

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.

**MOTION FOR TEMPORARY  
RESTRAINING ORDER**

**AND**

**MOTION FOR PRELIMINARY  
INJUNCTION**

Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, by and through counsel and pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, moves the Court for a temporary restraining order and preliminary injunction to restrain the North Carolina Environmental Management Commission (“EMC”) and its Commissioners from dismissing its claims in *EMC v. RRC* (23CV032096-910).

In support of the Motion, the Governor shows the Court as follows:

**I. Separation of Powers**

1. Over the past 50 years, the North Carolina Supreme Court has drawn a careful and clear line delineating the constitutional boundary between the legislative

branch and the executive branch. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), and *Cooper v. Berger* (“*Cooper BOE*”), 370 N.C. 392, 414, 809 S.E.2d 98, 111 (2018).

2. The Court has consistently reaffirmed that in our constitutional system, the duty to “take care that the laws be faithfully executed” is expressly assigned to the Governor. N.C. Const. art. III, § 5(4).

3. In order to fulfill that constitutional obligation, the Governor must retain sufficient control over boards, commissions, and committees that perform executive functions. *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. The Governor lacks sufficient control when he is unable to appoint, supervise, and remove a working majority of members to such boards, commissions, and committees. *Id.*

4. In binding precedent, our Supreme Court has repeatedly and consistently invalidated laws like Session Laws 2023-136 that strip the Governor of his authority to appoint a working majority to boards, commissions, and committees that perform executive functions. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88; *McCrory*, 368 N.C. at 648, 781 S.E.2d at 258; *Cooper*, 370 N.C. at 414, 809 S.E.2d at 111.

5. In *Wallace v. Bone*, the court held that “the principle of separation of powers is a cornerstone of our state and federal governments.” 304 N.C. at 601, 286 S.E.2d at 84. Applying this principal, the court held that legislators cannot “retain some control” over the implementation of legislation by serving on executive boards

and commissions. *Id.* at 608, 286 S.E. 2d at 88. It struck down a law that appointed legislators to the Environmental Management Commission. *Id.*

6. Writing for the court in *McCrorry v. Berger*, Chief Justice Martin explained that “separating the legislative, executive, and judicial powers of state government” is “necessary for the preservation of liberty.” *McCrorry*, 368 N.C. at 635, 781 S.E.2d at 250. This separation of powers is violated by laws that (1) allow the legislature to exercise power vested exclusively in the executive branch, or (2) interfere with the Governor’s ability to exert enough control over boards, commissions, and committees to fulfil his constitutional duty to ensure that the laws are faithfully executed. *Id.* at 635, 645, 781 S.E.2d at 250, 256; N.C. Const. art. II, § 5(4).

7. *McCrorry* outlined a two-part test:

- a. Is the board, commission, or committee at issue “primarily administrative or executive in character”? and,
- b. Does the law allow the Governor enough power to appoint, supervise, and remove a working majority of members?

*McCrorry*, 368 N.C. at 645–46, 781 S.E.2d at 256.

8. Applying that test, *McCrorry* held that the Oil and Gas Commission and the Mining Commission were primarily administrative or executive in character. *Id.* It then invalidated a law that prevented the Governor from appointing a majority of commissioners to each commission. *Id.* at 648, 781 S.E.2d at 258.

9. Our Supreme Court again applied that test in *Cooper v. Berger*. *Cooper* held that the State Board of Elections is primarily administrative or executive in character. It then struck down a law that stripped the Governor of the power to appoint a working majority to the board. *Cooper*, 370 N.C. at 414, 809 S.E.2d at 111 (“[T]he provisions of the challenged legislation ‘deprive[ ] the Governor of the ability to appoint a majority of members of the [Bipartisan] State Board who share his views and priorities.’”).

10. In order to obtain a temporary restraining order or preliminary injunction, the movant must first show likelihood of success on the merits of his case. *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Likelihood of success means “that there is probable cause to believe the plaintiff may prevail” on the merits. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401–02, 302 S.E.2d 754, 760 (1983); *Cobb v. Clegg*, 137 N.C. 153, 49 S.E. 80, 82–83 (1904). If the movant establishes a likelihood of success, he must also show he is likely to sustain irreparable loss or that issuance is necessary for the protection of a plaintiff’s rights during the course of litigation. *Ridge Cmty. Invs.*, 293 N.C. at 701, 239 S.E.2d at 574; *A.E.P. Indus.*, 308 N.C. at 405, 302 S.E.2d at 761–62.

11. As applied, Session Law 2023-136 violates North Carolina’s Separation of Powers clause. First, it unconstitutionally allows the General Assembly to exercise executive power vested exclusively in the Governor. By making a majority of appointments to the EMC, directly and indirectly through politically aligned officers

whose duties the legislature prescribes, the General Assembly is able to exercise the executive powers of the EMC, such as rulemaking, through its appointees.

