

No. _____

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT

From Wake County
No. 18-CVS-9805

GOVERNOR ROY A. COOPER, III'S CONDITIONAL PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS AND MOTION TO SUSPEND APPELLATE RULES

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Plaintiff Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina (“the Governor”) respectfully petitions this Court to certify for discretionary review, prior to determination by the Court of Appeals, the 21 August 2018 Order on Injunctive Relief (the “Order”) entered by a three-judge panel in Wake County case numbers 18-CVS-9805 and 18-CVS-9806, on grounds that this Court should determine any appeals regarding the constitutional questions of exceptional importance and extreme urgency presented in these related matters, as well as any related petitions or motions seeking review or stay of the Order.¹

INTRODUCTION

On 4 August 2018, hours after the General Assembly adjourned a special Saturday session, the Governor served counsel for the Legislative Defendants and counsel for the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and James A. (“Andy”) Penry (the “State Board Defendants”) with a complaint and motions for injunctive relief. The Governor challenged ballot language that purported to describe two of the six proposed amendments the General Assembly planned to submit to voters in the general election on 6 November 2018. More specifically, he alleged that the ballot language in Session

¹ This petition is conditional on an appeal of the Order being noticed by Defendants Philip E. Berger and Timothy K. Moore (the “Legislative Defendants”). The Governor is filing this conditional petition now because, as explained further below, (1) the Legislative Defendants have already signaled that they will appeal the Order, (2) one of the plaintiffs in Wake County case number 18-CVS-9806 has already appealed portions of the Order and sought discretionary review in this Court prior to determination by the Court of Appeals, and (3) this litigation has singular urgency due to impending deadlines for finalizing the ballot for the November 2018 general election.

Law 2018-117, § 5 and Session Law 2018-118, § 6 violated North Carolina law because that language did not fairly and accurately describe to voters the proposed amendments to the Constitution. As soon as the Wake County Courthouse opened on Monday morning, 6 August 2018, the Governor formally filed his complaint in case number 18-CVS-9805 (the “Governor’s Case”).

That same morning, the North Carolina State Conference of the National Association for the Advancement of Colored People (“NAACP”) and Clean Air Carolina also filed a complaint in case number 18-CVS-9806 (the “NAACP Case”). The NAACP challenged the same ballot questions as the Governor, as well as two additional questions.

That afternoon, the State Board Defendants filed their responsive papers in the Governor’s Case. The State Board Defendants answered the Governor’s complaint, crossclaimed against the Legislative Defendants, and moved for injunctive relief that would relieve the State Board Defendants of any obligation to place the ballot questions challenged by the Governor on the November 2018 ballot.

The following morning, Judge Ridgeway heard argument on motions for injunctive relief in both the Governor’s Case and the NAACP Case. At the conclusion of this 7 August 2018 hearing, Judge Ridgeway concluded that both cases presented facial constitutional challenges and should be assigned to a three-judge panel under N.C. Gen. Stat. § 1-267.1. As Senior Resident Superior Court Judge, he noted that he would confer with the Chief Justice to “impress upon him my view that this is a matter of great urgency and importance,” and that he

believed a three-judge panel should be convened promptly. Judge Ridgeway signed his order just minutes after the hearing concluded, and Chief Justice Martin entered an order that same afternoon constituting a panel of Judges Forrest D. Bridges, Thomas H. Lock, and Jeffery K. Carpenter.

On 15 August 2018, following expedited briefing, the panel heard a full day of argument on the pending motions for injunctive relief in the Governor's Case and the NAACP Case, as well as several procedural matters.² At the conclusion of this hearing, the panel announced its intent to enter a temporary order that would enable the panel to decide the pending motions on an expedited basis and facilitate appellate proceedings, which it viewed as nearly certain to occur regardless of its ultimate decision. On 20 August 2018, the court entered its Order on Temporary Measures. That order instructs the State Board Defendants not to take any action on the ballots for the November 2018 general election until the earlier of (a) 11:59 p.m. on Friday, August 31, 2018, (b) 11:59 p.m. on the third non-weekend day after the entry of the panel's Order on Injunctive Relief, or (c) any other expiration date stated in a further order of the panel or an appellate court.

