STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOU COURT DIVISION
WAKE COUNTY	18 CVS 009806-910
NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al v. TIM MOORE., in his official capacity, PHILIP BERGER, in his official capacity, et al	ORDER TRANSFERRING CASE TO A THREE JUDGE PANEL

This matter comes before the Court upon Defendants Berger and Moore's Motion to Transfer to a Three-judge Panel.

PROCEDURAL HISTORY

Plaintiffs filed this action on August 6, 2018 seeking, among other things, a declaratory judgment that two proposed constitutional amendments embodied in 2018 N.C. Sess. Laws 128 (the proposed Voter ID Amendment) and 2018 N.C. Sess. Laws 119 (the proposed Tax Cap Amendment) (hereinafter collectively referred to as the "proposed Amendments" or the "Session Laws") were void *ab initio* on a number of bases, including that the North Carolina General Assembly lacked authority to pass the acts as the General Assembly was a usurper (the "Legislative Usurper Claim"). Compl. ¶ 95; *see also* First Am. Compl. ¶ 95; Second Am. Compl. ¶ 95.

After a hearing on Plaintiffs' Motion for Temporary Restraining Order, the trial court concluded that Plaintiffs' claims constituted a facial challenge and

transferred the case to a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 (2023). Chief Justice Martin appointed a three-judge panel on August 7, 2018 and a hearing on Plaintiffs' request for injunctive relief was scheduled for August 15, 2018.

On August 21, 2018, the three judge panel held:

> 11 . . . that this claim by the NC NAACP in this action constitutes a collateral attack on acts of the General Assembly and, as a result, is not within the jurisdiction of this three-judge panel. N.C. Gen. Stat. § 1-267.1. We therefore decline to consider NC NAACP's claim that the General Assembly, as presently constituted, is a "usurper" legislative body.
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> 12. Furthermore, even if NC NAACP's claim on this point was within this three-judge panel's jurisdiction, the undersigned do not at this stage accept the argument that the General Assembly is a "usurper" legislative body. And even if assuming NC NAACP is correct, a conclusion by the undersigned three-judge panel that the General Assembly is a "usurper" legislative body would result only in causing chaos and confusion in government; in considering the equities, such a result must be avoided. *See Dawson v. Bowmar,* 322 F.2d 445 (6th Cir. 1963). For the reason stated above, we decline to invalidate any acts of the General Assembly as a "usurper" legislative body.

Order on Injunctive Relief pp. 6-7.

The proposed Amendments both made it on to the November 2018 ballot and were enacted by the People of North Carolina as amendments to our Constitution.

In light of the three-judge panel's determination that Plaintiffs' Legislative Usurper Claim was a collateral attack on an act of the General Assembly, this matter was set to be reviewed in the normal course of Wake County Superior Court. On February 22, 2019, the Wake County Superior Court, with a single judge sitting, determined that the Session Laws and the constitutional amendments then adopted were void *ab inito* because they were passed by a usurper legislature that was "not empowered to pass legislation that would amend the state's Constitution." *See N.C.*

State Conf. of the NAACP v. Moore, 382 N.C. 129, 2022-NCSC-99, ¶ 12 (2022). On appeal, the Court of Appeals reversed the trial court, holding that the General Assembly did have the authority to propose the amendments it did. *N.C. State Conf. of the NAACP v. Moore,* 273 N.C. App. 452, 849 S.E.2d 87 (2020).

The Supreme Court of North Carolina reversed in part and remanded the matter for additional consideration of whether the amendments were unconstitutional. *NAACP v. Moore*, 2022-NCSC-99, ¶ 73.

ANALYSIS

A. N.C. Gen. Stat. § 1-267.1 And Subject Matter Jurisdiction

Neither party raised on appeal whether the matter should have been heard by a three-judge panel, nor does it appear that the appellate courts addressed this issue. After remand from the Supreme Court, Defendants Moore and Berger filed the instant Motion to Transfer to a Three-Judge Panel pursuant to N.C. Gen. Stat. § 1-267.1.

