

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 TO STAY FURTHER
PROCEEDINGS ON PLAINTIFF'S
CLAIMS BEFORE THE THREE-
JUDGE PANEL**

Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, moves the Court for an order staying further proceedings on Plaintiff's claims before the Three-Judge Panel pending resolution Plaintiff's proposed supplemental as-applied claim (filed January 11, 2024).

INTRODUCTION

The Governor filed his Complaint in this action within hours of the General Assembly enactment of Session Law 2023-136, an obviously unconstitutional law. Given the immediate, significant disruption wrought by Session Law 2023-136, the Governor filed claims asserting several of the law's provisions were facially invalid,

and immediately sought preliminary relief enjoining Session Law 2023-136's implementation.

During the pendency of this matter before the Three-Judge Panel, the Commissioner of Agriculture appointed two members to the North Carolina Environmental Management Commission ("EMC"), reconstituting the EMC with a majority of Commissioners directly and indirectly controlled by the legislature, not the Governor.

Additionally, Session Law 2023-136's restructuring of the EMC has divested the Governor of sufficient control of the EMC to carry out his constitutional responsibility to ensure faithful execution of the laws under the jurisdiction of the EMC. In particular, the EMC has voted to voluntarily dismiss its claims seeking judicial review of a decision by the Rules Review Commission that violates state administrative law.

For the reasons detailed below, the Three-Judge Panel is required to stay hearing on the facial claims in this case pending resolution of the Governor's supplemental, as-applied claims challenging the constitutionality of Session Law 2023-136.

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

I. Additional actions taken by the Environmental Management Commission require the Governor to assert supplemental as-applied claims.

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 the facial validity of Session Law 2023-136 on October 10, 2023. The next day, the matter was transferred to the Three-Judge Panel.

3. On November 3, 2023, the Three-Judge Panel entered a preliminary injunction, enjoining enforcement of Session Law 2023-136's provisions regarding the Economic Investment Committee, Commission for Public Health, and the Board of Transportation. In its order, the Three-Judge Panel also denied the Governor's motion for preliminary injunction as to the Environmental Management Commission and Coastal Resources Commission.

4. On December 8, 2023, the parties filed cross-motions for summary judgment on Plaintiff's facial claims. Those motions are currently scheduled for hearing before the Three-Judge Panel on February 16, 2024.

5. In the meantime, on October 26, 2023, the Commissioner of Agriculture appointed two members to the North Carolina Environmental Management Commission ("EMC"), replacing two of the Governor's appointees and reducing the number of gubernatorial appointees to a minority of the commissioners.

6. As a result, the EMC voted to replace its Chair who had been appointed by the Governor on November 10, 2023. On January 11, 2024, it voted to dismiss litigation essential to advancing proposed rules needed to promote clean water in the State.

7. Because the EMC's actions have prevented the Governor from carrying out his constitutional responsibility to ensure faithful execution of the laws under the

jurisdiction of the EMC, the Governor filed (1) a motion for leave to file supplemental complaint with ex parte application to be heard on shortened notice, (2) a motion for temporary restraining order and preliminary injunction seeking to prevent the EMC from dismissing its lawsuit, and (3) this motion to stay.

II. Rule 42 requires a stay of the facial claims in this matter pending resolution of the Governor’s supplemental as-applied claims.

8. 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.

9. 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. Assimios*, 356 N.C. 415, 416 (2002)).

10. 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.

11. 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).

12. The canon of constitutional avoidance calls for resolution of as-applied challenges to a statute’s validity prior to resolving a facial challenge. *See* N.C. R. Civ. P. 42(b)(4); *Anderson*, 356 N.C. at 416 (“[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.”); *see also Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484–85 (1989).

13. Both the Rule 42 of the North Carolina Rules of Civil Procedure and sound principles of constitutional interpretation call for a stay of the facial claims before the Three-Judge Panel pending resolution of the Supplemental Complaint. As set out in the Supplemental Complaint, resolution of the as-applied claim is necessary to resolve separation of powers issues impacting, among others, the Governor, the General Assembly, the EMC, the North Carolina Rules Review Commission (“RRC”), the Office of State Budget and Management (“OSBM”), and the public.

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

- a. Stay hearing on the facial constitutional claims before the Three-Judge Panel pending adjudication of Plaintiff’s supplemental, as-applied claim;
- b. Retain jurisdiction over the preliminary injunction issued by the Three-Judge Panel on Plaintiff’s facial constitutional pending adjudication of Plaintiff’s supplemental, as-applied claim;
- c. Grant such other and further relief as the Court deems just and proper.

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

/s/ Amanda S. Hawkins

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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.

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By: /s/ Amanda S. Hawkins
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