

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23 CVS 28505-910

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.

**NOTICE OF OBJECTION**

Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, pursuant to N.C. Gen Stat. §§ 1-277, 1-278, and 7A-27: (1) objects to the court's decision not to hear or consider his October 10, 2023 Motion for Temporary Restraining Order ("TRO Motion"); and (2) preserves his objection for determination upon subsequent appeal.

**INTRODUCTION**

The Governor filed his Complaint in this action within hours of the General Assembly's enactment—over the Governor's veto—of an obviously unconstitutional bill. Given the immediate, significant disruption wrought by the bill's enactment, the

Governor also immediately sought a temporary restraining order blocking the bill's implementation.

*Eight days* after the Complaint and TRO Motion were filed, the court gave notice that it would not hear the TRO Motion and would instead hear the Governor's Motion for Preliminary Injunction on November 1, more than three weeks after the case was filed.

The court's failure to hear the TRO Motion *at all* deprives the Governor of the constitutional right—which belongs to any potential litigant—to access the judicial system and have his case heard in a timely manner and in accordance with the requirements of due process. Moreover, failure to hear the TRO Motion compounds uncertainty for impacted boards and commissions that continue to meet and the public servants who volunteer their time to help the state by serving on those boards. Finally, the chaos created by Session Law 2023-136 will only increase if the General Assembly or others purport to make appointments under the unconstitutional statute before the Governor's motion is heard.

For that reason, and as further detailed below, the Governor objects to the deprivation of his constitutional rights.

### **FACTS AND OBJECTIONS**

1. Session Law 2023-136 (Senate Bill 512) was enacted over the Governor's veto on October 10, 2023, with many provisions taking immediate effect.

2. The Governor filed his Complaint challenging Session Law 2023-136 on October 10, 2023 and also filed the TRO Motion, requesting a hearing as soon as practicable.

3. In his papers, the Governor specifically requested that the TRO Motion be heard prior to transfer to a three-judge panel, given the inherent delays in constituting such a panel and convening it to hear emergency relief, especially in light of the Superior Court Judges Conference scheduled for the week of October 16. *See* TRO Motion ¶ 10.

4. On October 11, 2023, Legislative Defendants filed a Motion to Transfer to a Three-Judge Panel, arguing—incorrectly—that a single Superior Court Judge lacks authority to grant injunctive relief on a facial challenge.

5. The Governor did not consent to Legislative Defendants’ motion.

6. Without a hearing and before the Governor could file his opposition to the Legislative Defendants’ Motion to Transfer, the court entered its Transfer Order on October 11, 2023.

**I. Chaos, confusion, and irreparable constitutional injury will intensify with each day that Session Law 2023-136 remains in effect.**

7. As a result of the delay in setting a hearing on the TRO Motion, Session Law 2023-136 is now in effect, irreparably harming the Governor and our constitutional separation of powers by changing the composition of certain boards and commissions and throwing their ongoing, important work into turmoil.

8. As explained in the affidavits attached to the TRO Motion, allowing Session Law 2023-136 to remain in effect interrupts ongoing projects that are critical

to the health and welfare of North Carolina citizens. These projects include, but are not limited to:

- a. The Environmental Management Commission's work to develop much needed clean water standards to protect North Carolinians from carcinogenic substances like per- and polyfluoroalkyl substances (PFAS) and dioxane;
- b. The Public Health Commission's work to finalize its decennial review of substantial health codes by March 1, 2024, to include rules governing sanitation of residential care facilities, summer camps, and public swimming pools;
- c. The Board of Transportation's work to address urgent highway needs across the state; and,
- d. The Coastal Resource Commission's work to assess plans for land development along our coast and assist local coastal communities in addressing the impacts of climate change.

9. Senate Bill 512, the bill that became Session Law 2023-136, was introduced in the Senate on April 3, 2023. At that time, the bill directed that certain appointments to the impacted boards and commissions be made by the General Assembly and others in the future. It likewise directed that the Governor not fill vacancies that would occur in the future. Senate Bill 512 also terminated certain members appointed by the Governor even though their terms of service had not concluded.

10. But Session Law 2023-136 did not become law until October 10, 2023. By then, many of the dates by which appointments were to be made, or were not to be made, and the dates on which the terms of sitting members of the relevant boards and commissions would expire had passed. Yet those dates were never amended and the Session Law continues to use those dates.

11. As a result, the Session Law is based on a state of affairs that no longer exists. It thus creates confusion and uncertainty as to whether many members of important State boards and commissions continue to serve or have been removed. It also creates questions about whether the chairs of several boards and commissions continue to hold those positions.

