

STATE OF 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 PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

23 CVS 28505-910

**THE NORTH CAROLINA
HOME BUILDERS ASSOCIATION'S
AMICUS CURIAE BRIEF**

The North Carolina Home Builders Association (NCHBA) submits this brief of *amicus curiae* in support of the Legislative Defendants' opposition to the Governor's request that the Court preliminarily enjoin Session Law 2023-108.¹

INTRODUCTION

Session Law 2023-108 creates the Residential Code Council. The Governor objects to the General Assembly's creation of the Residential Code Council as a usurpation of his control over executive agencies. Setting aside the merits of the Governor's objection to Session Law 2023-

¹ Consistent with Rule 28(i) of the North Carolina Rules of Appellate Procedure, the North Carolina Home Builders Association states that the Association and its counsel authored this brief and the Association contributed money for its preparation. No other person or entity assisted, either directly or indirectly, with the submission of this brief.

108, the law will not go into effect until January 1, 2025. The Governor, therefore, cannot show that he will suffer irreparable harm that warrants the extraordinary remedy of enjoining the challenged law at the very inception of this lawsuit.

ARGUMENT

“A preliminary injunction is an extraordinary measure.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983) (quotation cleaned up). A preliminary injunction may issue only “after a careful balancing of the equities” by the court. *State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913, *on reh’g*, 299 N.C. 731, 265 S.E.2d 387 (1980). The relief of a preliminary injunction exists “to preserve the status quo of the parties during litigation.” *A.E.P. Indus.*, 308 N.C. at 401, 302 S.E.2d at 759 (quotation cleaned up); *see id.* (“The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits.” (quotation cleaned up)). Therefore, to be entitled to a preliminary injunction, a plaintiff must demonstrate a “likelihood of success on the merits” *and* “irreparable loss unless the injunction is issued.” *Id.* (quotation cleaned up).

Even if a plaintiff alleges irreparable harm, the alleged harm cannot be some distant injury that is likely to occur after the conclusion of the litigation. Section 1-485 of the General Statutes plainly states that a preliminary injunction is permitted only when the plaintiff shows relief is needed to prevent an act that would injure the plaintiff “*during the litigation.*” N.C. Gen. Stat. § 1-485(1) (emphasis added).² Thus, the plaintiff must show that, absent injunctive relief, he will “suffer *immediate* and irreparable injury.” *N. Carolina Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 727, 673 S.E.2d 794, 798 (2009) (emphasis added). As the Fourth

² Section 1-485 also authorizes preliminary relief when a plaintiff shows by affidavit that (a) a party to the lawsuit “is doing or threatens or is about to do” an act that will “render the judgment ineffectual” or (b) a party “threatens or is about to remove or dispose of” property with the intent to defraud the plaintiff. N.C. Gen. Stat. § 1-485(2), (3). Neither is applicable here.

Circuit has stated, to justify a preliminary injunction, “the required ‘irreparable harm’ must be ‘neither remote nor speculative, but actual and imminent.’” *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989), and citing *ECRI v. McGraw–Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987)).

In addition to these general limitations on preliminary injunctive relief, the Court’s consideration of the Governor’s request to enjoin the challenged laws should be informed by the presumption of constitutionality that applies to all “laws duly enacted by the General Assembly.” *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015). North Carolina courts have the authority “to declare a law unconstitutional, but only when the violation is plain and clear.” *Id.* “Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond reasonable doubt.” *Id.*; see *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

The Governor asks the Court to enter an injunction enjoining Session Law 2023-108 at the outset of this lawsuit. Session Law 2023-108 creates Section 143-136.1 of the General Statutes, which establishes a thirteen-member Residential Code Council that will be responsible for the maintenance and amendment of the North Carolina Residential Building Code. See N.C. Sess. Law 2023-108, § 1.(a). Pursuant to Section 143-136.1(a), the Governor will appoint seven members to the Residential Code Council, while the General Assembly will appoint the remaining six members. See *id.* In addition to establishing the new Council, the session law creates Section 143-137.1, which sets forth the basic requirements for the Council’s operations. See *id.* Pursuant to Section 143-136.1(e), the Residential Code Council must have a quorum of nine members to transact business and nine members must vote to approve any action by the

Council, including revisions to the Residential Building Code. *See id.* Session Law 2023-108 states that Sections 143-136.1 and 143-137.1 will not become effective until January 1, 2025. *See* N.C. Sess. Law 2023-108, § 1.(r).

Governor Cooper objects to Session Law 2023-108 as commandeering his constitutional powers to enforce laws by allocating the Governor a “slim majority” of Council appointees whose objectives, due to the Council’s nine-vote requirement, could be impeded by other appointees. *See* Pl.’s Br. Supp. Prelim. Inj. at 35. Although NCHBA disagrees with the Governor’s view on the constitutionality of Session Law 2023-108, the Association’s primary opposition to the Governor’s request for *immediate* injunctive relief is that the Governor will suffer no *immediate harm* absent a preliminary injunction. Sections 143-136.1 and 143-137.1 will not go into effect for another fourteen months. Thus, even if the Governor were correct about the constitutionality of the laws, the Governor is not at risk of suffering any imminent harm. At this early stage in the lawsuit, the Governor cannot show that injunctive relief is needed “during the litigation” to avoid irreparable harm.

In fact, because Sections 143-136.1 and 143-137.1 do not go into effect until 2025, there is a question of whether Governor Cooper could suffer *any* harm, given that the Residential Code Council will not exist until after the Governor’s term. *See* N.C. Const., art. III, § 2(a) (dictating the gubernatorial terms “shall commence on the first day of January next after their election”). Notably, the irreparable harm alleged by the Governor is “changing the composition of certain boards and commissions and throwing their ongoing, important work into turmoil.” Pl.’s Br. Supp. Prelim. Inj. at 36. Yet, the Residential Code Council will not come into existence until January 1, 2025—after a new Governor has taken office. It is uncertain that Governor Cooper will ever be harmed by the composition and “turmoil” caused by the Residential Code Council.

Further counseling against the issuance of a premature preliminary injunction is the presumptive constitutionality of Session Law 2023-108. Unless the Governor can show that Session Law 2023-108 violates the North Carolina constitution “beyond reasonable doubt,” the General Assembly will prevail in its defense of its laws. *Hart*, 368 N.C. at 126, 774 S.E.2d at 284. This presumption of constitutionality, when coupled with the lack of imminent harm faced by the Governor, tips the balance of equities decidedly against preliminarily enjoining Session Law 2023-108.

CONCLUSION

For the reasons stated above, NCHBA respectfully asks that the Court deny the Governor’s request for a preliminary injunction of Session Law 2023-108.

Respectfully submitted, this the 27th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document, including exhibits, was served on the following parties via email as follows:

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