants' motion is inconsistent with North Carolina Rule of Civil Procedure 12(c). Third, Defendants do not come close to showing that they are entitled to judgment on the pleadings as a matter of law. Because Defendants' motion is meritless, this Court must hold the evidentiary hearing required by the Supreme Court, after a sufficient opportunity for the parties to engage in additional fact-finding consistent with the remand.

I. Defendants' motion is an improper invitation for this Court to ignore the Supreme Court's remand and to grant relief that cannot be lawfully granted.

Defendants' motion asks this Court to ignore the unambiguous ruling of the state Supreme Court. Though captioned as a "Motion for Dispositive Ruling," their pleading would be more accurately entitled "Motion to Overrule the Opinion of the North Carolina Supreme Court," which is not something that this Court can do. Defendants' motion would not only have this Court exceed its authority and ignore the narrow remand, but also ignore the standard of review set out by the Supreme Court and instead substitute one conjured up by Defendants.

a. The Supreme Court remanded this case for a specific and narrow purpose and this Court is limited by that remand.

The Supreme Court remanded to this Court "*solely* for an evidentiary hearing" and entry of "additional findings of fact and conclusions of law" regarding the three factors described in its opinion. *Moore*, 382 N.C. at 166, 876 S.E.2d at 540 (emphasis added). It did not grant leave for this Court to reconsider, prior to any additional fact-finding, whether NC NAACP's six-year-old complaint failed to state a claim as a matter of law.

The Supreme Court's mandate "is binding upon the trial court and must be strictly followed without variation or departure." *Matter of D.C.*, 289 N.C. App. 30, 38, 887 S.E.2d 475, 481 (2023) (quoting *McKinney v. McKinney*, 228 N.C. App. 300, 302, 745 S.E.2d 356, 358 (2013)). If this Court were to grant Defendants' motion and not conduct an evidentiary hearing, it would plainly be acting contrary to the Supreme Court's mandate, and any resulting order would be "unauthorized and void." *Id.*, 887 S.E.2d at 481 (quoting *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989)).

Indeed, it is axiomatic that this Court lacks the authority to venture beyond the narrow remand ordered by the state Supreme Court. *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) ("On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." (quoting *Collis v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962) (Parker, J., concurring))). As the Court of Appeals recently reaffirmed, "[w]hen an appellate court remands a matter to the trial court, the remand may be general or limited; and, in the case of a limited remand, the appellate court may divest the trial court of discretion it would otherwise retain were the remand general." *State v. Kelliher*, 900 S.E.2d 239, 2024 WL 2014207, at *1 (N.C. Ct. App. 2024) (table decision). The Supreme Court has echoed this finding, clarifying

that when it "remand[s] cases to the lower courts for the consideration of additional issues,"[2] such a remand "should not be interpreted as an invitation to consider new claims that are unrelated to any contention that had been advanced before this Court, the Court of Appeals, or the trial court to that point in the litigation." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 115, 868 S.E.2d 5, 19–20 (2022).

Here too, it would be highly improper for this Court to ignore the direction of the Supreme Court and exceed the bounds of the narrow remand. Accordingly, this Court lacks the authority to grant the relief requested by Defendants. This should be the end of the inquiry, and Defendants' motion should be denied.

b. The Supreme Court's remand makes clear that further factual development and analysis is required to answer the question before the Court.

Defendants argue that this case requires no additional factual development and can be resolved as a matter of law. Mem. in Support at 2. But if no factual issues remained to be resolved, the Supreme Court would not have issued its opinion holding that there are factual circumstances under which relief could be granted and would not have remanded the case for an evidentiary hearing. *See Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 514, 742 S.E.2d 781, 788 (2013) (noting that when the Supreme Court "implements a new analysis to be used in future cases," and "when the new analysis relies upon conclusions of law rather than findings of fact," then the Supreme Court may elect to resolve the issue itself "rather than to remand the case").[3]

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[2] The Supreme Court's explicit directive to remand this case to the trial court "solely for an evidentiary hearing and the entry of additional findings of fact and conclusions of law" is unlike cases in which the appellate court mandate requires a trial court to "conduct further hearings as necessary." *Cf. Matter of D.C.*, 289 N.C. App. at 39, 887 S.E.2d at 481 (2023) (finding no error in trial court's decision on remand not to conduct an evidentiary hearing when the Supreme Court's mandate simply provided that the trial court was to "review and reconsider the record before it by applying the clear, cogent, and convincing standard to make findings of fact").

