

NORTH CAROLINA

WAKE COUNTY

ROY A. COOPER, III, in his official
Capacity as GOVERNOR OF THE
STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official
capacity as the PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY K.
MOORE, in his official capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; NORTH
CAROLINA BIPARTISAN STATE
BOARD OF ELECTIONS AND ETHICS
ENFORCEMENT; and JAMES A.
("ANDY") PENRY, in his official
capacity as CHAIR OF THE
NORTH CAROLINA BIPARTISAN
STATE BOARD OF ELECTIONS AND
ETHICS ENFORCEMENT,

Defendants.

IN THE GENERAL COURT OF JUSTICE
FILED SUPERIOR COURT DIVISION
18-CVS-9805

2018 AUG 31 P 2:03

**ORDER DENYING REQUEST FOR
TEMPORARY RESTRAINING ORDER**

THIS MATTER CAME ON TO BE HEARD before the undersigned three-judge panel on August 31, 2018, on Plaintiff's motion to amend the complaint and motion for a temporary restraining order. All adverse parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, supplemental affidavits, submissions and arguments of the parties and counsel in attendance, as well as the record established thus far.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following findings of fact and conclusions of law:

1. On August 21, 2018, the undersigned three-judge panel entered an order wherein a majority of this panel granted Plaintiff Governor Roy A. Cooper's (hereinafter "Governor Cooper") motion for preliminary injunction. The order enjoined Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, (hereinafter "Legislative Defendants"), as well as cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "State Board of Elections"), from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language contained in Section 5 of Session Law 2018-117 and Section 6 of Session Law 2018-118. On August 23, 2018, a memorandum of dissent was entered by the Honorable Jeffery K. Carpenter.

2. The facts of the case at bar, as well as the guiding legal principles, applicable legal standards, and analysis regarding this panel's consideration of the constitutionality of Session Law 2018-117 and Session Law 2018-118 were fully set forth in the August 21, 2018, order and August 23, 2018, memorandum of dissent. As such, those facts, principles, standards, and analyses are incorporated in this order by reference and will not be repeated here unless necessary to understand the rationale for our decision.

3. In this panel's August 21, 2018, order, we invited Legislative Defendants to act immediately to correct the problems in the language of the enjoined Ballot Questions so that the corresponding proposed amendments could appear on the 2018 general election ballot. On August 27, 2018, the General Assembly enacted Session Law 2018-133 (hereinafter "S.L. 2018-

133” or “Board of Elections Proposed Amendment”) and Session Law 2018-132 (hereinafter “S.L. 2018-132” or “Judicial Vacancies Proposed Amendment”).

4. S.L. 2018-133 and S.L. 2018-132 do not repeal the previously-enacted S.L. 2018-117 and S.L. 2018-118; however, S.L. 2018-133, in effect, replaces Session Law 2018-117, and S.L. 2018-132, in effect, replaces Session Law 2018-118. Accordingly, the entry of this order does not operate to rescind or otherwise alter our prior order granting a preliminary injunction enjoining the ballot language contained in S.L. 2018-117 and S.L. 2018-118.

5. As previously explained by counsel for the State Board of Elections, the deadline under federal law for the Board to begin printing 2018 general election ballots is September 1, 2018.

6. On August 30, 2018, Governor Cooper filed a motion to amend the complaint in this action pursuant to Rule 15 of the North Carolina Rules of Civil Procedure. On August 30, 2018, Legislative Defendants, through counsel, consented via email to Governor Cooper’s motion to amend the complaint.

7. On August 30, 2018, Governor Cooper also filed a motion for a temporary restraining order to prevent ballot questions in Section 6 of S.L. 2018-132 and Section 2 of S.L. 2018-133 from appearing on the ballot for the 2018 general election.

8. Governor Cooper has asserted facial challenges to the constitutionality of acts of the General Assembly. As such, the portions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Furthermore, a majority of the undersigned three-judge panel has again concluded that Governor Cooper’s facial constitutional challenges, as expressed, present a justiciable issue as distinguished from “a non-justiciable political question arising from nothing more than a policy dispute,” *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018).

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE¹

10. S.L. 2018-133 and S.L. 2018-132, like their predecessors, contain the text of proposed amendments to the North Carolina Constitution, *see* 2018 N.C. Sess. Laws 133 § 1; 2018 N.C. Sess. Laws 132 §§ 1-5, and the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 133 § 2; 2018 N.C. Sess. Laws 132 § 6.

11. Section 1 of S.L. 2018-133 proposes to amend Article VI of the North Carolina Constitution by adding a new section to read:

Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and elections law, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only and shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made by the Governor as follows:

(a) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two Senate political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

¹ In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~struckthrough text in the proposed amendments~~ represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

- (b) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two House of Representatives political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.
- (3) The General Assembly shall enact general laws governing how appointments shall be made if the Governor fails to appoint a member within 10 days of receiving recommendations as required by this section.

2018 N.C. Sess. Laws 133, § 1.

12. Section 2 of S.L. 2018-133 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-133 to the qualified voters of our State. The “question to be used in the voting systems and ballots” is required by S.L. 2018-117 to read as follows:

[] FOR [] AGAINST

Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.

2018 N.C. Sess. Laws 133, § 2.

13. Section 1 of S.L. 2018-132 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan

commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity, and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law.

2018 N.C. Sess. Laws 132, § 1.

14. Section 2 of S.L. 2018-132 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 132, § 2.

15. Section 3 of S.L. 2018-132 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 132, § 3.

16. Section 4 of S.L. 2018-132 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:²

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General

² For the sake of clarity, this section is not displayed as ~~struck through~~ despite the proposed amendment fully removing the language from the North Carolina Constitution.

Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 132, § 4.

