No. 21-709 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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TAMIKA WALTER KELLY, KRISTY MOORE, AMANDA HOWELL, KATE MEININGER, ELIZABETH MEININGER, JOHN SHERRY, and RIVCA RACHEL SANOGUEIRA,	)	
PLAINTIFFS,	)	FROM WAKE/COUNTY NO. 20-CVS-8346
v.	)	
THE STATE OF NORTH CAROLINA and NORTH CAROLINA STATE EDUCATION ASSISTANCE AUTHORITY,	)	
DEFENDANTS,	)	
PHILIP 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 of Representatives, collectively on behalf of the General Assembly and in their capacities as agents of the State*,	)	
LEGISLATIVE INTERVENOR-DEFENDANTS	)	
JANET NUNN, CHRISTOPHER and NICHOLE PEEDIN, and KATRINA POWERS,	)	
INTERVENOR-DEFENDANTS.	)	

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REPLY BRIEF OF LEGISLATIVE INTERVENOR-DEFENDANTS-APPELLANTS

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REPLY BRIEF OF LEGISLATIVE INTERVENOR-DEFENDANTS-APPELLANTS

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ARGUMENT

I. Plaintiffs' challenge to the OSP is facial in nature and should be transferred to a three-judge panel.

A. Under North Carolina law, Plaintiffs' claims are facial because they request relief beyond themselves.

When parties request relief that extends beyond themselves, North Carolina courts construe the claims as facial. *Grady v. State*, 372 N.C. 509, 548-50, 831 S.E.2d 542, 548-50 (2019), *M.E. v. T.J.*, 2022-NCSC-23, ¶¶ 61, 69; *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 441 (M.D.N.C. 1999). In their Complaint, Plaintiffs ask this Court to declare the OSP unconstitutional in its entirety, to enjoin the State from selecting *any* scholarship recipients, and to prohibit it from disbursing *any* money from the OSP's Reserve Fund. (R pp 40-41) (prayer for relief). Further, Plaintiffs claims do not rest on any facts showing how the Program was applied in their case. Because Plaintiffs seek to affect tens of thousands of scholarship students other than themselves by denying them participation in the Program, their claims are facial. *See Frye*, 109 F. Supp. 2d at 440-41 (the broad nature of "the relief [plaintiffs] seek[ ]" is one of two "hallmarks of a facial claim").

Plaintiffs' case has morphed over the course of this appeal. They now "concede that the statutes authorizing the Program are facially valid." Pls.-Appellees' Br. 26 (citing *Hart v. State*, 368 N.C. 122, 774 S.E.2d 281 (2015); *Richardson v. State*, 368 N.C. 158, 774 S.E.2d 304 (2015)). They even attempted to amend their Complaint *after* their challenge was held to be as-applied by periodically adding the words "as-implemented" throughout, but the trial court declined to rule on that motion because

the case was on appeal. (R pp 110-96). Now that it has become clear that the law weighs against construing their challenge to be as-applied, they are attempting to backpedal by abandoning the relief sought in their Complaint.

Plaintiffs correctly note that the trial court will ultimately determine the relief, but they claim the determination will somehow be made regardless of what relief they prayed for. Pls.-Appellees' Br. 35. Amazingly, they conclude, "We do not know what remedy the trial court will allow." *Id.* at 36. So, almost two years into the prosecution of their lawsuit, Plaintiffs still do not know what it is they are asking for. Regardless, whether they are asking for the entire Program to be shut down or for it to be partially shut down, the relief they seek extends beyond themselves and, thus, under North Carolina law, constitutes a facial challenge that should be transferred to a three-judge panel.

Plaintiffs attempt to rely on *Grady*, 372 N.C. 509, 522, 831 S.E.2d 542, 554 (2019), but it does not help their case and, instead, shows that their quest to remove an entire category of students or schools from the Program is still a facial claim. *Contra* Pls.-Appellees' Br. 33. *Grady* involved a statute that provided for ankle bracelet monitoring of sex offenders. Specifically, the Court considered a provision that automatically subjected a defendant to lifetime monitoring based solely on the fact that he was a recidivist. 372 N.C. at 511, 831 S.E.2d at 546. The statute also required automatic monitoring for other classes of sex offenders but used a "risk assessment" to determine whether to monitor other offenders. *Id.* at 513, 831 S.E.2d at 547-48. The Supreme Court held that subjecting all recidivists to lifetime

monitoring without assessing their individual circumstances violated the Fourth Amendment. 372 N.C. at 545, 831 S.E.2d at 65. The Court explained that its holding applied to "individuals in the same category as the defendant." *Id.* at 545, 831 S.E.2d at 568-69. The Court noted that this holding "has both facial and as-applied characteristics" but ultimately concluded that "what matters" is "the extent that a 'claim and the relief that would follow . . . reach beyond the particular circumstances of' the party before the court . . . ." *Id.* at 547, 831 S.E.2d at 570 (quoting *Doe v. Reed*, 561 U.S. 186, 194 (2010)).