[3] The Supreme Court answered other parts of its new test where the factual record was fully developed. In addition to the three factors related to the nature of the constitutional amendments, the Supreme Court announced that to find an

Defendants' attempt to justify their request by miscasting the standard of review this Court must apply. First, they assert the misleading notion that the Supreme Court merely directed this Court to examine the "text of the Amendment[s]." Mem. in Support at 19. But again, if all that were required was a textual analysis, the Supreme Court itself would have ruled on whether any one of the three factors it announced had been met. In fact, the Supreme Court determined that it was not just the text of the proposed amendments that is at issue. *See Moore*, 382 N.C. at 166, 876 S.E.2d at 540 (remanding "for an *evidentiary hearing* and the entry of *additional findings of fact* and conclusions of law addressing" the new three-factor test (emphases added)). Instead, the factual issues relating to the process of passing the legislation that placed the amendments on the ballot, as well as the real-world impact the amendments will have, are central to the remaining inquiry before the Court. *See id.* at 165–66, 876 S.E.2d at 539–40 (noting the factual impact of the amendments is "relevant" to the three-factor test). This was made all the more clear when the Supreme Court singled out several factual findings that will be "relevant" to—and binding on—this Court on remand, such as the fact that "African American and Latino Voters" would be "directly harmed" by the photo voter-ID amendment, and the income tax cap could lead to "spending cuts that disproportionately hurt public schools, eliminate[] or significantly reduced

amendment unconstitutional, a court must first examine whether the gerrymandered legislature in question "was composed of a sufficient number of legislators elected from unconstitutionally gerrymandered districts—or from districts that were made possible by the unconstitutional gerrymander—such that the votes of those legislators could have been decisive in passing the challenged enactments." *Moore*, 382 N.C. at 133, 876 S.E.2d at 519. The Court went on to find that in this case "the record is clear that votes of legislators unconstitutionally gerrymandered districts could have been decisive." *Id.*, 876 S.E.2d at 519. In other words, where the facts were in the record, the Supreme Court knew how to apply them to its new test.

funding for communities of color, and otherwise undermine[] economic opportunity for the nonwealthy."[4] *Id.*, 876 S.E.2d at 539–40.

Next, Defendants sow further confusion by asserting that the burden is on NC NAACP to demonstrate that there are no circumstances under which the amendments can be found constitutional. Mem. in Support at 13–14. Not so. The standard Defendants cite is employed when a court is considering whether a statute is unconstitutional in all circumstances. The test is well known and predates the Supreme Court's opinion in this case. *See, e.g.*, *Wayne Cnty. Citizens Ass'n v. Wayne Cnty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314–15 (1991). Had the North Carolina Supreme Court intended that the "all circumstances" standard should apply to this case, it would have said so. But the Court did not, and for good reason. NC NAACP did not argue, and has never argued, that the text of the amendments at issue in the case could *never be constitutional in any circumstance*. Rather, from the start, NC NAACP's claims have focused on *the manner in which* the challenged amendments were placed on the ballot by a racially gerrymandered General Assembly. *See* Second Am. Compl. ¶¶ 54–65 (challenging the General Assembly's application of the "procedures for amending the North Carolina Constitution"). The Supreme Court's opinion focused on the same. *See Moore*, 382 N.C. at 149, 876 S.E.2d at 528 (characterizing NC NAACP's claims as challenging a "fail[ure] to adhere to constitutional procedural requirements"). For that reason, the Supreme Court directed this Court to consider, after an evidentiary hearing, whether the facts support invalidating constitutional amendments

[4] Even the dissent acknowledged that the Supreme Court's test meant that NC NAACP stood a significant chance of prevailing on remand, noting that "[w]hile the case [was] technically being remanded to the trial court, the desired outcome is clear from the . . . test announced today." *Moore*, 382 N.C. at 168 n.2, 876 S.E.2d at 541 n.2 (Berger, J., dissenting).

proposed by a racially gerrymandered legislature based on the way that they were passed and the impact they will have under the three-part test. *Id.* at 162–66, 876 S.E.2d at 537–40.

Crucially, at no point during briefing or argument in the Supreme Court did Defendants suggest an "all circumstances" standard of review should apply to this unique and novel case. And just as a party "is not free to raise a completely new claim for the first time on appeal from a trial court order granting summary judgment," a party cannot raise a completely new argument on remand following an unsuccessful appeal. *See New Hanover Cnty. Bd. of Educ.*, 380 N.C. at 114, 868 S.E.2d at 19 (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836 (1934)). Defendants are precluded from making a new legal argument now, more than six years after the start of the case.