17. Section 5 of S.L. 2018-132 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

- (5) Other exceptions. Every bill:
- (a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;
 - (b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;
 - (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; ~~or~~
 - (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter, matter;~~
 - (e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter; or
 - (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter,
- shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 132, § 5.

18. Section 6 of S.L. 2018-132 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-132 to the qualified voters of our State. The “question to be used in the voting systems and ballots” is required by S.L. 2018-132 to read as follows:

[] FOR [] AGAINST

Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

2018 N.C. Sess. Laws 132, § 6.

TEMPORARY RESTRAINING ORDER

19. A temporary restraining order may be issued “for the purpose of preventing the commission or continuance of some act which during the litigation would produce injury to the plaintiff or tend to render judgment in his favor ineffectual. It is an ancillary remedy afforded by the courts of equity and authorized by statute for the purpose of preserving the *status quo* pending the action.” *Seaboard A. L. R. Co. v. Atl. C. L. R. Co.*, 237 N.C. 88, 94, 74 S.E.2d 430, 434 (1953); N.C.G.S. § 1A-1, Rule 65. “A temporary restraining order is not predicated upon illusory injury, loss, or damage, . . . but is entered only upon a showing of immediate and irreparable injury, loss, or damage.” *Jolliff v. Winslow*, 24 N.C. App. 107, 108, 210 S.E.2d 221, 222 (1974).

Board of Elections Proposed Amendment

20. S.L. 2018-133, as shown above, proposes to amend Article VI of the North Carolina Constitution by adding a new section. The language of the Ballot Question, also as shown above, is as follows: “Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.”

21. Governor Cooper complains that this Ballot Language is misleading in that the language fails to inform the voters of our State of the primary purpose and effect of the corresponding amendment. Governor Cooper takes particular issue with the Ballot Language for not informing the voters that the amendment will overrule a decision of the Supreme Court of North Carolina and transfer authority over the Board of Elections from the Governor to the General Assembly.

22. While the language may not be the most detailed description of the purpose and effect of the amendment, we do not find that the language in this Ballot Question is so misleading so as to violate the constitutional requirements explained in our August 21, 2018 order. Indeed, as noted in our prior order, while a Board of Elections and Ethics already exists under law, such a Board has not previously been specifically addressed by our state constitution.

23. In determining facial constitutional challenges, this panel should not concern itself with the wisdom of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-133, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

Judicial Vacancies Proposed Amendment

24. S.L. 2018-132, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section; amend Article IV, Section 10 by rewriting the section; amend Article IV, Section 18 by adding a new subsection; repeal in its entirety Article IV, Section 19; and, amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: “Constitutional

amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.”

25. Governor Cooper similarly complains that this Ballot Language is misleading in that the language fails to inform the voters of our State of the primary purpose and effect of the corresponding amendment. Governor Cooper takes particular issue with the Ballot Language for failing to mention that appointed judges would hold their seats beyond a subsequent election, mischaracterizing the current system for filling judicial vacancies as one in which the Governor has “sole appointment power,” and using language that wrongfully suggests the new system for filling judicial vacancies is one in which all parties involved in the appointment process share equal power.

26. While the language may not be the most accurate or articulate description of the purpose and effect of these provisions, we do not find that the language in this Ballot Question is so misleading so as to violate the constitutional requirements explained in our August 21, 2018 order. Again, this panel is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-132, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

27. We therefore find that there is not a substantial likelihood that Governor Cooper will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Board of Elections Proposed Amendment and the Judicial Vacancies Proposed Amendment.

28. Under these circumstances, this panel, in its discretion and after a careful balancing of the equities, concludes that the requested temporary restraining order shall not issue in regards to S.L. 2018-133 and S.L. 2018-132.

29. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

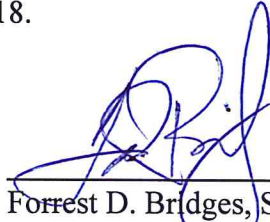
30. In light of the Supreme Court of North Carolina's previous stay of the printing of ballots, this panel considers that granting a stay of this order by this panel pending appeal to be unnecessary.

31. The Honorable Jeffrey K. Carpenter concurs in the result.

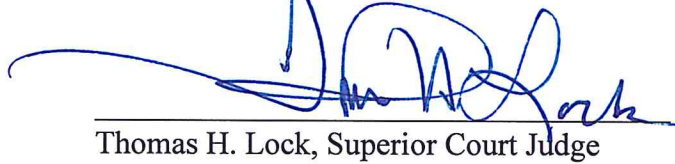
BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND
DECREED that:

1. Plaintiff Governor Cooper's motion to amend the complaint is GRANTED.
2. Plaintiff Governor Cooper's motion for a temporary restraining order as to the ballot language in S.L 2018-133 and S.L. 2018-132 is hereby DENIED.
3. The August 21, 2018, order granting a preliminary injunction enjoining the ballot language contained in S.L 2018-117 and S.L. 2018-118 remains in full force and effect as to those Session Laws, pending further decision of this panel or the appellate courts.
4. Plaintiff's request for a stay of the order of this panel pending appeal is hereby DENIED.

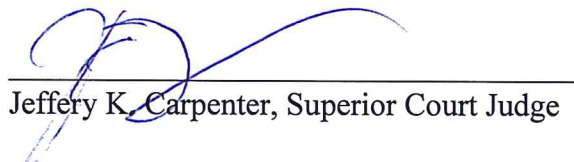
SO ORDERED, this 31st day of August, 2018.



Forrest D. Bridges, Superior Court Judge



Thomas H. Lock, Superior Court Judge



Jeffery K. Carpenter, Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

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This the 31st day of August, 2018.



Kellie Z. Myers
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