

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV028505-910

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; THE STATE OF
NORTH CAROLINA; NORTH
CAROLINA ENVIRONMENTAL
MANAGEMENT COMMISSION; and
JOHN (JD) SOLOMON, in his official
capacity as CHAIR of the North
Carolina Environmental Management
Commission; CHRISTOPHER M.
DUGGAN, in his official capacity as
VICE-CHAIR of the North Carolina
Environmental Management
Commission; and YVONNE C. BAILEY,
TIMOTHY M. BAUMGARTNER,
CHARLES S. CARTER, MARION
DEERHAKE, MICHAEL S. ELLISON,
STEVEN P. KEEN, H. KIM LYERLY,
JACQUELINE M. GIBSON, JOSEPH
REARDON, ROBIN SMITH, KEVIN L.
TWEEDY, ELIZABETH J. WEESE, and
BILL YARBOROUGH, in their official
capacities as COMMISSIONERS of the
North Carolina Environmental
Management Commission,

Defendants.

LEGISLATIVE DEFENDANTS'
MOTION TO TRANSFER TO
THREE-JUDGE PANEL

Defendants Philp E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House (together, “Legislative Defendants”), through undersigned counsel and pursuant to N.C. Gen. Stat. § 1-267.1 and North Carolina Rule of Civil Procedure 42, hereby move to transfer Plaintiff’s Supplemental Complaint and all related proceedings to a Three-Judge Panel (the “Motion”). In support of this Motion, Legislative Defendants show the Court as follows:

1. Plaintiff Roy A. Cooper, III (the “Governor”) filed his Complaint on October 10, 2023, and simultaneously moved for a temporary restraining order and preliminary injunction enjoining, *inter alia*, certain provisions of Senate Bill 512, 2023 N.C. Sess. L. 136.

2. Following briefing and argument on the Governor’s motion for temporary restraining order and preliminary injunction, the Three-Judge Panel granted his motion in part but denied it as to the Environmental Management Commission (“EMC”) and Coastal Resources Commission.

3. Thereafter, on November 17, 2023, Legislative Defendants responded to the Governor’s Complaint.

4. On November 20, the Court entered the Case Management Order setting briefing deadlines for dispositive motions and the hearing in this case.

5. On December 8, 2023, pursuant to the Case Management Order, the Governor and Legislative Defendants submitted cross-motions for summary judgment and supporting briefs.

6. Responses to the motions for summary judgment were originally due on January 12, 2024.

7. At 11:24 am on January 11, counsel for the Governor notified the parties and the Court that the Governor intended to file a Supplemental Complaint, accompanied by another motion for temporary restraining order and preliminary injunction, (i) to assert a new as-applied challenge to Senate Bill 512 and (ii) to enjoin the EMC from dismissing a lawsuit filed by the EMC against the Rules Review Commission (“RRC”).

8. On January 11, the Governor’s counsel provided copies of the Governor’s Motion for Leave to File Supplemental Complaint, Motion for TRO, and a calendar request to have his Motion for TRO heard that same day.

9. In his Supplemental Complaint, the Governor purports to bring what he calls an “as-applied challenge” to Part II of Senate Bill 512 based on a recent vote by the EMC to voluntarily dismiss litigation it filed against the RRC related to its rejection of a rule proposed by the EMC. The Governor disagrees with the decision to voluntarily dismiss the *EMC v. RRC* litigation.

10. In reality, the Governor’s Supplemental Complaint merely reasserts the same facial challenge to Senate Bill 512’s amendments to the EMC’s membership structure that he raised in his original Complaint.

11. Specifically, the Governor’s purported “as-applied” challenge (i) is predicated upon the same exact theory as his facial challenge, and (ii) explicitly seeks

facial relief, *i.e.*, total invalidation of the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512, which pertain to the EMC.

12. Thus, the Governor's challenge is facial, and facial challenges to statutes must be submitted to a three-judge panel. N.C. Gen. Stat. § 1-267.1; N.C. Gen. Stat. § 1A-1, Rule 42(b)(4); *Lakins v. W. N. Carolina Conf. of United Methodist Church*, 283 N.C. App. 385, 391, 873 S.E.2d 667, 674 (2022).

WHEREFORE, the Legislative Defendants request that the Governor's Supplemental Complaint and all related proceedings be transferred to a three-judge panel in accordance with N.C. Gen. Stat. § 1A-1, Rule 42 and § 1-267.1. In further support of this Motion, Legislative Defendants will submit a memorandum of law no later than the morning of January 17, 2024.

Respectfully submitted this, the 16th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, I caused a copy of the foregoing has been served by email and regular, first-class mail to:

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