12. Moreover, Session Law 2023-136 raises constitutional issues as to whether the General Assembly can retroactively remove from office validly appointed board and commission members without legislating a change in their terms of office or otherwise altering the board or commission on which they serve. *Cf. McCrory*, 368 N.C. at 645–46 (holding that the power to remove from office is central to ensuring that the laws are faithfully executed). If valid, these purportedly retroactive changes would also cause confusion about the vital work these boards and commissions have accomplished since April 2023.

13. The following examples show the confusion and uncertainty created by Session Law 2013-136 with respect to each of the impacted boards and commissions.

- a. With regard to the Economic Investment Committee, Session Law 2023-136 immediately appoints the Speaker and the President

Pro Tempore to the Committee, making a majority of that Committee controlled by the legislature, not the Governor. *See* Session Law 2023-136, § 1.1.(a). The appointment of legislators to the Economic Investment Committee violates plain and unambiguous Supreme Court precedent, which has stood for over forty years. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608 (1982) (striking down law that appointed legislators to Environmental Management Commission). The participation of legislators on the Economic Investment Committee will thus create questions regarding the validity of the Committee's acts. The Economic Investment Committee has a meeting scheduled on October 24, and it is scheduled to consider grants for several significant economic development projects. These projects may go to other states if the Economic Investment Committee is not able to make timely awards. *See* Affidavit of Jordan Whichard, attached as **Exhibit A**.

- b. With regard to the Commission on Public Health, Session Law 2023-136 directs that the Governor not fill four vacancies on that Commission where the members' terms expire on April 30, 2023. Because Session Law 2023-136 was not law on April 30, 2023, the Governor did fill these vacancies with Commission members whose terms expire on April 30, 2027. Does Session Law 2023-

136 now remove those members? The law is at best unclear as to whether they continue to serve. If not, the law raises serious constitutional issues regarding the General Assembly's authority to take such actions.

- c. Further, as its publicly available website shows, the Commission for Public Health: (1) met on May 3, 2023; (2) proposed the repeal of an outdated Covid-19 testing provision by notice issued June 1, 2023; (3) proposed re-adoption of a rule regarding sanitation in jails and other pre-trial detention facilities by notice issued June 1, 2023; and (4) met on August 2, 2023. *See* Commission for Public Health, <https://cph.dph.ncdhhs.gov/> (last accessed October 17, 2023).
- d. Session Law 2023-136 directs that all of the terms of all of the members of the Board of Transportation expire on June 30, 2023. But that date has passed. Is the retroactive termination of these validly appointed Board members effective? Does it violate the Constitution? The Board of Transportation is next scheduled to meet from Tuesday, November 1 to Wednesday, November 2, 2023. *See, e.g.*, NC Dep't of Transportation, Board Meeting Dates, <https://www.ncdot.gov/about-us/board-offices/boards/board-transportation/Pages/Board-Meeting-Dates.aspx> (last accessed October 17, 2023).

- e. With regard to the Environmental Management Commission (“EMC”), Session Law 2023-136 terminates two of the Governor’s appointees, depriving the Governor of a majority of appointments. *See* Session Law 2023-136, § 2.1.(a). Session Law 2023-136 also appears to terminate the current chair appointed by the Governor and delay appointment of a new chair until two new appointments are made. *See id.* § 2.1.(b); Session Law 2023-139, § 6.1.(a). The termination of the chair will severely disrupt ongoing EMC work in all work areas—enforcement, rulemaking, and declaratory rulings. This will “damage the EMC’s ability to meet its state and federal responsibilities on issues that directly affect the health and welfare of the state’s citizens, including the safety of their drinking water.” Robin Smith Aff. ¶ 8 (Exhibit E to Motion for TRO).
- f. Finally, Session Law 2023-136 disrupts the Coastal Resources Commission (“CRC”) by terminating three members appointed by the Governor, two of whom are in the middle of their terms. As with the EMC and the Board of Transportation, Session Law 2023-136 terminates the current chair selected by the Governor and delays appointment of a new chair until two additional legislative appointees and an appointee of the Insurance



Commissioner have been added to the CRC. *See* Session Law 2023-139 (Senate Bill 749), § 6.3.

14. Put simply, each day that Session Law 2023-136 remains effective intensifies the constitutional injury to the Governor and increases chaos and confusion for some of the most important policy-making boards and commissions in the State.

15. Moreover, dozens of dedicated public servants serving on the impacted boards and commissions face uncertainty and confusion regarding their continuing role.

**II. Denying a hearing on the Governor’s TRO Motion violates due process and the Open Courts provision of the North Carolina Constitution.**

16. The Governor recognizes the unusual posture of the present case, where two branches of government are in dispute and the most fundamental powers of this court are invoked.