Along these same lines, the Court must reject Defendants' contortionist-level efforts to evade the Supreme Court's highly factual test by reframing it as an "equitable test" or a "balance of the equities test." Mem. in Support at 2, 10. Not only is it too late for Defendants to make such an argument, but this reframing gets Defendants precisely nowhere because the "balances of equity" necessarily "depend on the facts of each case." *Miller v. Talton*, 112 N.C. App. 484, 488, 435 S.E.2d 793, 797 (1993). In other words, even under Defendants' novel framing of the case, this Court is brought squarely back to what the Supreme Court directed it to do—to permit discovery, hold an evidentiary hearing, and consider the facts to determine if there is a "substantial risk" that any of the three factors articulated by the Supreme Court apply to either amendment.

II. Defendants' motion is inconsistent with Rule 12(c).

Defendants admit that their purported motion for judgment on the pleadings, filed more than six years into this case, does not "squarely fall within routinely timed dispositive motions in the Rules of Civil Procedure." Mem. in Support at 15. That is putting it too mildly. Defendants

instead have completely abandoned the North Carolina Rules of Civil Procedure. Such a departure from the rules should be swiftly dismissed.

Rule 12(c) allows parties to file a motion "for judgment on the pleadings" after pleadings are closed "but within such time as not to delay the trial." N.C. R. Civ. P. 12(c). However, if "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* Because it is focused only on the pleadings, Rule 12(c) applies when legal claims can be resolved purely as a matter of law. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) [cited by Defendants].

"A Rule 12(c) motion for judgment on the pleadings is not favored by the law[.]" *Governors Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 247, 567 S.E.2d 781, 786 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003). Because "[j]udgment on the pleadings is a summary procedure and the judgment is final, . . . each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

In considering a motion for judgment on the pleadings, "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings." *Minor v. Minor*, 70 N.C. App. 76, 78, 318 S.E.2d 865, 867 (1984). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. In addition, the "trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." *Id.*, 209

S.E.2d at 499. When all factual issues are not resolved by the pleadings, judgment on the pleadings is inappropriate. *Id.*, 209 S.E.2d at 499.

Defendants' 12(c) motion is improper for *at least four reason*s: (1) it fails to accept NC NAACP's allegations as true; (2) it requires the Court to draw inferences in favor of Defendants rather than NC NAACP; (3) it asks the Court to accept materials outside of the pleadings; and (4) it comes far too late in the proceedings to be considered.

Taking each of these in turn, first, while Rule 12(c) requires the Court to accept NC NAACP's allegations as true, Defendants' motion and memorandum directly contradict not only NC NAACP's allegations, but also this Court's previous findings of fact. For example, NC NAACP alleged that the photo voter-ID amendment "effectively denied the right to vote" to African American and Latino voters or "otherwise deprived [them] of meaningful access to the political process." Second Am. Compl. ¶ 11. NC NAACP alleged that the amendment "will also impose costs and substantial and undue burdens on the right to vote for those" individuals and "circumvent[] the NC NAACP's hard-fought legal victory against a racially discriminatory voter-ID requirement." *Id.* ¶¶ 11–12. Regarding the tax-cap amendment, NC NAACP alleged that because the "amendment places a flat artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy." *Id.* ¶ 16. The complaint went on to allege in detail how the tax cap could disadvantage people of color and the poor. *Id.*

The trial court incorporated these allegations in its findings of fact. *See N.C. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, No. 18 CVS 9806, 2019 WL 2331258, at *7–9 (N.C. Super. Ct. Feb. 22, 2019). Defendants did not challenge these findings of fact on appeal. And as noted above, the Supreme Court then held that this Court would "remain

bound" by these "unchallenged findings of fact" on remand. *Moore*, 382 N.C. at 166, 876 S.E.2d at 540.

Defendants cannot contradict these accepted findings using a motion for judgment on the pleadings. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. But that is exactly what they attempt to do. Among other things, in their brief, Defendants assert that the photo voter-ID amendment is "race neutral" and "does not exclude minority voters from the voting process in North Carolina." Mem. in Support at 23–24. Regarding the tax-cap amendment, Defendants assert that the tax cap does not impose a burden on people of color because it "applies equally to all state citizens regardless of race." *Id.* at 18.