12. Additionally, Session Law 2023-136 has interfered with Governor Cooper carrying out his constitutional duties. Control of a working majority of the EMC has been reallocated to Commissioners who do not share the views and priorities of the Governor concerning execution of North Carolina's environmental laws, as evidenced by the EMC's recent vote purporting to dismiss critical litigation protecting the EMC's rulemaking authority.

13. To prevent irreparable harm to the Governor's constitutional obligation to ensure faithful execution of the law, and to preserve the status quo of the subject matter involved until a trial can be had on the merits, a temporary restraining order and preliminary injunction preventing the EMC from dismissing its lawsuit against the North Carolina Rules Review Commission is necessary.

14. In support of the Motion, the Governor respectfully refers the Court to Exhibit A to this Motion, the affidavit of Peter Ledford, and his Verified Proposed Supplemental Complaint filed contemporaneously herewith.

15. The Governor also respectfully refers the Court to the following exhibits to Plaintiff's previous Motion for Temporary Restraining Order and Preliminary Injunction (Index #6), filed in this matter on October 10, 2023:

- a. Exhibit E – Affidavit of Robin W. Smith (Environmental Management Commission, Chair);

b. Exhibit J – Affidavit of Elizabeth S. Biser (Secretary of Department of Environmental Quality)

**II. The Governor is likely to succeed in showing that, as applied, Session Law 2023-136 unconstitutionally deprives him of control of Environmental Management Commission.**

16. The Governor’s constitutional obligation to ensure North Carolina’s executive boards and commissions faithfully execute the State’s environmental laws has been impermissibly interfered with by the General Assembly on multiple occasions. *McCrorry*, 368 N.C. at 648, 781 S.E.2d at 258 (holding that a law preventing the Governor from appointing a majority of members to the Oil and Gas Commission and the Mining Commission was unconstitutional); *Wallace*, 304 N.C. at 608, 286 S.E. 2d at 88 (holding a law that appointed legislators to the EMC unconstitutional). With respect to the EMC, Session Law 2023-136 is a renewed attack on the Governor’s executive powers in this area.

17. The EMC is an executive commission that regulates the State’s air and water resources. *Wallace*, 304 N.C. at 608, 286 S.E.2d at 88 (“[T]he duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws.”).

18. As applied, Session Law 2023-136 does not allow the Governor enough power to appoint, supervise, and remove a working majority of the EMC, thereby preventing the Governor from taking care that the laws under the jurisdiction of the EMC are faithfully executed.

19. Prior to enactment of Session Law 2023-136, the EMC had fifteen commissioners: nine appointed by the Governor and six appointed by the General Assembly.

20. With respect to the EMC, Session Law 2023-136 went into effect on October 10, 2023. Part II of Session Law 2023-136 reassigned the Governor's authority to appoint two commissioners to the Commissioner of Agriculture. As a result of this change in the law, Commissioners Donna Davis and Pat Harris, two of the Governor's appointees, were removed from their positions on the EMC.

21. On October 26, 2023, acting under authority purportedly granted by Part II of Session Law 2023-136, the Commissioner of Agriculture appointed Joseph Reardon and Bill Yarborough as Commissioners on the EMC. Upon making these appointments, the Governor's appointees to the EMC became a minority of commissioners (seven of fifteen).

22. Together with the six legislative appointees to the EMC, the appointees of the Commissioner of Agriculture form a working majority on the EMC that has taken actions inconsistent with the Governor's policy views and priorities with respect to how the EMC should execute the laws within its jurisdiction.

23. On November 10, 2023, at a meeting of the EMC, the EMC voted to elect a new Chair. The legislative appointees, together with the appointees of the Commissioner of Agriculture, voted to replace Robin Smith (a gubernatorial appointee to the commission and the then-current chair) with John (JD) Solomon (a legislative appointee to the commission and a former chair).

24. Under the EMC's bylaws, the Chair of the EMC serves as the head of the commission and has the power to call special meetings, schedule work sessions, alter the order of business at meetings of the commission, appoint committees of the commission, designate chairs for those committees, appoint members to committees, and appoint hearing officers for comment on regulations or any public hearing conducted by the Commission.

25. But for Session Law 2023-136's reallocation of two appointees from the Governor to the Commissioner of Agriculture, Commissioner Solomon would not have been elected Chair of the EMC.

26. Commissioner Solomon does not share the Governor's policy views and priorities with respect to how the EMC should execute the laws that are within the jurisdiction of the EMC. For example, Commissioner Solomon personally disagrees with the Governor's policy views and priorities reflected in the EMC's Proposed 1,4-Dioxane Amendments and the related Complaint in *EMC vs. RRC* (23CV032096-910).