17. But, the Governor, like everyone else in this State, has a constitutional right to be heard under constitutional principles of due process and the Open Courts provision of the North Carolina Constitution, which dates back to the Magna Carta. N.C. CONST. art. I, § 18 (“All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.”); *id.* § 19 (“No person shall be . . . disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the

land.”); *see Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 174 (1989) (“[T]he courts of North Carolina cannot fail to provide a forum to determine a valid cause of action.”).

**III. The failure to hear the TRO Motion does not alter the last peaceable status quo.**

18. With each day that passes since Session Law 2023-136 was enacted, there is greater risk that the General Assembly or a Council of State member given appointment authority under the legislation will purport to make appointments under the bill.

19. At the upcoming hearing on the Governor’s Motion for Preliminary Injunction, any such actions taken to implement Session Law 2023-136 in the absence of a temporary restraining order must be undone.

20. If a preliminary injunction issues, it should restore the parties to the last peaceable status quo—specifically the state of affairs before the enactment of Session Law 2023-136. *See, e.g., State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 732–33 (1980) (“The preliminary injunction serves to place the parties in the position they were before the dispute between them arose. Thus, it maintains the last peaceable status quo between the parties. . . .”); *Pruitt v. Williams*, 288 N.C. 368, 373–74 (1975) (affirming, in case of blocked access road, that last peaceable status quo properly restored by preliminary injunction “consists of the open and unobstructed use of the road in question which road has been recently blocked off by the defendants”).

WHEREFORE, Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, prays the court:

- a. Note his objection to the failure of the court to hear his Motion for Temporary Restraining Order and preservation of that error of law for future appellate review; and
- b. Grant such other and further relief as the court deems just and proper.

Respectfully submitted this the 19th day of October, 2023.

/s/ Eric M. David  
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**CERTIFICATE OF SERVICE**

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

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This the 19<sup>th</sup> day of October, 2023.

BROOKS, PIERCE, McLENDON,  
HUMPHREY & LEONARD, L.L.P.

By: /s/ Eric M. David  
Eric M. David

**EXHIBIT A**

**AFFIDAVIT OF JORDAN  
WHICHARD**

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
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ROY A. COOPER, III, in his official  
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PHILIP E. BERGER, in his official  
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Defendants.

**AFFIDAVIT OF D. JORDAN  
WHICHARD IV, CHIEF DEPUTY  
SECRETARY OF COMMERCE**

I, D. Jordan Whichard IV, being first duly sworn, depose and say:

1. I am over the age of 18 years old, am of sound mind and am competent to testify to the matters contained within this affidavit. Except as specifically stated otherwise, I have personal knowledge of all the facts stated herein.

2. I serve as Chief Deputy Secretary of the North Carolina Department of Commerce. I have served as Chief Deputy Secretary since March 2021.

3. In my role, I am familiar with the work of the Department of Commerce and Secretary Sanders related to the Economic Investment Committee.

4. Among other work, the Economic Investment Committee is responsible for administering economic development awards pursuant to the Job Development Investment Grant (JDIG) program.

5. In the next few months, the Economic Investment Committee is anticipated to certify \$40,426,000 in annual incentive payments which consist of \$31,006,450 in direct payments to approximately forty-six (46) companies and \$9,419,550 to the Utility Account to support public infrastructure projects in rural areas of the State. At the upcoming meeting on Tuesday, October 24, 2023, \$4,653,000 is expected to be approved with \$3,602,200 owed to companies and \$1,050,800 to the Utility Account.

6. The exact date of certification depends on when the Department of Revenue is able to certify tax withholdings for the eligible grantees and that eligible grantees have no outstanding tax debts. The Department of Revenue has advised Department of Commerce staff that certifications should only be relied upon for thirty (30) days, so delays in Economic Investment Committee certification will impact the ability to promptly make incentive payments.

7. Three (3) economic development projects are also pending before the Economic Investment Committee that are anticipated to award in the coming weeks, one of which may be considered as early as a specially called meeting on Thursday, October 26, 2023. These are competitive projects that will only locate to North Carolina if a JDIG program award is made and acceptable to the grantee

company. If the Economic Investment Committee is unable to make these awards, they are likely to be lost to locations in other states.

8. Session Law 2023-136 (Senate Bill 512) creates uncertainty regarding the Economic Investment Committee's authority to take action to approve new economic development incentives and certify payments to existing grantees.

FURTHER AFFIANT SAYETH NOT.

This the 17<sup>th</sup> day of October, 2023

*Jordan Whichard*  
D. Jordan Whichard IV

Wake County, North Carolina

Sworn to and subscribed before me this day by Jordan Whichard

Date: 10/17/23

*Linette Holloman* (signature), Notary Public

Linette Holloman (printed or typed name), Notary Public

(Official Seal)

My commission expires: 5/29/2028