N.C. Gen. Stat. § 1-267.1. provides in pertinent part:

> (a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.
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> . . .
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> (c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of

> the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section. In the event of disagreement among the three resident superior court judges comprising a three-judge panel, then the opinion of the majority shall prevail.

In *Holdstock v. Duke Univ Health Sys.,* 270 N.C. App. 267, 841 S.E.2d 307 (2020), which was decided after the three-judge panel concluded it did not have jurisdiction to hear the Legislative Usurper Claim, the Court of Appeals conducted an in depth analysis of N.C.G.S. § 1-267.1. *Holdstock,* to the extent there was confusion about what constitutes a facial challenge, clarified that a facial challenge to an act of the General Assembly is "an attack on a statute itself as opposed to a particular application." *Holdstock*, 270 N.C. App. at 272, 841 S.E.2d at 311; *see also Kelly v. State*, 286 N.C. App. 23, 2022-NCCOA-675, ¶ 26 (2022) ("[Courts] must look to the scope of relief requested by [p]laintiffs to determine whether [p]laintiffs' claims are properly viewed as a facial or an as-applied challenge.").

It is the trial court's role to determine whether a facial challenge to an act of the General Assembly was raised in a complaint, amended complaint, answer, responsive pleading, or otherwise within thirty days of a defendant's answer or responsive pleading. *Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309, 318, 2021-NCCOA-612, ¶ 23 ("[A] trial court is [not] free to transfer a matter to a three-judge panel so that the three-judge panel may decide whether a facial challenge was raised."). If the trial court finds that a facial challenge was properly raised, it has no subject matter jurisdiction to hear the challenge. *Kelly*, 2022-NCCOA-675, ¶ 32 ("[T]he trial court has no subject matter jurisdiction if this is a facial challenge.").

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Lippard v. Holleman*, 271 N.C. App. 401, 406, 844 S.E.2d 591, 597 (2020) (*quoting Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). N.C. Gen. Stat. §1-267.1 vests exclusive subject matter jurisdiction to a three-judge panel of the Superior Court of Wake County to enter orders determining that an act of the General Assembly is facially invalid. *See Kelly*, 2022-NCCOA-675, ¶ 32; *Holdstock*, 270 N.C. App. at 276, 841 S.E.2d at 314. As the Court of Appeals explained in *In re McKinney*, 158 N.C. App. 441, 443, 581 S.E.2d 793, 795 (2003):

> "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (citing 1 Restatement (Second) of Judgments § 11, at 108 (1982)), disc. review denied, 354 N.C. 217, 554 S.E.2d 338 (2001). "Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[, and] . . . is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987)* (citing W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981)). Moreover, a court's inherent authority does not allow it to act where it would otherwise lack jurisdiction. "Courts have the inherent power to do only those things which are reasonably necessary for the administration of justice within the scope of their jurisdiction. *In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 559 (1991) (citing 20 Am. Jur. 2d Courts § 78 (1965)). "The inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943).

"A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, 251 N.C. App. 528, 531, 796

S.E.2d 361, 365 (2017) (*citing Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)). Moreover, a lack of subject matter jurisdiction may be raised for the first time on remand from an appellate court. *Watts v. N.C. Dept. of Envtl. & Natural Res.*, 2010 N.C. App. LEXIS 1246 at *9–11 (2010). This Court is unaware of any authority that the courts have authority to confer subject matter jurisdiction where none previously existed.

Given the holdings in *Holdstock*, *Cryan*, and *Kelly*, if a court, other than a three-judge panel appointed pursuant to N.C. Gen. Stat. § 1-267.1, were to find that an act of the legislature was facially unconstitutional, the order would be a nullity. *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006) (lack of subject matter jurisdiction voids a judgment); *In re Custodial Law Enforcement Agency Recording Sought By: Capitol Broad. Co.*, ___ N.C. App. ___, 886 S.E.2d 866 (2023) (proceedings in which trial court lacked subject matter jurisdiction are a nullity).

