

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

CHRISTOPHER J. ANGLIN,

Plaintiff-Petitioner,

From the Court of Appeals
COA P18-587

v.

From Wake County
No. 18 CVS 9748

PHILLIP E. BERGER, in his
official capacity as PRESIDENT
PRO TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY
K. MOORE, in his official capacity
as SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; THE STATE
OF NORTH CAROLINA; THE
NORTH CAROLINA BIPARTISAN
STATE BOARD OF ELECTIONS
AND ETHICS ENFORCEMENT; and
KIMBERLY W. STRACH, in her
official capacity as EXECUTIVE
DIRECTOR OF THE NORTH
CAROLINA BIPARTISAN STATE
BOARD OF ELECTIONS AND
ETHICS ENFORCEMENT,

Defendants.

**PLAINTIFF-APPELLEE CHRISTOPHER J. ANGLIN'S
PETITION FOR DISCRETIONARY REVIEW**

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

CHRISTOPHER J. ANGLIN,

Plaintiff-Petitioner,

From the Court of Appeals
COA P18-587

v.

From Wake County
No. 18 CVS 9748

PHILLIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and KIMBERLY W. STRACH, in her official capacity as EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

**PLAINTIFF-APPELLEE CHRISTOPHER J. ANGLIN'S
PETITION FOR DISCRETIONARY REVIEW**

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

The North Carolina Bipartisan Board of Elections and Ethics Enforcement ("SBOE") has stated that it must authorize the language for the ballots for the November 6, 2018 General Election in time for absentee ballots to

be delivered on or before September 7, 2018. Printing is therefore imminent. In order to ensure that language is untainted by the unconstitutional effects of Session Law 2018-130 (“S.L. 2018-130”), Plaintiff-Appellee Christopher J. Anglin (“Anglin”) respectfully petitions this Court to certify for discretionary review, prior to determination by the Court of Appeals, the Appeal by Defendants Timothy K. Moore and Phillip E. Berger (“the Legislative Appellants”) from the 13 August 2018 Order Granting Plaintiff’s Motion for Preliminary Injunction in Wake County Case No. 18-CVS-9748. This case presents urgent constitutional issues and concerns the integrity of the 6 November 2018 general election. The Legislative Appellants’ 10-day delay in seeking a writ of supersedeas from the Court of Appeals requires that this Court bypass the Court of Appeals and assume jurisdiction.¹

INTRODUCTION AND STATEMENT OF THE CASE

On 4 August 2018, the North Carolina General Assembly (“General Assembly”) passed S.L. 2018-130 over Governor Cooper’s veto. The bill changed the registration requirements for candidates for judicial offices despite candidate filing for those offices having closed on 29 June 2018. S.L. 2018-130 imposed a new and retroactive 90-day “cooling off” period and amended prior law to allow a party designation on the ballot after a

¹ Plaintiff-Appellee has submitted a Response to the Petition for Writ of Supersedeas in the Court of Appeals (attached as Attachment 1) but requests this emergency discretionary review in order to preserve Plaintiff-Appellee’s rights pending such submission and consideration by the Courts.

candidate's name *only* if "the candidate's political party affiliation or unaffiliated status is the same on their voter registration at the time they filed to run for office and 90 days prior to that filing." S.L. 2018-130 also required the ballot to contain a disclaimer stating that candidate party designations were only included where the candidate's party designation was the same on the date of filing as it was 90 days prior. Finally, S.L. 2018-130 provided that a candidate could withdraw from the race by 8 August 2018 if he or she did not wish to appear on the ballot with no party designation.

Plaintiff-Appellee filed as a candidate for Associate Justice of the North Carolina Supreme Court on 29 June 2018. At the time, Anglin was a registered Republican, having changed his party registration from Democrat to Republican on 7 June 2018. S.L. 2018-130 therefore retroactively bars Anglin from having his Republican party designation listed on the ballot.