Similarly, Plaintiffs' claims and the relief that would follow reach beyond their particular circumstances and would extend to tens of thousands of students attending religious schools throughout the state. Therefore, under the reasoning of *Grady*, Plaintiffs' challenge to the Program is facial.

As the Supreme Court further reasoned in *Grady*, its holding was facial because its "reach . . . extend[ed] to applications of mandatory lifetime [monitoring] of unsupervised individuals authorized solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator." *Id.* at 547, 831 S.E.2d at 570 (cleaned up). The Court emphasized that "this portion of the law is unconstitutional in *all of its applications*." *Id.*, 831 S.E.2d at 570-71 (internal quotations removed) (emphasis added). Thus, the Court effectively severed this class of applications from the statute. *Id.* at 549-51, 831 S.E.2d at 571-72.

Likewise, Plaintiffs are seeking to enjoin the OSP in its entirety because it does not prohibit families from choosing schools that allegedly discriminate on the basis of religion or sexuality. Plaintiffs thus attack the OSP's statutory scheme generally. Instead of asking for an injunction connected to their own desire to attend a specific school, they seek relief against the OSP as a whole. Indeed, they offer, "The trial court could prohibit the use of State funds at any private schools that close their doors to students based on the students' religious beliefs." Pls.-Appellees' Br. 36. This desire to sever from the Program an entire category of applicants is a facial claim under *Grady's* reasoning because it "reach[es] beyond the particular circumstances of the part[ies] before the court.'" *Id.* at 547, 831 S.E.2d at 570 (cleaned up).

Plaintiffs also attempt to rely on *M.E. v. T.J.*, 275 N.C. App. 528, 854 S.E.2d 74 (2020), for the proposition that their case constitutes an as-applied challenge, but its scant analysis of the question leads to the same conclusion as that of *Grady*. In *M.E.*, the State had denied a restraining order against an applicant's same-sex partner because the statute's definition of "domestic violence" encompassed only dating relationships between members of the opposite sex. 275 N.C. App. at 533, 854 S.E.2d at 86. The applicant challenged the State's denial of the restraining order on equal protection and substantive due process grounds, and this Court characterized the challenge as being an as-applied one. *Id.* at 539, 854 S.E.2d at 89. But the Supreme Court explained that if it decided that the statute "was unconstitutionally applied to Plaintiff in denying her request for a [restraining order], based solely or in part on her gender or gender-identity, denial of the protections of [the restraining

order statute] to any similarly situated plaintiff would also be prohibited as an unconstitutional application of the statute to that plaintiff." *Id.*, 854 S.E.2d at 89.

Thus, under the Supreme Court's more extensive reasoning in *Grady*, the challenge in *M.E.* would also be facial because it sought to enjoin an entire category of applications from all those in same-sex relationships. Therefore, both *Grady* and *M.E.* show that even if Plaintiffs no longer seek to invalidate the OSP in its entirety, their quest to invalidate it as to an entire category of applications is still a facial claim. *Contra* Pls.-Appellees' Br. 28.

Finally, the Supreme Court in *Grady* adopted the reasoning of the U.S. Supreme Court on facial versus as-applied challenges by quoting with favorability *Doe v. Reed*. *See Grady*, 372 N.C. at 547, 831 S.E.2d at 570. *Doe v. Reed* established clearly that challenging an entire class of applications of a statute constitutes a facial claim.

In *Doe v. Reed*, a referendum organizer challenged a state statute authorizing the release of public records. 561 U.S. at 192. The statute defined "public record" broadly as "any writing containing information relating to the conduct of government" but did not mention referendum petitions specifically. *Id.* The referendum organizer sought to enjoin the state from releasing a referendum petition containing signatures that it had gathered by arguing that the statute violated the First Amendment's protection of anonymity. For his relief, the plaintiff sought to enjoin the statute "only to the extent it covers referendum petitions." *Id.* at 194.

Nevertheless, the Court in *Doe v. Reed* held that the claim was facial. *Id.* It explained that the relief sought is "not limited to plaintiffs' particular case, but challenges application of the law more broadly to all referendum petitions." *Id.* Therefore, when a complaint seeks to challenge application of the law to an entire class of individuals other than the particular plaintiffs in the lawsuit, that challenge is facial. That is exactly the situation in this case.