B. The Processes By Which The N.C. Constitution May Be Amended

The power to amend the North Carolina Constitution is reserved to the People of this State. N.C. Const. art. XIII, § 2. Amendment of the North Carolina Constitution is only possible by convention or legislative initiative. N.C. Const. art. XIII, §§ 2-4. To amend the N.C. Constitution through legislative initiative, the proposed amendment must "be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." *Id.* If the act is passed by the required three-fifths of each house, it will be placed on the ballot and

become effective *only* if a majority of the votes cast are in favor of the amendment. *Id*.

Over a century ago, in recognizing the importance of the role of the legislature in the amendment process, the North Carolina Supreme Court stated:

> No one can read Article XIII, sec. 2, of our Constitution without concluding at once that no alteration is permitted by it without the joint action of the Legislature and the people. Amendment of the organic law of the State does not depend upon a popular vote alone, but before the people have a right to express their choice as to whether or not there shall be a change the Legislature must by a three-fifths vote of each house thereof consent and provide that the amendment shall be submitted to the people "in such manner as may be prescribed by law."

Reade v. City of Durham, 173 N.C. 668, 674, 92 S.E.712, 714 (1917).

Reade makes clear that any successful attempt to amend the North Carolina Constitution must meet two requirements: (1) there must be a proposed amendment by the legislature in which three-fifths of all the members of each house adopt an act submitting the proposed amendment to the qualified voters of the State for their ratification or rejection, and (2) a vote in favor of the proposed amendment by a majority of the voters. N.C. Const. art. XIII, § 4. If either condition is not met, the proposed amendment fails.

The North Carolina Supreme Court, in its decision remanding this matter, emphasized the importance of the first condition that must be met in order for an amendment to pass in stating:

> Consistent with the principles of popular sovereignty and democratic self-rule, only the people can change the way sovereign power is allocated and exercised within North Carolina's system of government. And, through their constitution, the people assigned the General Assembly a vital role in the amendment process. Specifically, the constitution authorizes the General Assembly to initiate the process of

> enacting constitutional amendments by "adopt[ing] an act submitting the propos[ed] [constitutional amendments] to the qualified voters of the State for their ratification or rejection," provided that "three-fifths of all the members of each house shall adopt [the] act."

NC NAACP, 2022-NCSC-99, ¶ 28 (*emphasis added*) (*internal citations omitted*).

Among other things, the North Carolina Supreme Court considered the argument that the legislator's authority to initiate the amendment process was "practically irrelevant" because a majority of the voters had approved and thus ratified the Tax Cap and Voter ID Amendments. In response to this argument, and at great length, our Supreme Court countered:

> . . [T]his argument is misguided in ways that illustrate the stakes at issue in this case.
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> First, this argument overlooks the fact that constitutional provisions defining the procedures elected officials must utilize in order to exercise the people's sovereign power reflect the people's conscious choices regarding how, and under what circumstances, their power may be exercised by elected representatives. These choices have meaning—they reflect the people's best efforts to structure a political system that would facilitate effective governance without fostering tyranny. . . . For this reason, we have held that when governmental entities fail to adhere to constitutional procedural requirements, their resulting actions are *void*.

Id. at ¶¶ 30–31 (*emphasis added*).

Our Supreme Court also pointed out that accepting the Legislative Defendants' argument that ratification by the voters cures any defect in the legislative process flagrantly disregards and ignores the will of the people of this State in stating that:

> . . . [R]atification by the voters does not render the procedural requirements of article XIII, section 4 constitutionally extraneous. To conclude otherwise would flagrantly disregard the people of North Carolina's choice *not* to permit constitutional amendment by citizen initiative or popular referendum, in contrast to the choices made by the citizens of certain other states.

> Second, embracing this argument would also flagrantly ignore the purpose of the people's choice to structure the amendment process to require something more than ratification by the voters. The legislative supermajority requirement is not a mere procedural nicety; it is a means of safeguarding the system of government created in the North Carolina Constitution by ensuring that the people's fundamental law is not altered or abolished rashly in response to the whims of a particular moment.

Id. at ¶¶ 32–33 (*internal citations omitted*).