Anglin filed an action in the Wake County Superior Court on 6 August 2018, arguing that S.L. 2018-130 is unconstitutional as applied to him, and seeking injunctive and declaratory relief (App. 1-105). On 6 August 2018 at 2:00 p.m., the Wake County Superior Court held a hearing on the Plaintiff's motion for temporary restraining order ("TRO"). After the hearing, at which the Defendants appeared and were represented, the Superior Court entered a TRO barring the Defendants from authorizing any final ballot language until ordered by the court to do so. The court set a hearing on a preliminary

injunction for 13 August 2018. On 13 August 2018, after a full hearing, the Wake County Superior Court entered its Preliminary Injunction (App. 106-117). The Legislative Appellants filed a notice of appeal with the trial court on 14 August 2018 but did not seek a stay of the injunction.

On 17 August 2018, the panel in *Cooper v. Berger*, No. 18-CVS-9805 entered an order in which the court recognized that the SBOE was required to print ballots on or before 1 September 2018 to meet absentee ballot deadlines. The Legislative Appellants, despite being defendants in that lawsuit and thus aware of the deadline, still failed to petition the Court of Appeals in this action until 23 August 2018, when they filed a petition for writ of supersedeas and motion for temporary stay. With less than a week until the printing deadline, the Legislative Defendants seek to win by running out the clock and obtaining a “temporary” stay from the Court of Appeals to which Anglin would have little opportunity to reply.

It is thus crucial for this Court to assume jurisdiction over this case immediately in order to decisively address the question of whether the General Assembly can retroactively change ballot access rules after election filing has closed. As a result of the Legislative Appellants’ unjustified delay in seeking appellate review, there is no time for a two-tiered review of the trial court’s order. Plaintiff-Appellee respectfully requests that this Court grant his petition, assume jurisdiction over the Legislative Appellants’ appeal, and deny their petition for writ of supersedeas and motion for

temporary stay for the reasons set out in Anglin's Response to Petition for Writ of Supersedeas, attached hereto as Attachment A.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C. Gen. Stat. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, Anglin petitions this Court to grant discretionary review over the issues presented in the Legislative Appellants' petition for writ of supersedeas prior to determination by the Court of Appeals. This case satisfies all five criteria for such intervention. *See* N.C. Gen. Stat. § 7A-31(b). In addition, intervention is required because of the Legislative Defendants' own delay in seeking appellate review.

First, certification should issue because "the subject matter of the appeal has significant public interest." N.C. Gen. Stat. § 7A-31(b)(1). The election for the Supreme Court of North Carolina is necessarily a matter of public interest, and the proceedings of this case have been covered intensively by the state's media. The integrity of that election and the fairness of the circumstances under which it is administered are of paramount public concern. *See, e.g., North Carolina GOP Leaders to Appeal Judicial Race Court Ruling*, WRAL, 14 August 2018 (accessible at <https://www.wral.com/n-carolina-gop-leaders-to-appeal-judicial-race-court-ruling/17769493/>).

Second, certification is appropriate and necessary because "[t]he cause involved legal principles of major significance to the jurisprudence of the

State.” N.C. Gen. Stat. §7A-31(b)(2). North Carolina courts have long held that retroactive statutes that deprive a person of a vested right are invalid.

Overman Co. v. Md. Cas. Co., 193 N.C. 86, 92, 136 S.E. 250, 253 (1927)

(“Every law that takes away or impairs rights that have vested under existing laws is generally unjust and may be oppressive. Hence such laws have always been looked on with disfavor....[S]uch laws are void if they impair the obligations of contracts or vested rights.” (quotation omitted)).