On 21 August 2018, a majority of the panel entered the Order in both the Governor's Case and the NAACP Case and enjoined the two questions challenged by the Governor from appearing on the ballot. Although the panel noted that the claims in the two cases do not overlap fully, "in order to promote judicial efficiency and expediency," it consolidated the cases "for purposes of consideration of the

² A video recording of the 15 August hearing in the Governor's Case is available at this link: <https://www.wral.com/news/state/nccapitol/video/17770741/>.

arguments and entry of this Order.” Order ¶ 1. The Order granted the Governor’s motion for preliminary injunction, granted the State Board Defendants’ motion, and granted in part and denied in part the NAACP’s motion. The Court also recognized the “significance and the urgency of the questions presented by this litigation” and the fact that all parties “have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed.” Order ¶¶ 61, 62.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C. Gen. Stat. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, the Governor respectfully petitions this Court, in the event that the Legislative Defendants appeal the Order, to exercise its authority to grant discretionary review of the Order prior to determination by the Court of Appeals. Recognizing that a bypass petition by the party prevailing below is not a common request, the Governor submits that this procedure is nevertheless warranted here.

As an initial matter, the NAACP has noticed an appeal of the Order and petitioned this Court for discretionary review prior to determination by the Court of Appeals. The Order addresses the claims of both the Governor and the NAACP in a single ruling, and an appellate ruling in the NAACP Case could have implications for the Governor’s Case. Accordingly, to the extent that this Court grants discretionary review in the NAACP Case, it makes practical sense for this Court to grant discretionary review in the Governor’s Case as well.

Even if this Court does not grant discretionary review in the NAACP Case, however, discretionary review is independently warranted in the Governor’s Case.

The Legislative Defendants' counsel indicated at the 15 August hearing that the Legislative Defendants were likely to appeal any adverse ruling. As contemplated by the panel in both the Order and the Order on Temporary Measures, there is therefore every indication that appellate review will now be sought. These appellate proceedings will need to move quickly, and the Governor does not believe that the timing of this matter will permit two levels of appellate review. Thus, the need to expedite any appeal justifies granting discretionary review prior to determination by the Court of Appeals.

Finally, as set forth in more detail below, this case satisfies *all five* of the statutory criteria for certification prior to determination by the Court of Appeals in N.C. Gen. Stat. § 7A-31(b), any *one* of which is sufficient to justify this Court's exercise of discretionary review. Accordingly, in support of this petition, the Governor incorporates the background above, and shows the Court the following:

**REASONS WHY CERTIFICATION SHOULD ISSUE PRIOR TO
DETERMINATION BY THE COURT OF APPEALS**

I. The subject matter of the appeal has significant public interest.

The outcome of the Governor's Case will determine whether ballot questions purporting to describe two proposed amendments to the North Carolina Constitution may appear on the November 2018 general election ballot. These proposed amendments and the challenges to the ballot questions have been featured in numerous newspaper articles, television and radio broadcasts, and political cartoons. Earlier this month, all five living former governors of North Carolina gathered across party lines to condemn the ballot questions challenged in the

Governor's Case, as well as the corresponding proposed amendments, in a press conference that was streamed live and featured prominently in reporting across the State. There can be no dispute that the subject matter of the appeal has significant public interest. *See* N.C. Gen. Stat. § 7A-31(b)(1).

II. The cause involves legal principles of major significance to the jurisprudence of the State.

There is also no question that this litigation meets the second factor under Section 7A-31(b), which asks whether the cause involves legal principles of major significance to the jurisprudence of the State. The central question presented by this case is whether truthfulness and accuracy are required in seeking the consent of the people of North Carolina to amend their Constitution. To call this a legal principle of major significance is an understatement.

The significance of this principle is amplified by the fact that one of the proposed amendments at issue involves the Separation of Powers Clause itself, a provision the Court has expressly and recently recognized as a “cornerstone” and a “fundamental principle[]” of our system of government. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 649, 781 S.E.2d 248, 258 (2016) (quoting *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 84 (1982)); *Cooper v. Berger*, 370 N.C. 392, 401, 407, 809 S.E.2d 98, 103, 107 (2018).

Finally, this Court's recent decisions are themselves precedents of major significance to the jurisprudence of the State. Those precedents would be effectively torn from the case reports if the General Assembly were permitted to mislead the voters into ratifying the proposed amendments at issue here. This case therefore

satisfies the Section 7A-31(b)(2) significance criterion on every possible level, from the abrogation of major precedents to the subject matter of the proposed amendments and the constitutional requirements for ballot questions.