> Finally, the Supreme Court stated with respect to this issue:
>
> We reject the contention that we do not need to examine the authority of legislators to propose the Voter ID and Tax Cap Amendments because a majority of North Carolinians who participated in the 2018 elections subsequently ratified both amendments. Simply put, the fact that a majority of voters ratified a constitutional amendment is insufficient to ensure adherence to the principles that animate our constitutional system of government as defined by the people of North Carolina. The constitution, which "contains the permanent will of the people," incorporates the adoption of a particular procedural mechanism for exercising the people's sovereign power to alter or abolish their chosen form of government. Respecting the people's will means respecting the processes they saw fit to include in their fundamental law. Adherence to constitutional procedural requirements is especially warranted when considering constitutional amendments which, in contrast to ordinary statutes and other governmental actions, have the potential to redefine the way sovereign power is channeled and exercised, the basic structure and organization of our government, and the aims our constitution seeks to realize.
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> . . .
>
> Again, the fact that these proposed amendments must subsequently garner approval from a majority of voters does not assure that an amendment is an expression of the people's will as defined under the North Carolina Constitution as it currently exists—while the people reserved for themselves the awesome power to fundamentally change North Carolina's theory of government and basic political structure, they also chose to involve the legislature in the amendment process in order to avoid allowing such profound changes to be effectuated by a potentially fleeting majority of voters at any single moment in time.

Id. at ¶¶ 34, 63.

It is clear from the unambiguous language of our Supreme Court in this case that if there is no valid act of the legislature placing a proposed amendment on the ballot, a proposed amendment must fail, even if a majority of the votes cast were cast in favor of the proposed amendment. Likewise, a valid act of the legislature proposing an amendment to the North Carolina Constitution passed in accordance N.C. Const. art. XIII, § 4, but which fails to receive a majority of votes cast in its favor, remains merely an act of the General Assembly, albeit without life, force or effect.

C. <u>The Validity of Session Law 2018-119 And Session Law 2018-128</u>

The Session Laws, which constituted the legislative authority for submitting the proposed Amendments to popular vote, are acts of the General Assembly. The Session Laws are presumed to be within constitutional boundaries and the acts of the legislature at issue are presumptively valid as the actions of *de facto* officers. *NC NAACP*, 2022-NCSC-99, ¶ 58*; see also Harper v. Hall*, 384 N.C. 292, 325, 886 S.E.2d 393, 415 (2023) (act of General Assembly presumed to be constitutional); *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (acts of the General Assembly are accorded a strong presumption of constitutionality).

Despite the presumption of the constitutionality of an enactment of the legislature:

> "It is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people."

City of Asheville v. State, 369 N.C. 80, 87–88, 794 S.E.2d 759, 766 (2016) (*quoting*

Glenn v. Bd. of Educ., 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936)); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989). "An act of the General Assembly will be declared unconstitutional only when 'it [is] plainly and clearly the case,' . . . and its unconstitutionality must be demonstrated beyond a reasonable doubt." *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (*quoting Preston*, 325 N.C. at 449, 385 S.E.2d at 478 (*quoting Glenn v. Bd. of Educ.*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936)).

The Supreme Court did not accept Plaintiff's legislative usurper theory and instead applied the *de facto* officer doctrine to this case. *NC NAACP*, 2022-NCSC-99, ¶ 58. ("Although we agree with Legislative Defendants that the *de facto* officer doctrine applies in this case . . ."). Our Supreme Court held that "the legislature, writ large, did not entirely lack authority to exercise legislative powers–legislators elected due to unconstitutional racial gerrymandering did not, as plaintiff argues, lack any colorable claim to exercise the powers dedicated to the legislature." *Id.*

Our Supreme Court identified, on multiple occasions, the issue before the Court:

> The issue is whether legislators elected from unconstitutionally racially gerrymandered districts possess unreviewable authority *to initiate the process of changing the North Carolina Constitution*, including in ways that would allow those same legislators to entrench their own power, insulate themselves from political accountability, or discriminate against the same racial group who were excluded from the democratic process by the unconstitutionally racially gerrymandered districts.