These "contravening assertions" plainly contradict NC NAACP's long-settled allegations and must be disregarded for purposes of a Rule 12(c) motion. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. The factual implications of the two amendments are something that the parties can dispute later at the evidentiary hearing ordered by the Supreme Court. But contradictory factual assertions cannot be used to win a judgment under Rule 12(c). This is especially true when doing so would require this Court to not only contradict its own findings of fact, but also ignore the express command of the North Carolina Supreme Court that this Court "remain bound" by them. *Moore*, 382 N.C. at 166, 876 S.E.2d at 540.

Second, though Rule 12(c) requires the Court to draw inferences in favor of the nonmoving party, i.e., NC NAACP, Defendants request the reverse. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 ("The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party."). For example, Defendants ask this Court to infer that since some form of a tax cap has existed for nearly 100 years, the cap must not exclude voters from the political process or be animated by a discriminatory intent. Mem. in Support at 18. Similarly,

Defendants ask the Court to infer that because the tax cap purportedly "applies equally to all state citizens regardless of race" and because the voter-ID amendment supposedly "applies equally across the board," Defendants did not act with discriminatory intent. *Id.* at 18, 25. Defendants' attempt to flip the presumption to favor them is directly contrary to Rule 12(c) and must be rejected.

Third, Defendants' motion unlawfully asks this Court to consider matters outside the pleadings. To list just a few examples, Defendants ask this Court to consider: (1) the factual history of the tax cap in the North Carolina Constitution; (2) the factual history of various session laws allocating income tax rates; (3) a report from a 1968 Commission on the income tax rate; (4) Defendants' observations regarding whether the tax-cap "appeared" to affect legislative accountability following its ratification; (5) voter-ID laws in other states; (6) facts going to the legislative intent regarding an entirely separate voter-ID law, S.B. 824; (7) developments in the case challenging S.B. 824 post-dating the closure of pleadings in this case; and (8) voters' purported "reli[ance] upon changes in the law introduced by the [photo voter-ID] amendment." Mem. in Support at 15–27.

All of these facts are outside of the pleadings and cannot be considered under Rule 12(c). *See* N.C. R. Civ. P. 12(c); *see also Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867 (In considering a motion for judgment on the pleadings, "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings."); *Erickson v. Starling*, 235 N.C. 643, 657, 71 S.E.2d 384, 394 (1952) ("On a motion for judgment on the pleadings, the presiding judge should consider the pleadings, and nothing else."). If it does consider these extrinsic matters, this Court will be required to convert Defendants' 12(c) motion into a motion for summary judgment. *See* N.C. R. Civ. P. 12(c). And in

that case, NC NAACP must be "given reasonable opportunity to present all material made pertinent to such a motion," *id.*—an opportunity it has yet to receive.

Fourth, Defendants' motion comes much too late. Pleadings were closed nearly six years ago. Defendants cannot file a six-years-too-late motion for judgment on the pleadings just before discovery and mere months before trial. *See Riggins v. Walter*, 279 F.3d 422, 427 (7th Cir. 1995) (affirming dismissal of motion for judgment on the pleadings filed twenty-six months after the close of pleadings). Defendants offer no reason why their 12(c) motion could not have been filed years earlier, apart from their own delay. *Id.* at 428 (affirming denial of 12(c) motion in part because defendant failed "to offer any reason why he could not have filed his motion" in a timely fashion). Because Defendants' belated—and meritless—motion will only serve to further delay an already much-delayed trial, it should be rejected.

Because Defendants' motion is so thoroughly inconsistent with Rule 12(c) this Court should reject it and allow NC NAACP to obtain the discovery ordered by the North Carolina Supreme Court before proceeding to an evidentiary hearing.

III. Defendants' motion fails to show that they are entitled to judgment as matter of law.

Even if this Court entertains the merits of Defendants' 12(c) motion, it must reject Defendants' borderline frivolous arguments. Defendants' citations to post-pleading facts and inapposite cases are incapable of meeting their burden under Rule 12(c). Pursuant to the express commands of the North Carolina Supreme Court, NC NAACP must be given the opportunity for further factual development.

a. Defendants repeatedly recite the wrong standard of review.