27. On January 11, 2024, at a meeting of the EMC, the legislative appointees, together with the appointees of the Commissioner of Agriculture, voted to dismiss the EMC's Complaint in Complaint in *EMC vs. RRC* (23CV032096-910).

28. But for Session Law 2023-136's reallocation of two appointees from the Governor to the Commissioner of Agriculture, the EMC would not have voted to voluntarily dismiss the Complaint in *EMC vs. RRC* (23CV032096-910).



29. In sum, the Governor is likely to succeed in showing that he has in fact lost control of the EMC, and the EMC has exercised its control inconsistent with the Governor's views and priorities with respect to ensuring faithful execution of the laws under the jurisdiction of the EMC.

**III. The Governor will be irreparably harmed if Session Law 2023-136 is not enjoined, and preliminary relief is necessary to preserve the status quo pending trial on the merits.**

30. If the EMC is not enjoined from dismissing its Complaint in *EMC vs. RRC* (23CV032096-910) during the pendency of this litigation, such dismissal will irreparably harm the Governor and our constitutional separation of powers.

31. On March 7, 2023, the EMC previously sued the RRC over its objections to EMC's Proposed 1,4-Dioxane Amendments in *EMC vs. RRC* (23CV005003-910). On March 20, 2023, the EMC voluntarily dismissed its complaint in the *EMC vs. RRC* (23CV005003-910) without prejudice.

32. Under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, voluntary dismissal of the *EMC vs. RRC* (23CV032096-910) Complaint will operate as an adjudication on the merits, precluding the EMC from seeking judicial review of the RRC's objections to the Proposed 1,4-Dioxane Amendments. Such dismissal would prejudice the Governor's constitutional duty to ensure the laws are faithfully executed with respect to the Proposed 1,4-Dioxane Amendments and the related *EMC vs. RRC* (23CV032096-910) Complaint. Thus, the Governor will be irreparably harmed if EMC carries out the dismissal of the *EMC vs. RRC* (23CV032096-910) Complaint authorized by the EMC.

33. Furthermore, enjoining the EMC from dismissing the *EMC vs. RRC* (23CV032096-910) Complaint is necessary for the protection of the Governor's rights during the course of this litigation. Although the EMC has voted to voluntarily dismiss the *EMC vs. RRC* (23CV032096-910) Complaint, a notice of dismissal has not yet been filed. Preliminary relief is necessary to enjoin the EMC's counsel from voluntarily dismissing the *EMC vs. RRC* (23CV032096-910) Complaint during the pendency of this litigation, which would ensure the Governor is able to faithfully carry out the constitutional duties reposed in his office.

**IV. The balance of equities and the public interest favor granting a temporary restraining order and preliminary injunction.**

34. The balance of equities favors an order granting this motion. Allowing the EMC to voluntarily dismiss the *EMC vs. RRC* (23CV032096-910) Complaint would prevent the Governor from performing his constitutional duty to ensure that the EMC faithfully executes the laws or impermissibly interfere with his ability to do so during the pendency of this litigation.

35. Further, granting this motion is in the public's interest. The people reserved their right to separation of powers in their Declaration of Rights, which provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art I, § 6. The public has an interest in preserving that separation during the pendency of this litigation.

**V. The Governor has provided notice of the motion to the EMC, its Commissioners, and the Defendants in this case.**

36. The undersigned certifies that it has given notice of these motions by serving the same upon Defendants through the Court's electronic case filing system. As to the EMC and its Commissioners, the undersigned has provided notice to the EMC's general counsel via email, addressed as follows:

North Carolina Environmental Management Commission  
c/o Bill Lane, General Counsel  
bill.lane@ncdenr.gov

37. The undersigned further certifies that notice will be given to Defendants, the EMC, and the Commissioners of the date, time, and location of the hearing on the motion for a Temporary Restraining Order in the same manner provided above when the hearing is set.

38. Hearing on the Motion for Temporary Restraining Order on January 11, 2024 is necessary because the EMC has directed its counsel to dismiss the *EMC vs. RRC* (23CV032096-910) Complaint today.

**VI. A single judge presiding in the Wake County Superior Court has jurisdiction to enter a temporary restraining order on the Governor's supplemental as-applied claims.**

39. A three-judge panel's jurisdiction is limited to "facial challenge[s] to the validity of an act of the General Assembly." N.C. Gen. Stat. § 1-267.1(a1). In the event any other challenge is raised, by either the plaintiff or defendant, that challenge must be heard first by a single judge.

