

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

Civil Action No.

NORTH CAROLINA STATE)
CONFERENCE OF THE NATIONAL)
ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE,)
and CLEAN AIR CAROLINA,)

Plaintiffs,)

v.)

TIM MOORE, in his official capacity, PHILIP)
BERGER, in his official capacity, THE)
NORTH CAROLINA BIPARTISAN STATE)
BOARD OF ELECTIONS AND ETHICS)
ENFORCEMENT, ANDREW PENRY, in his)
official capacity, JOSHUA MALCOLM, in)
his official capacity, KEN RAYMOND, in his)
official capacity, STELLA ANDERSON, in)
her official capacity, DAMON CIRCOSTA, in)
his official capacity, STACY EGGERS IV, in)
his official capacity, JAY HEMPHILL, in his)
official capacity, VALERIE JOHNSON, in her)
official capacity, JOHN LEWIS, in his official)
capacity.)

Defendants.)
_____)
)

**PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION AND REQUEST FOR
AN EXPEDITED HEARING**

N.C. Civ. Pro. R. 65

Plaintiffs the North Carolina State Conference for the National Association for the Advancement of Colored People (“NC NAACP”) and Clean Air Carolina (“CAC”) (collectively, “Plaintiffs”) respectfully move the Court for a temporary restraining order (“TRO”) and preliminary injunction (“PI”) against Defendants, Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives, Philip Berger, in his official capacity as President Pro Tem of the North Carolina Senate, the North Carolina Bipartisan State Board of

Elections and Ethics Enforcement (“SBE”), Andrew Penry, in his official capacity as a board member of the SBE, Joshua Malcolm, in his official capacity as a board member of the SBE, Ken Raymond, in his official capacity as a board member of the SBE, Stella Anderson, in her official capacity as a board member of the SBE, Damon Circosta, in his official capacity as a board member of the SBE, Stacy Eggers IV, in his official capacity as a board member of the SBE, Jay Hemphill, in his official capacity as a board member of the SBE, Valerie Johnson, in her official capacity as a board member of the SBE, and John Lewis, in his official capacity as a board member of the SBE (collectively “Defendants”) pursuant to Rule 65 of the North Carolina Rules of Civil Procedure.

Plaintiffs seek immediate and permanent injunctive relief preventing the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot. Plaintiffs assert that they are likely to be successful on the merits of the underlying case and that they will sustain irreparable harm unless the TRO and PI are issued. Plaintiffs request an expedited hearing on the matter pursuant to Local Rule 14.4.

In support of this Motion, Plaintiffs show the Court the following:

1. On August 6, 2018, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief pursuant to N.C. Gen. Stat. §§ 1-253, et seq., and Rules 65 and 57 of the North Carolina Rule of Civil Procedure in the above-captioned action.
 - a. Plaintiffs seek a declaration that following the U.S. Supreme Court’s ruling in *Covington v. North Carolina*, *North Carolina v. Covington*, 581 U.S. —, 137 S.Ct. 2211, (2017) (per curiam), for which mandate issued

on June 30, 2017, the N.C.G.A. ceased to be a legislature with any *de facto* lawful authority and assumed usurper status.

- b. Plaintiffs seek a declaration that a usurper legislature is not empowered to place constitutional amendments on the ballot pursuant to N.C. Const. art. I § 2, 3, 35 and art. XIII § 4.
- c. Plaintiffs seek a declaration that N.C.G.A.'s passage of Senate Bills 814 and 75 and House Bills 913 and 1092, which would place four constitutional amendment proposals on the ballot was unconstitutional and ask that these laws be declared void *ab initio*.
- d. Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. art. I § 3 and art. XIII § 4 when it enacted vague, incomplete and misleading ballot language to describe the constitutional amendments contained in Senate Bills 75, 814 and House Bills 913 and 1092.
- e. Plaintiffs seek a declaration that the N.C.G.A. violated N.C. Const. art. I § 3 and art. XIII § 4 when it passed proposed constitutional amendments that are vague, incomplete, and misleading as contained in Senate Bill 814 and House Bills 913 and 1092.

2. The United States Supreme Court has ruled that twenty-eight North Carolina legislative districts were illegal racial gerrymanders in violation of the Equal Protection Clause of the Fourteen Amendment of the United States Constitution and the Voting Rights Act. *Covington* 137 S. Ct. at 2211. Mandate issued on this ruling on June 30, 2017.

3. In the 2018 legislative session, the N.C.G.A. drafted and passed into law six constitutional amendment proposals, which were ratified by both houses on June 28, 2018.

