

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

17 CVS 5084

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, N.C.

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.

**PLAINTIFF'S MOTION FOR STAY
PENDING APPEAL AND REQUEST
FOR EXPEDITED DETERMINATION**

Plaintiff Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina, pursuant to North Carolina Rule of Civil Procedure 62(c), North Carolina Rules of Appellate Procedure 8(a) and 23(c), and N.C. Gen. Stat. § 1-500, moves the Court to stay the effectiveness of Sections 3 through 22 of Session Law 2017-6 (the "Act") during the pendency of Plaintiff's appeal. The Governor further requests that the Court provide an expedited ruling on this Motion.

In support of this Motion, Plaintiff shows:

1. On 1 June 2017, this Court entered its final judgment dismissing the Governor's claims pursuant to N.C. R. Civ. P. 12(b)(1) (the "Order").
2. On 6 June 2017, the Governor duly noticed his appeal from the Order.

INTRODUCTION

3. Since the Court entered its Order on 1 June 2017, the underpinnings of Defendants' legal defenses have fundamentally shifted, and the reasons that this Court should enter a stay have become all too clear.

4. On 5 June 2017, for the second time in two weeks, the United States Supreme Court ruled that the General Assembly engaged in unconstitutional racial gerrymandering with respect to congressional and legislative districts. *See North Carolina v. Covington*, 581 U.S. --- (June 5, 2017); *Cooper v. Harris*, 197 L. Ed. 2d 837 (U.S. May, 22, 2017).

5. As further argued below, those rulings demonstrate exactly why the Act must be stayed until an appellate court can closely scrutinize the constitutionality of the General Assembly's enactment.

* * *

6. Under Article III, Section 4 of North Carolina Constitution, the Governor is required, before entering office, to take an oath "that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of governor."

7. As his oath made clear, the Governor must ensure execution of both state and federal law. That is what our Constitution and the Supremacy Clause of the United States Constitution require.

8. The Governor's duty to ensure that the State complies with federal law is nowhere more important than in the area of elections law and voting rights.

9. Since 2011, Defendants have made wholesale changes in the State's elections law, including multiple rounds of redistricting at the local, state, and congressional level and, most famously, with voter ID and changes to early voting.

10. There have been numerous challenges to all those changes in state and federal court. The result, so far, is that the legislature has lost every single challenge—one challenge to the voter ID law and six different challenges to local, state, and congressional redistricting. And that calculation does not even include judicial retention elections or the challenges filed by the Governor.

11. In invalidating the legislature's voter ID law, the Fourth Circuit held that the law "targeted African-Americans with almost surgical precision." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). *See also Covington*, 581 U.S. --- ; *Harris*, 197 L. Ed. 2d 837 (both ruling that the General Assembly relied on unconstitutional racial gerrymandering in drawing districts).

12. It is the Governor's duty to execute the laws. And under our Constitution, the United States Constitution, and the oath sworn by the Governor, it is his duty to ensure that the laws he executes do not violate federal law. That is why it is so critical that this Court enter a stay of the Act pending appeal.

THE LEGAL STANDARD

13. N.C. Gen. Stat. § 1-500 provides that a trial court may, in its discretion, issue an injunction even if it denies the Governor's claims on the merits when an "injunction is the principal relief sought by the plaintiff" and it appears that "denying said injunction will enable the defendant to consummate the threatened act, sought

to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court. . . .” N.C. Gen. Stat. § 1-500.

14. Section 1-500 has previously been used in just that circumstance. In *GI Surplus Store, Inc. v. Hunter*, a trial court denied a plaintiff's claims of unconstitutionality, but nevertheless enjoined the challenged act. The Supreme Court ultimately upheld the injunction as proper but reversed the substantive ruling of the trial court, finding the challenged act unconstitutional. 257 N.C. 206, 214, 125 S.E.2d 764, 770 (1962).

15. Even beyond N.C. Gen. Stat. § 1-500, this Court has the statutory authority and discretion to enter a stay to protect the rights of the litigants during the pendency of the appeal. *See, e.g.*, N.C. R. App. P. 8(a) (requiring appellants to seek stay pending appeal first from the trial court); N.C. R. App. P. 23(e); N.C. R. Civ. P. 62(c).

WHY A STAY IS NECESSARY

16. Staying the effectiveness of the Act during the pendency of the Governor's appeal will preserve the ultimate relief that the Governor seeks. If the Governor is successful on appeal, he will not suffer injury from the Act taking effect before a final appellate determination of constitutionality can be made.