As noted above, in their attempts to turn this case into one that can be resolved as a matter of law, Defendants attempt to conjure up inapposite standards for the Court to apply. Mem. in

Support at 13 (suggesting that NC NAACP must establish the amendments are unconstitutional "beyond a reasonable doubt"); *id.* at 14 (suggesting that NC NAACP must show that "there is no circumstance in which either the" tax-cap or photo voter-ID amendment "would pass [the] three-factor test"); *id.* at 27 (suggesting that this Court should also consider whether voiding the amendments will lead to "chaos and confusion"). But the Supreme Court has been clear what three-part test must be administered. Try as they might, Defendants cannot raise the bar and require NC NAACP to meet a different test of their own conjuring.

The Supreme Court set out only one test: Whether there is *a substantial risk* that either amendment would "(1) immunize legislators elected due to unconstitutional racial gerrymandering from democratic accountability going forward; (2) perpetuate the continued exclusion of a category of voters from the democratic process; or (3) constitute intentional discrimination against the same category of voters discriminated against in the reapportionment process that resulted in the unconstitutionally gerrymandered districts." *Moore*, 382 N.C. at 133–34, 876 S.E.2d at 519. That is the one and only standard this Court need concern itself with.

b. Defendants' appeals to intervening factual circumstances are irrelevant.

Defendants gesture towards minor, and irrelevant changes since the Supreme Court's 2022 Order as justification for their bizarre and untimely motion. [5]

As a primary matter, Defendants' attempt to point to legal and factual developments that significantly post-date pleadings to win a judgment based on those pleadings is inherently flawed. *See Erickson*, 235 N.C. at 657, 71 S.E.2d at 394 ("On a motion for judgment on the pleadings, the

[5] It is doubtful that Defendants' motion meets the requirements of N.C. Gen. Stat. § 1A–1, Rule 11, -3- or N.C. Rule Prof. Cond. 3.1. The Supreme Court remanded this case to the trial court solely for an evidentiary hearing. Defendants' motion asks that this trial court not conduct that required evidentiary hearing and is thus plainly not "warranted by existing law." As explained in more detail above, the relief Defendants seek is likewise impermissible under the Rules of Civil Procedure. Moreover, Defendants make no good faith argument to modify or reverse existing law, or articulate why the governing Rules of Civil Procedure should not apply to them, nor how this Court could reverse the law of this case as set forth in unambiguous language by the Supreme Court.

presiding judge should consider the pleadings, and nothing else."). In effect, Defendants have filed a motion for summary judgment and called it a motion for judgment on the pleadings. The reasons for this seem clear. Plainly, Defendants cannot win a motion for judgment on the pleadings by citing only to the pleadings. So, they have decided to raise post-pleading facts. *See supra* Pt. II. By doing so, they have effectively converted their motion to one for summary judgment. *See* N.C. R. Civ. P. 12(c). However, Defendants do not like that, during summary judgment, the opposing party must "be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* Under this standard, NC NAACP would be entitled to receive the discovery and evidentiary hearing the Supreme Court remanded for. To avoid this outcome, Defendants couch their motion as a motion for "judgment on the pleadings," Mem. in Support at 15, cite to post-pleading facts, and hope that this Court will not notice. This Court cannot let Defendants have it both ways.

Even if this Court decided to consider Defendants' post-pleading facts in the current procedural posture, nothing relevant has changed. For example, Defendants point to absolutely nothing that has changed in the past two years with regards to the tax-cap amendment. Mem. in Support at 15–18. This lack of change makes it crystal clear that everything that was in front of the Supreme Court when it issued its order is the same today and removes any scintilla of doubt that its order must be followed.

Meanwhile, the developments Defendants mention regarding the photo voter-ID amendment do not implicate the test sent down by the Supreme Court. Some of these developments are not even new. For example, Defendants invoke the decision of the Fourth Circuit in *Raymond* in the challenge to voter-ID law S.B. 824 which was issued in 2020 and was available to all parties and the Supreme Court when it issued its 2022 Opinion. *See N.C. State Conf. of the NAACP v.*

Raymond, 981 F.3d 295 (4th Cir. 2020). Defendants also invoke *Crawford*, a challenge to Indiana's photo voter-ID law which was decided in 2008 and was available when this suit was filed. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008). Meanwhile *Holmes*, the only potentially relevant legal development between 2022 and today, has no bearing on the Supreme Court's test about constitutional amendments or the Supreme Court's standard in this case as discussed further below.

c. Defendants fail to justify dismissal of NC NAACP's tax-cap claim as a matter of law.

Defendants do not come close to demonstrating that NC NAACP's tax-cap claim cannot meet any part of the three-factor test established by the Supreme Court as a matter of law.