The Superior Court, after considering the submissions of the parties and arguments of counsel at both hearings on the motion, found that Anglin had shown a likelihood of success on the merits of his constitutional claims against S.L. 2018-130 and that he would suffer irreparable harm and the loss of his Constitutional rights if ballots were allowed to be printed without his party designation. In that Order, the Superior Court found:

“14. Importantly to Plaintiff’s claims, S.L. 2018-130 changes the legal consequences flowing from Plaintiff’s already-completed actions in filing a notice of candidacy. The application of 2018-130 to a candidate like Plaintiff, who changed his or her party registration less than ninety days before a notice of candidacy, now precludes the candidate’s affiliation or unaffiliated status from being included on the 2018 general election ballot. The application of S.L. 2018-130 to Plaintiff will result in no party affiliation or unaffiliated status being listed with Plaintiff’s name on a partisan ballot, while still providing a party affiliation or unaffiliated status of Plaintiff’s opponents.”

Among other conclusions of law, the Superior Court found:

2. While the Court recognizes S.L. 2018-130 is

entitled to a presumption of constitutionality, Plaintiff has shown a likelihood that he will prevail on the merits of his case, particularly as it relates to his claims based on a violation of his due process and associational rights under Article I, Sections 19 and 14 of the North Carolina Constitution.

The Superior Court further held “that S.L. 2018-130 retroactively eliminates Plaintiff’s vested right and forces Plaintiff to choose between either being listed on the ballot with no party affiliation or withdrawing from the race” without allowing him any “opportunity to comply with the new requirements to otherwise preserve his vested right.” This situation “violates fundamental principles of fairness, thereby violating Plaintiff’s right to due process provided by the North Carolina Constitution.”

(Preliminary Injunction at 7-8.)

In addition to the violation of due process under the Law of the Land Clause of the North Carolina Constitution, the Superior Court found that the law imposed a severe burden on Plaintiff’s speech and associational rights at the “crucial stage” just prior to the casting of votes. (*Id.* at 8, citing *Cook v. Gralike*, 531 U.S. 510, 525 (2001).) Further, the Defendants were unlikely to show that S.L. 2018-130 advanced a compelling state interest. In fact, the court determined that even under a less stringent review, the interests promoted by the defendants “are not ‘sufficiently weighty to justify the limitation imposed on [Plaintiff’s] rights.’” (*Id.* at 9.)

Third, failure to certify this case will cause substantial harm through a delay in final adjudication which will allow an unconstitutional law to be

enforced while it is being challenged in court. The harms that will be suffered by Plaintiff with the imposition of S.L. 2018-130 will be immediate and irreparable. (*Id.* at 9.) The entry of the Superior Court's Preliminary Injunction was necessary to preserve Plaintiff's Constitutional rights pending the outcome of the litigation. "Given the severity of Plaintiff's constitutional injury and absence of legitimate countervailing interests, the public interest in fair elections clearly favors" the Preliminary Injunction. (*Id.* at 9.)

The Preliminary Injunction barred the Defendants from "enforcing against Plaintiff the provisions of S.L. 2018-130 or otherwise issuing or causing any county Board of Elections to issue any official state publication to the voting public which states that Plaintiff is anything other than a Republican candidate for Associate Justice of the Supreme Court of North Carolina." (*Id.* at 10.) The deadline under which ballots will be printed is rapidly approaching. Failure to certify may result in this Court having no opportunity to address the fundamental questions posed by this case. Should this Court ultimately agree with the Superior Court and find S.L. 2018-130 unconstitutional as applied without preventing its entry into effect, Plaintiff-Appellee would win his case yet lose his constitutional rights irreparably and immediately upon the printing of the ballots.

Fourth, the workload of the appellate courts supports certification. *See* N.C. Gen. Stat. § 7A-31(b)(4). The Legislative Appellants' unjustified delay

in seeking appellate review under the pressing circumstances of this case means that there is insufficient time for two levels of appellate review. This Court will be asked to weigh in on this law and its applicability to Anglin. When an unconstitutional statute is allowed to take effect, it creates confusion, spawning unnecessary litigation. *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 442, 450 S.E.2d 735, 743 (1994) (addressing validity of municipal inspections performed pursuant to unconstitutional authority). This Court could avoid that confusion by exercising immediate jurisdiction without the risk of an intermediate determination while the ballot deadline approaches.