17. As detailed in the Governor's Complaint and summary judgment briefing, if the Act is allowed to continue to have effect during the Governor's appeal, the unconstitutionally structured New State Board will be in place for the 2017

election cycle and, most likely, the 2018 election cycle. As a result, if the Act is ultimately found to be unconstitutional, for at least two election cycles the Governor will have suffered the constitutional harm of the General Assembly—through the Act—preventing him from his core duty to ensure faithful execution of the State’s elections and ethics laws.

COVINGTON DEMONSTRATES THE IMPORTANCE OF A STAY

18. A stay of the Act pending appeal is especially important in light of the United States Supreme Court’s rulings in *North Carolina v. Covington*, in which the Court (a) summarily affirmed a lower court ruling declaring 28 of the State’s legislative districts to be unconstitutionally racially gerrymandered; and (b) ordered the lower court to decide whether new legislative elections should be held in 2017.

19. Both rulings in *Covington* counsel in favor of a stay.

20. As to the first ruling, the United States Supreme Court has now summarily affirmed that Defendants were elected as a result of unconstitutional racial gerrymandering. As detailed above, since the complaint in this case was filed, the United States Supreme Court has twice ruled that Defendants engaged in unconstitutional racial gerrymandering.

21. In light of Defendants’ inability, or unwillingness, to comply with federal and state law relating to voting rights, this Court should stay the effectiveness of the Act until an appellate court can rule on the constitutionality of the challenged statute. At least in the area of elections law and voting rights, recent history has

demonstrated that Defendants' enactments must be carefully scrutinized and squared with the federal and state constitutions.

22. Defendants, in short, should not be allowed to use the so-called "presumption of constitutionality" as a shield to enforce unconstitutional laws.

23. As to the second *Covington* ruling, with the potential for special legislative elections to be held in about five months, it is critically important that the State Board of Elections be prepared to hold fair, orderly elections. For that reason, a stay is appropriate. North Carolina's government has functioned since 1901 with a five-member State Board of Elections that provides the Governor adequate control over that core executive agency to ensure the faithful execution of the State's election laws. A stay of the Act during the pendency of the Governor's appeal will simply preserve the status quo that has existed, largely untouched, since 1901.

THE ACT, BY ITS OWN TERMS, IS UNWORKABLE

24. By contrast, the Act, if allowed to continue to have effect, is simply unworkable as enacted. As just one example, under N.C. Gen. Stat. § 138A-22(a), the putative members of the New State Board and the Executive Director "shall not be appointed, employed, or receive a certificate of election, prior to submission by the [State Ethics] Commission of the Commission's evaluation of the [Statement of Economic Interest] in accordance with this Article." Yet, the Act has destroyed the Ethics Commission.

25. As a result, there is no board to evaluate the Statements of Economic Interest of the putative new board members, meaning the new board members cannot be appointed.

26. By destroying the State Board of Elections and the State Ethics Commission before the New State Board was constituted and appointed, Defendants have created a board that cannot be filled, leaving a vacuum in the State's elections and ethics enforcement.

REQUEST FOR EXPEDITED RULING

27. The Rules of Appellate Procedure require the Governor to first seek relief from this Court before seeking a stay from the Court of Appeals or the Supreme Court. In order to shorten the period of any uncertainty for the State Board of Elections, the Governor respectfully requests that this Court provide an expedited ruling on this Motion.

28. For the convenience of the Court, a proposed order is attached. The Governor does not intend to submit a brief in support of this Motion and consents to this Court considering this Motion on the written submissions and without oral argument.

WHEREFORE, Plaintiff Governor Cooper prays that the Court:

- a. Enter an order staying the effectiveness of Sections 3 through 22 of Session Law 2017-6 during the pendency of the Governor's appeal; and
- b. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 6th day of June, 2017.



Jim W. Phillips, Jr.
N.C. State Bar No. 12516
jphillips@brookspierce.com

Eric M. David
N.C. State Bar No. 38118
edavid@brookspierce.com

Daniel F.E. Smith
N.C. State Bar No. 41601
dsmith@brookspierce.com

*Attorneys for Plaintiff Roy A. Cooper, III,
Governor of the State of North Carolina*

OF COUNSEL:

**BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.**

Suite 2000 Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
(336) 373-8850
(336) 378-1001 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via e-mail and first-class United States Mail:

Noah H. Huffstetler, III
D. Martin Warf
Nelson Mullins Riley & Scarborough LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612

Grayson G. Kelley
Alec Peters
North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602

This the 6th day of June, 2017.

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

By:



Eric M. David