NC NAACP's pleadings include several allegations that are "relevant" to the three-factor test. *Moore*, 382 N.C. at 166, 876 S.E.2d at 540. For example, NC NAACP alleged that the tax cap "disadvantage[s] people of color" and "undermin[es]" public institutions that support people of color. Second Am. Compl. ¶ 16. These and other allegations were adopted by the trial court and incorporated by the Supreme Court. Specifically, as the Supreme Court noted:

> Because the amendment places a flat, artificial limit on income taxes, it prohibits the state from establishing graduated tax rates on higher-income taxpayers and, over time, will act as a tax cut only for the wealthy. This tends to favor white households and disadvantage people of color, reinforcing the accumulation of wealth for white taxpayers and undermining the financing of public structures that have the potential to benefit non-wealthy people, including people of color and the poor. For example, historically in North Carolina, decreased revenue produced by income tax cuts in the state has resulted in significant spending cuts that disproportionately hurt public schools, eliminated or significantly reduced funding for communities of color[.]

Moore, 382 N.C. at 166, 876 S.E.2d at 539–40. Defendants now belatedly dispute these findings of fact, arguing that the tax cap "applies equally to all state citizens regardless of race." Mem. in Support at 18.

Evidently, Defendants and NC NAACP disagree about the disparate impact and intent of the tax-cap amendment. And because this disputed fact is obviously "material" to the Supreme Court's test—especially the "intentional discrimination" factor—this Court cannot grant judgment to Defendants as a matter of law at this juncture. *See Erickson*, 235 N.C. at 657, 71 S.E.2d at 394 ("The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on *any* single material proposition." (emphasis added)). Instead, the parties must engage in further factual development, and then this Court can hold an evidentiary hearing on the facts.

Defendants' additional arguments should likewise be disregarded. To start, Defendants suggest that NC NAACP cannot "forecast a material fact" that would satisfy any of the three factors for the tax-cap amendment. Mem. in Support at 18. But not only did NC NAACP already do so, the Supreme Court already incorporated those findings into its order, as noted above. Such findings are directly relevant to whether the tax cap will have a disparate impact, which goes to both the "continued exclusion" and "intentional racial discrimination" factors of the three-factor test. That alone is enough to defeat Defendants' challenge to the tax-cap claim.

And when NC NAACP proceeds with the discovery ordered by the Supreme Court, it may show much more. For example, discovery may demonstrate that members of the legislature were aware that slashing the maximum allowable income tax would drive the State to increasingly rely on regressive sales taxes that disproportionately harm people of color. Discovery may also show that the legislature intended to impose an exceedingly low tax cap as a method to ensure that no legislature now or in the future would have sufficient revenue to fund policies favored by Black leaders and interest groups—the same voters impacted by the racial gerrymander. NC NAACP has

not yet had the opportunity to explore these issues and make these factual showings. Therefore, any adjudication on the merits by the Court would be premature.

Defendants' series of *ipse dixit* observations do not assist them. For example, Defendants suggest that neither the 100-year history of the tax "cap nor its change [in 2018] has appeared to insulate any legislative body from accountability." Mem. in Support at 18. But a self-serving, one-sentence, say-so assessment of the tax-cap amendment's factual impact—including the purported impact of the amendment *following the closure of pleadings*—cannot be used to support a judgment on the pleadings. *See Minor*, 70 N.C. App. at 78, 318 S.E.2d at 867 (In considering a motion for judgment on the pleadings, "[n]o evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings.").

Defendants' observation that though the tax cap "is established by the Constitution, the allocable rate is a matter of statute" likewise does nothing to assist them. Mem. in Support at 17. Defendants already noted this obvious point while challenging NC NAACP's standing and were firmly rebuffed. *See Moore*, 2019 WL 2331258, at *8–9. Yes, the tax rate is established by statute. And yes, the limitation in the constitution sets bounds on that statutory authority. As this Court determined six years ago, the constitutional tax cap influences the statutory rate, and over time, "will act as a tax cut only for the wealthy," "disadvantage people of color," and "undermin[e]" the public institutions that benefit people of color. *See id.* at *4. Defendants cannot use a motion for judgment on the pleadings to rehash a factual dispute they already lost.

Finally, Defendants' tired statement that "the tax cap applies equally to all state citizens regardless of race" adds nothing to the analysis. Mem. in Support at 18. The question before the Court is not whether the amendments are explicitly racist, but rather whether they were passed

with discriminatory intent, or will have the effect of impacting some more than others. Such questions can be explored once the parties have had the opportunity to develop the factual record.

d. Defendants fail to justify dismissal of NC NAACP's photo voter-ID claim as a matter of law.