Finally, the subject matter of this appeal is important in overseeing the jurisdiction and integrity of the court system. *See* N.C. Gen. Stat. § 7A-31(b)95). “The final check on the legislative power of the General Assembly is judicial review[.]” *State v. Berger*, 368 N.C. 633, 653, 781 S.E.2d 248, 261 (2016). Judicial review of legislative acts is of paramount importance to the protection of the Constitution and the courts themselves. The General Assembly has increasingly sought to encroach upon the authority of this Court and undermine the faith of the electorate by repeatedly changing the rules that affect the election of members of the judiciary. The legal issues presented by this case are highly relevant to the balance of power between the judicial and legislative branches of government, and to the continued vitality of the Declaration of Rights.

ISSUE FOR WHICH REVIEW IS SOUGHT

Plaintiff-Appellee Anglin respectfully requests that the Court allow discretionary review on the following issue:

Whether the trial court correctly enjoined the application of S.L. 2018-130 against Anglin because that law, as applied to Anglin, violates his rights to due process under the Law of the Land and his associational and free speech rights under Article 1 of the North Carolina Constitution.

MOTION TO SUSPEND THE APPELLATE RULES TO EXPEDITE DECISION IN THE PUBLIC INTEREST

Pursuant to Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, Anglin respectfully moves that this Court consider the above petition now, even though a record on appeal has not yet been docketed with the Court of Appeals, as would otherwise be required under Appellate Rules 15(a) and 15(b). Due to the exigencies of this case, time does not permit the filing of a formal record prior review. Significant issues of constitutional concern and the public's interest in the outcome of this case call for expedited treatment of this petition under Rule 2. Plaintiff therefore respectfully requests that the Court suspend the operation of Appellate Rules 15(a) and 15(b) pursuant to Rules 2 and 37(a), and consider this petition for discretionary review immediately.

CONCLUSION

Plaintiff-Appellee Christopher J. Anglin respectfully requests that this Court grant discretionary review prior to review by the Court of Appeals and uphold the 13 August 2018 Preliminary Injunction entered by the Superior Court.

Respectfully submitted, this 24th day of August 2018.

FORREST FIRM, P.C.

Electronically Submitted

John D. Burns
N.C. Bar No. 24152
410 N. Boylan Ave
Raleigh, NC 27613
p/f 919-706-1389
john.burns@forrestfirm.com

N.C.R. App. Proc. 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.

WEAVER, BENNETT & BLAND, P.A.

Michael David Bland, N.C. Bar No. 8179
Bo Caudill, N.C. Bar No. 45104
196 N. Trade St.
Matthews, NC 28105
Tel: (704) 844-1400
Fax: (704) 845-1503
dbland@wbbatty.com
bcaudill@wbbatty.com

Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

Undersigned counsel for Plaintiff-Appellee hereby certifies that a copy of Plaintiff-Appellee's Petition for Discretionary Review was sent via email, per agreement of counsel, as follows:

Amar Majmundar
Olga Vysotskaya
James Bernier, Jr.
N.C. Department of Justice
PO Box 629
Raleigh, NC 27602
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov
jbernier@ncdoj.gov

Noah H. Huffstetler
D. Martin Warf
Matthew A. Abee
Nelson Mullins Rile & Scarborough LLP
4140 Parklake Avenue
Raleigh, NC 27612
noaf.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com
matt.abee@nelsonmullins.com

Respectfully submitted, this 24th day of August 2018.

Electronically Submitted
John D. Burns

APPENDIX

Verified Complaint with all exhibits	1-105
Order on Plaintiff's Motion for Preliminary Injunction	106-117

ATTACHMENT 1

Christopher J. Anglin's Response to Petition for Writ of Supersedeas to the North Carolina Court of Appeals, filed contemporaneously herewith.