Id. at ¶ 1 (*emphasis added*).

Stated another way:

The precise legal question before us is *whether a General Assembly*

> *composed of a substantial number of legislators elected due to unconstitutional gerrymandering may exercise the sovereign power delegated by the people of North Carolina to the legislature under article XIII, section 4 of the North Carolina Constitution, which authorizes the General Assembly to propose constitutional amendments "if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection."* The broader question is whether there are any limits on the authority of legislators elected due to unconstitutional racial gerrymandering to alter or abolish "the fundamental law of the State [that] defines the form and concept of our government." *Bazemore v. Bertie Cnty. Bd. of Elections*, 254 N.C. 398, 402-03, 119 S.E.2d 637 (1961). These questions cut to the core of our constitutional system of government: if legislators who assumed power in a manner inconsistent with constitutional requirements possess unreviewable authority to initiate the process of altering or abolishing the constitution, then the fundamental principle that all political power resides with and flows from the people of North Carolina would be threatened.

Id. at ¶ 4 (*emphasis added*).

Finally, should there be any question, the North Carolina Supreme Court stated "[t]he sole question before us is whether the legislators who passed the bills submitting these two amendments to the voters could validly exercise the authority conferred upon the legislature by the people in article XIII, section 4." *Id.* at ¶ 28. Simply put, did the legislature act within its constitutional authority when it enacted the Session Laws? If the legislature exceeded its constitutional authority, then the acts proposing the Amendments are invalid, which in turn invalidates the Amendments themselves.

After identifying the issue before it, our Supreme Court set forth a one-of-a-kind test to determine whether the Session Laws were valid. The court must first ask, as a threshold question, whether "the votes of legislators who were elected as a result of unconstitutional gerrymandering were potentially decisive," *Id.* at ¶ 65, a

threshold that our Supreme Court announced would be easily met in this case, *Id.* at ¶ 66. Once met, the court must then examine if there is a substantial risk that the amendment will: "(1) immunize legislators from democratic accountability; (2) perpetuate the ongoing exclusion of a category of voters from the political process; or (3) intentionally discriminate against a particular category of citizens who were also discriminated against in the political process leading to the legislators' election." *Id.* at ¶ 70. The presence of any of these factors requires the panel to invalidate the amendment; the absence of these factors means the amendment must be upheld. *Id.*

CONCLUSION

The Supreme Court's analysis clearly reveals that Plaintiffs' claims, which are collateral attacks on the Amendments themselves, are also direct attacks on the Sessions Laws and thus constitute facial challenges to acts of the General Assembly which initiated the amendment process at issue. The facial challenges were properly raised in the pleading stages. Compl. ¶95; First Am. Compl. ¶ 95; Second Am. Compl. ¶ 95. As such, N.C. Gen. Stat. § 1-267.1 vests exclusive subject matter jurisdiction in a three-judge panel of the Superior Court of Wake County, as organized pursuant to N.C. Gen. Stat. §1-267.1(b2).

IT IS THEREFORE ODRERED ADJUDGED AND DECREED that:

1. Defendants Berger and Moore's Motion to Transfer to a Three-Judge Panel is granted; and

2. This matter is hereby transferred to the Senior Resident Superior Court Judge of Wake County in order that he may assign this matter to a three-judge panel

pursuant to N.C. Gen. Stat. 1-267.1(b2).

This the 2nd day of August 2023.

Honorable A. Graham Shirley
Superior Court Judge Presiding

8/2/2023 7:23:12 AM

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served on the persons indicated below by electronic transmission via e-mail, addressed as follows:

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E-mail addresses used for attorneys are those on record with the NC State Bar.[1] Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, if any, with the same effect as if personally made on a foreign attorney within this state.

This the 2nd day of August 2023.

Kellie Z. Myers
Court Administrator – 10th Judicial District
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[1] *See* Administrative Order In Re: Designation Of NC State Bar List As Courts Address Of Record For Court Service And Other Court Communications - March 16, 2023.