Defendants also fail to demonstrate that they prevail as a matter of law on photo voter-ID. Defendants have done nothing to foreclose NC NAACP from being able to demonstrate that there is a substantial risk that the photo voter-ID amendment meets one of the three factors established by the Supreme Court.

NC NAACP's allegations, and the findings of fact incorporated by the Supreme Court, observe that the amendment will "effectively den[y] the right to vote" to African American and Latino voters or "otherwise deprive[] [them] of meaningful access to the political process." *Moore*, 382 N.C. at 165, 876 S.E.2d at 539. The amendment "will also impose costs and substantial and undue burdens on the right to vote for those" individuals. *Id.*

As explained above, Defendants now inappropriately contradict these factual findings, arguing that the photo voter-ID amendment is "race neutral" and "does not exclude minority voters from the voting process in North Carolina." Mem. in Support at 23–24. Like the tax cap, Defendants and NC NAACP evidently disagree about the disparate impact and intent of the voter-ID amendment. And because these disputed facts are obviously "material" to the Supreme Court's test—especially the "continued exclusion" and "intentional discrimination" factors—this Court cannot grant judgment to Defendants as a matter of law at this juncture. *See Erickson*, 235 N.C. at 657, 71 S.E.2d at 394 ("The law does not authorize the entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on *any* single material proposition." (emphasis added)). Instead, the parties must engage in further factual development as commanded by the North Carolina Supreme Court.

Like the tax-cap amendment, the discovery ordered by the Supreme Court may allow NC NAACP to show much more. For example, discovery may demonstrate that members of the legislature were aware that African Americans "disproportionately lack[]" certain IDs, and proposed a voter-ID requirement with the ultimate aim of excluding them from the political process. *NAACP v. McCrory*, 831 F.3d 204, 215–16, 225 (4th Cir. 2016) (concluding the North Carolina General Assembly enacted a photo voter-ID law "with discriminatory intent"). Discovery may also show that the legislature intended to impose a photo voter-ID requirement as a tool to exclude certain voters and preserve their legislative supermajority. Again, NC NAACP has not yet had the opportunity to explore these issues and make these factual showings—therefore any adjudication by the Court would be premature.

Defendants' other arguments must be rejected. To start, Defendants contend that the voter-ID amendment did not insulate legislators from democratic accountability because: (1) photo voter-ID laws have been found to comply with the Fourteenth Amendment of the U.S. Constitution; (2) photo voter-ID laws "exist in a number of states"; (3) the "members of the 2018 General Assembly were no more or less insulated from their constituents than in other years"; and (4) the amendment did not change legislative terms, district lines, qualifications for office, and a host of other factors. Mem. in Support at 20–22. These contentions are irrelevant. Whether other photo voter-ID laws in other states exist or have been found to comply with the U.S. Constitution has no bearing on whether the specific photo voter-ID amendment at issue here violates the North Carolina Supreme Court's three-factor test and the North Carolina Constitution. Similarly, whether the 2018 legislature that proposed the amendment was insulated from democratic accountability is not at issue here[6]—the Supreme Court's test asks whether the amendment would insulate

[6] To the extent Defendants are arguing that a racially gerrymandered legislature is "no more or less insulated from their constituents" than a lawfully constituted legislature, it is seriously mistaken.

legislators "from democratic accountability *going forward*." *Moore*, 382 N.C. at 133–34, 876 S.E.2d at 519 (emphasis added). Finally, changing legislative terms, district lines, and qualifications for office are not the only ways to insulate legislators from democratic accountability. As the Fourth Circuit found in *McCrory*, imposing a photo voter-ID requirement that disproportionately excludes certain categories of voters is another way to insulate legislators. 831 F.3d at 216, 225. Ultimately, though Defendants may find it "hard to fathom" how NC NAACP will satisfy this factor, Mem. in Support at 21, Defendants' failure of imagination does not entitle them to judgment as a matter of law.

Next, Defendants argue that there is no substantial risk of either excluding voters or intentional discrimination because of the Supreme Court's inapposite decision in *Holmes v. Moore*, 384 N.C. 426, 886 S.E.2d 120 (2023). This argument is profoundly flawed.