III. Delay in the final adjudication is likely to result from failure to certify and thereby cause substantial harm.

The third statutory justification for discretionary review offers an independent basis for this Court's immediate and direct review: delay in the final adjudication of this case could cause significant and irreparable harm. *See* N.C. Gen. Stat. § 7A-31(b)(3). With the federal deadline for making absentee ballots available to voters rapidly approaching, there is limited time to resolve this case, a fact that the panel and Judge Ridgeway all acknowledged. Thus, although the Governor firmly believes that the panel's careful and well-reasoned Order will withstand any review sought by the Legislative Defendants, a failure to certify the case for review risks substantial harm to the extent that it would deprive this Court of sufficient time to resolve any forthcoming appellate motions or petitions.

IV. The workload of the courts of the appellate division is such that the expeditious administration of justice requires certification.

In the unusual circumstances of this case, the workload of the appellate courts also supports the conclusion that certification is necessary. *See* N.C. Gen. Stat. § 7A-31(b)(4). There is simply no time for two levels of appellate review here. Given that only one appellate court could possibly handle any appellate proceedings in the time remaining before ballots must be finalized, it should be this Court, which is charged with the constitutional responsibility of standing as a "final check" on the legislature through the exercise of "judicial review, the implied constitutional

authority of the court to decide if a law violates the constitution.” *McCrorry*, 368 N.C. at 653, 781 S.E.2d at 261 (citing *Bayard v. Singleton*, 1 N.C. 5, 6-7 (1787)).

V. The subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.

This Court has the authority to immediately review decisions of lower courts when they are important to the jurisdiction and integrity of the court system. N.C. Gen. Stat. § 7A-31(b)(5). In proceedings before Judge Ridgeway and the three-judge panel, the Legislative Defendants repeatedly asserted that North Carolina courts have no role to play in evaluating challenges to ballot questions seeking the consent of voters to amend the Constitution. Accepting this proffered limitation on the authority of the judicial branch would leave the legislative branch free to pursue constitutional amendments through subterfuge by proposing amendments without fairly and accurately informing the voters of the proposed changes. This represents a significant risk to the Court’s jurisdiction to determine constitutional questions.

Moreover, one of the proposed amendments at issue involves changes to the appointment process for filling judicial vacancies. The panel expressly found that the ballot question concerning this proposal is misleading, does not sufficiently inform the voters, and does not enable the voters to express intelligently their opinions on the proposed amendment. Order ¶ 57. Accordingly, the “subject matter of the appeal”—whether voters can be misled in deciding whether to amend the constitutional process for filling judicial vacancies—implicates the integrity of our state’s court system.

WHEREFORE, the Governor respectfully requests that, to the extent that the Legislative Defendants pursue an appeal of the Order, this Court allow discretionary review of the Order before any determination by the Court of Appeals.

ISSUE FOR WHICH REVIEW IS SOUGHT

The Governor conditionally and respectfully requests that the Court allow discretionary review on the following issue:

Whether the three-judge panel correctly enjoined the ballot questions challenged by the Governor from appearing on the ballot for the November 2018 general election because those ballot questions violate North Carolina law.

**MOTION TO SUSPEND APPELLATE RULES
TO EXPEDITE DECISION IN THE PUBLIC INTEREST**

Pursuant to Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, the Governor respectfully moves that the Court consider the above petition at this time notwithstanding that a record has not yet been docketed in the Court of Appeals, as would generally be required under Appellate Rules 15(a) and 15(b). Due to the exigencies of this case, time would not permit the filing of a formal record prior to seeking this Court's review of any appeal pursued by the Legislative Defendants. Because of the significant public interest in this case, as discussed above, expediting the treatment of the petition would also serve the public interest as provided under Appellate Rule 2. This case presents exactly the sort of unusual, context-specific situation where suspending the Appellate Rules to expedite decision in the public interest is justified.

WHEREFORE, the Governor respectfully requests that the Court suspend the operation of Appellate Rules 15(a) and 15(b) pursuant to Appellate Rules 2 and

37(a) and consider the Governor's petition for discretionary review immediately, without awaiting docketing in the Court of Appeals.

CONCLUSION

The Governor respectfully requests that this Court allow discretionary review prior to determination by the Court of Appeals and suspend the appellate rules to expedite a decision on these matters in the public interest.

Respectfully submitted this 22nd day of August, 2018.

ROBINSON, BRADSHAW & HINSON, P.A.

Electronically Submitted

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N.C. R. App. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email and U.S. First Class Mail:

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This 22nd day of August, 2018.

Electronically Submitted
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