40. North Carolina Rule of Civil Procedure 42 sets forth the relevant procedure. If a party raises a facial challenge, the Superior Court must transfer the

“portion” of the action raising the facial challenge to the three-judge panel. N.C. R. Civ. P. 42(b)(4). Consistent with principles of constitutional avoidance, the facial challenge will only be resolved “if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.” *Id.*; *see also Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 397 (2022) (Rule 42(b)(4) “requires [that] the transfer for the facial constitutional challenge should not happen until after a trial on the other unaffected claims in the lawsuit.” (quoting *Hull v. Brown*, 279 N.C. App. 570, 574 (2021))); *cf. Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 277 (2020) (noting that “it is well settled that ‘the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.’” (quoting *Anderson v. Assimos*, 356 N.C. 415, 416 (2002))).

41. Consistent with Rule 42(b), in his order transferring this matter to the Panel, the Wake County Senior Resident Superior Court Judge only transferred “the portions of this action” raising facial challenges to the General Assembly’s acts. Order Transferring to a Three-Judge Panel, No. 23CV028505-910 (N.C. Sup. Ct. Oct. 11, 2023); *see also Alexander v. N.C. State Bd. of Elections*, 2022-NCCOA-52, ¶ 26, 281 N.C. App. 495, 503 (N.C. 2022) (“[W]hen the trial court transferred the case to the three-judge panel, it transferred only the facial challenge to the validity of the law.”). All other portions of this action—including Plaintiff’s Supplemental Complaint—remain with under the Wake County Superior Court’s jurisdiction.

42. Plaintiff's Supplemental Complaint asserts as-applied claims regarding Session Law 2023-136 and the EMC. *See also Lakins*, 2022-NCCOA-337, ¶ 23 (explaining that “[a] facial challenge is an attack on a statute itself as opposed to a particular application” and holding that a single judge, rather than the panel, should have resolved defendants’ statute-of-limitations and other 12(b)(6) defenses). Accordingly, a single judge presiding in the Wake County Superior Court, rather than a three-judge panel, must hear this motion.

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

a. Issue a temporary restraining order and preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65 enjoining the EMC, its Commissioners, officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise, from voluntarily dismissing the EMC’s claims in *EMC vs. RRC* (23CV032096-910) during the pendency of this litigation; and

b. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 11th day of January, 2024.

/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 following parties via email as follows:

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This the 11th day of January, 2024.

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

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



**EXHIBIT A**  
**AFFIDAVIT OF PETER LEDFORD**

STATE OF NORTH CAROLINA  
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ROY A. COOPER, III, in his official  
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SPEAKER OF THE NORTH  
CAROLINA HOUSE OF  
REPRESENTATIVES; and THE  
STATE OF NORTH CAROLINA.

Defendants.

**AFFIDAVIT OF PETER LEDFORD**

I, Peter Ledford, being first duly sworn, depose and say:

1. I am over the age of 18 years and under no legal disability. I am competent to make this Affidavit and do so voluntarily. Except as specifically stated otherwise, I have personal knowledge of the facts stated herein.

2. I serve as the Governor's Clean Energy Director.

3. On January 11, 2024, I attended the regularly scheduled meeting of the full North Carolina Environmental Management Commission ("EMC").

4. At that meeting, the EMC had a "Discussion of EMC vs. RRC (23CV032096-910) – 1,4 Dioxane Rulemaking." Although listed on the agenda as an

information item, the Chair of the EMC, John (JD) Solomon, announced that was he was changing the item from an information item to an action item.

5. Following an executive session, the EMC considered whether to dismiss the EMC's Complaint in *Environmental Management Commission ("EMC") vs. Rules Review Commission ("RRC")* (23CV032096-910). On the record, during the EMC's deliberations, Commissioner Smith noted in her remarks that the Governor's administration opposed dismissal of the EMC's Complaint in *EMC vs. RRC* (23CV032096-910).

6. Commissioners Carter, Duggan, Keen, Baumgartner, Ellison, Solomon, Reardon, and Yarborough voted in favor of dismissing the EMC's Complaint in *EMC vs. RRC* (23CV032096-910). Commissioners Bailey, Deerhake, Lyerly, Gibson, Smith, Tweedy, and Weese voted against dismissing the EMC's Complaint in *EMC vs. RRC* (23CV032096-910). The total vote was 8-7, and as a result the motion before the EMC to dismiss the EMC's Complaint in *EMC vs. RRC* (23CV032096-910) passed.

FURTHER AFFIANT SAYETH NOT.


This the 11<sup>th</sup> day of January, 2024.

  
Peter Ledford

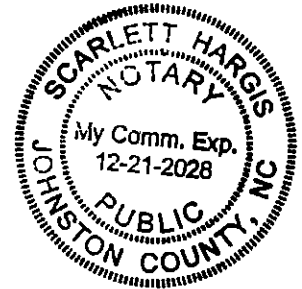
Wake County, North Carolina

Sworn to and subscribed before me this day by Peter Ledford

Date: Jan 11<sup>th</sup> 2024

 (signature), Notary Public

Scarlett Hargis (printed or typed name), Notary Public



(Official Seal)  
My commission expires: Dec. 21, 2028