To start, while Defendants attempt to draw recourse again from their theory that NC NAACP must prove the amendments are unconstitutional in "all circumstances," Mem. in Support at 22, the Supreme Court made no such command. Rather, the Supreme Court specifically required this Court to assess whether there is a "*substantial risk*" of voter exclusion or intentional discrimination. *Moore*, 382 N.C. at 133–34, 163–65, 876 S.E.2d at 519, 538–39 (emphasis added). This specific command controls Defendants' more general proposition. *Cf. Jones v. Shoji*, 336 N.C. 581, 583–84, 444 S.E.2d 203, 204 (1994) ("The principle that the specific controls the general, often employed in statutory construction, informs our interpretation of this language.").

Next, Defendants err where they proclaim that the *Holmes* Court found a statute implementing the voter-ID amendment was "implemented *without racial discrimination*" as "a matter of law." Mem. in Support at 23. Not so. Rather, the *Holmes* Court found that "plaintiffs have *produced insufficient evidence* to meet their burden" to show, as a "factual" matter, that a

completely different statute was passed with discriminatory intent or produced a disparate impact. 384 N.C. at 453–55, 886 S.E.2d at 140–41 (emphasis added). What's more, the *Holmes* Court assessed whether plaintiffs met their evidentiary burden under an entirely different standard—not the "substantial risk" standard announced by the Supreme Court for this case. *See id.*, 886 S.E.2d at 140–41 (assessing whether the "evidence in the record" proved "beyond a reasonable doubt that S.B. 824: (1) was enacted with discriminatory intent, and (2) produces a meaningful disparate impact").

Defendants' appeal to *Holmes* is thus flawed for multiple reasons. To summarize, *Holmes* examined the discriminatory intent behind S.B. 824—not the constitutional amendment; *Holmes* examined only whether the plaintiffs in that case—not NC NAACP—had produced sufficient factual evidence to show discriminatory intent; and finally, the claims in *Holmes* required a much higher standard of proof than the "substantial risk" standard at issue here. To be sure, there may be evidence in *Holmes* that the parties can use in an evidentiary hearing about the constitutional amendment—but the *Holmes* decision cannot support a judgment on the pleadings at this stage.

e. The Supreme Court's mandated fact-finding will not cause chaos and confusion.

In a final Hail Mary, Defendants appear to suggest that proceeding to factual development, or an order in favor of NC NAACP, should be disallowed because it will cause chaos and confusion. Mem. in Support at 27–28. While Defendants do not fully develop this argument, it is deeply flawed.

As an initial matter, Defendants' insinuation that this Court can reject NC NAACP's claims if it finds that "chaos and confusion" will result misstates the law. In its order, the Supreme Court acknowledged "the risk of chaos and confusion arising from retroactively examining"—and potentially invalidating—legislative enactments. *Moore*, 382 N.C. at 164, 876 S.E.2d at 538.

However, it found that if there was a substantial risk that a proposed constitutional amendment satisfied one of its three factors, then allowing that amendment to remain on the books "would engender the very 'chaos'" that the law "was designed to avoid." *Id.* at 165, 876 S.E.2d at 539. In other words, when there is a substantial risk that one of the three factors is present, "the balance of equities *requires* the court to invalidate the challenged amendment." *Id.*, 876 S.E.2d at 539 (emphasis added). Defendants' efforts to confuse this balancing test must be rejected.

Furthermore, despite Defendants' miscasting of this case, NC NAACP brought this case well before the constitutional amendments were placed on the ballot. During hearings on NC NAACP's request for preliminary injunctive relief, Defendants argued that there was no need for the amendments to be removed from the ballot because if they were found to be unconstitutional after votes had been cast, they could easily be removed at a later date. After this urging and their own litigation delays, Defendants cannot now argue that the removal of the amendments would be chaotic. The situation is entirely of Defendants' making.

At any rate, the Supreme Court's order made clear that the future of the two amendments was in doubt when it issued its opinion. It left it to this Court to determine if the amendments should be included in our constitution or not. There is nothing that has happened since that ruling that would cause any chaos or confusion today.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Amended Motion for Dispositive Ruling. The Court should allow NC NAACP to conduct discovery before proceeding to an evidentiary hearing as ordered by the North Carolina Supreme Court.

Respectfully submitted, this the 20th day of September, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20th, 2024, I electronically filed a copy of the foregoing using the Wake County Superior Court's eCourts filing system. The participants in the case are registered users of the eCourts system and service will be accomplished by the eCourts system. Because the eCourts system is new, and out of an abundance of caution, I also served the parties listed at the address below by email:

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