(House Bill 1092, Senate Bill 75, House Bill 551, House Bill 913, Senate Bill 677 and Senate Bill 814). Four of those proposed amendments achieved the required three-fifths majority in both houses of the legislature by only one or two votes. The proposed amendments are House Bill 1092, Senate Bill 75, House Bill 913, Senate Bill 814. In the present action, Plaintiffs challenge these as the invalid acts of an unconstitutional usurper legislature. They further challenge the proposed amendments as unconstitutional acts of the N.C.G.A. because they are vague, incomplete, and misleading, and the language with which they will be presented to the voter is vague, incomplete, and in some cases intentionally misleading.

4. Plaintiffs seek a TRO and PI because Plaintiffs will be seriously and irreparably harmed by the proposed constitutional amendments, which are the product of illegal acts by an unconstitutional, racially-gerrymandered usurper N.C.G.A. and that would further augment the power of this unconstitutional body while limiting the power of voters and the executive branch.

5. Plaintiffs seek a TRO and PI to prevent serious and irreparable harm to Plaintiffs that will arise if these vague and incomplete amendment proposals are placed on the ballot with the misleading, false language proposed by the N.C.G.A.

6. Unless the court grants emergency preliminary relief, Plaintiffs will be required to immediately devote substantial resources to educating their members and the public about the unlawful proposed amendments.

7. This court has inherent authority to issue a TRO or PI to preserve the status quo of parties during litigation “(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 402, 302

S.E.2d754, 759 (1983) (internal citations omitted). “The issuance of a TRO ‘is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities.’” *Nat’l Surgery Ctr. Holdings, Inc. v. Surgical Inst. of Viewmont, LLC*, No. 16 CVS 1003, 2016 WL 2757972, at *3 (N.C. Super. May 12, 2016) (quoting *A.E.P. Indust., Inc.* at 759).

8. As is detailed in Plaintiffs’ memorandum in support of this motion, Plaintiffs are likely to succeed on the merits of their claims. The proposed constitutional amendments are the act of an illegally-constituted usurper legislature and thus invalid. Moreover, the vague, incomplete, and misleading language with which the proposed amendments will be presented to voters violates the constitutional requirements for amendment proposals. N.C. Const. art. I § 2, 3, 35 and art XIII § 4.

9. When considering whether a plaintiff is likely to suffer irreparable loss absent an injunction, a judge “should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted.” *Williams v. Greene*, 36 N.C. App. 80, 86 (1978). As outlined in detail in Plaintiffs’ Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, the harm to Defendants in this case is negligible. A legally constituted N.C.G.A. will have the opportunity to place constitutional amendment proposals on the ballot at any time in the future, so long as those amendments are legally constituted.

10. The Court should grant preliminary injunctive relief because it is in the public interest. *Huggins v. Wake Cty. Bd. of Educ.*, 272 N.C. 33, 42, 157 S.E.2d 703, 709 (1967) (considering the disruption to the operation of a school and the interest of the children enrolled therein and the interests of the public in their education). There is a significant public interest in ensuring that the voting public is not presented with amendments to ratify that may later be

deemed unconstitutional. Such an event would result in chaos, and would be likely to lead to years of confusion while the constitutionality of the amendments and their myriad implications are determined by the judicial system. The public interest weighs in favor of action now.

11. Plaintiffs seek a TRO and PI to prevent the N.C. Bipartisan State Board of Elections and Ethics Enforcement from placing the constitutional amendment proposals authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot. This is necessary pending a trial on the merits in this case. Plaintiffs are likely to succeed on the merits of their claims that the N.C.G.A. is in violation of N.C. Const. art. I § 2, 3, 35; art XIII § 4, first, because to the extent that the usurper N.C.G.A. has any limited power to engage in acts, that power certainly does not extend to the authority to propose amendments to the Constitution; and, second, because the N.C.G.A. violated the requirement in N.C. Const. art XIII § 4 to submit the proposed constitutional amendments to the public because it used vague and misleading language to describe the constitutional amendment proposals on the ballot and because the amendments themselves are vague and incomplete and thus also acted in violation of N.C. Const. art. I § 2, 3, 35. Placing the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November 2018 ballot will result in irreparable injury to Plaintiffs.

12. Plaintiffs respectfully request that, in view of the circumstances of this case, the Court exercise its discretion to require no security or only a nominal security and set the matter for expedited hearing as permitted under Local Rule 14.4.

WHEREFORE, Plaintiffs respectfully request that:

1. The Court enter a Temporary Restraining Order and Preliminary Injunction enjoining the N.C. Bipartisan State Board of Elections and Ethics Enforcement from taking any

steps to place the constitutional amendments authorized by Senate Bills 814 and 75 and House Bills 913 and 1092 on the November, 2018 ballot.

2. The Court order the restraining order and injunction to remain in effect for the duration of this litigation.

3. The Court order that no security be required.

4. The Court set this matter for expedited hearing for August 7, 2018.

5. The Court grant such other and further relief as is just and proper.

Respectfully submitted this 6th day of August, 2018.

s/ Kimberley Hunter
s/ Derb S. Carter, jnr.

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