Here, the OSP statute does not mention religious schools specifically. Instead, it grants scholarships to students who want to attend any type of independent school, religious or not. Even though Plaintiffs claim that they are not challenging the statute "in general," Pls.-Appellees' Br. 31, they admit that they are challenging application of the statute to an entire class of individuals—those who seek to attend a religious school with tenets with which they disagree. Thus, under *Doe*, because their complaint "reach[es] beyond the particular circumstances of these plaintiffs[, t]hey must therefore satisfy our standards for a facial challenge." 561 U.S. at 194. In North Carolina, the standard for a facial challenge is that it must be tried before a three-judge panel. N.C.G.S. § 1-267.1(a1); N.C. R. Civ. P. 42(b)(4).

B. Plaintiffs' claims are facial because the Court must make a generalized inquiry to resolve their claims instead of an inquiry into their own particular actions.

The second "hallmark[ ] of a facial claim" is "the generalized inquiry the court must make to resolve [the] claim." *Frye*, 109 F. Supp. 2d at 441. The Plaintiff-

Appellees' Brief has no rebuttal to *Frye* in its forty-one pages.[1]

Plaintiffs cannot reconcile their claim that their Complaint presents an as-applied challenge with the holding of *Frye*. There, an adult business challenged a zoning ordinance that prohibited it from operating within 2,000 feet of certain places. 109 F. Supp. 2d at 440. The plaintiff did not claim the ordinance banned adult businesses on its face but that it did so in practice because the ordinance left nowhere in the city for such a business to locate. *Id*. The court reasoned the claim presented a "generalized inquiry" into the ordinance and its application rather than an inquiry specific to the particular adult business that brought the claim. *Id*. at 440-41. Because of the generalized inquiry and the relief sought, the court held that the claim was "properly viewed as a facial attack." *Id*.

Plaintiffs' claims require just the same type of generalized inquiry. Plaintiffs fail to allege any circumstances that are unique to them—i.e., that they applied to a school participating in the OSP and were denied admission due to their religion. Indeed, their request for an injunction to end the Program shows that they do not want to attend such a school at all. Because the Court's inquiry is "not peculiar to the application of the [statute] against Plaintiff[s]," it is a facial challenge. *Id*. at 440.

By clarifying in their brief that Plaintiffs do not allege that the OSP discriminates against them on its face but that it does so "in practice," they run headlong into *Frye*, which shows that such challenges are still facial when they

[1] In their opposition to Legislative Intervenors' Petition for Certiorari, Plaintiffs respond to *Frye* simply by saying they "do not seek to have any statute declared unconstitutional." Pls.-Appellees' Br. 5. That just begs the question.

require a generalized inquiry into how a statute affects other individuals. Plaintiffs' claim is not that the OSP was unconstitutionally applied in their case; it is, instead, a generalized complaint that the Program does not include the type of "non-discrimination" provisions they would want to see included.

Plaintiffs' claims are, likewise, facial under the reasoning of *State v. Lovette*, 233 N.C. App. 706, 758 S.E.2d 399 (2014). *Lovette* shows that Plaintiffs' attack on the OSP is general in nature because Plaintiffs argue that the statute is unconstitutional, regardless of how it was applied to them.

In *Lovette*, a convict challenged a sentencing statute because it "vested the sentencing judge with unbridled discretion providing no standards." *Id.* at 715, 758 S.E.2d at 406. This Court held that the claim was facial because the "defendant [was] arguing that no matter what the trial court's ultimate determination was, the new sentencing statute is unconstitutional because of the amount of discretion given to the trial court." *Id.* The Court also reasoned that the claim did not turn on applying the sentencing factors in the convict's case specifically. *Id.* Thus, *Lovette* shows that when a plaintiff contends that a statute is unconstitutional "no matter what" the plaintiff's individual circumstances might entail, that general attack on the statute is a facial claim. *Id.*

Lovette's logic applies here, too. The gravamen of Plaintiffs' Complaint is that the OSP is unconstitutional, regardless of whether they applied to an OSP school or even wanted to attend one. Indeed, the Complaint lacks any allegations that plaintiffs applied to or wished to attend an OSP school. Given that they are challenging the

OSP "no matter what" their individual circumstances might be, *Lovette* confirms that their claims are facial. *Lovette* also shows that Plaintiffs are wrong when they contend that "even if no Plaintiff wanted to attend a private school, that would not mean Plaintiffs are somehow challenging a statute's facial validity." Pls.-Appellees' Br. 23. Instead, *Lovette* shows that a general attack on the OSP, regardless of one's own circumstances, is a facial claim. Plaintiffs attempt to distinguish *Lovette* by saying that they focus on how the OSP operates "in practice," but that argument still has nothing to do with their individual circumstances. Pls.-Appellees' Br. 30. Thus, *Lovette* applies, and their challenge is facial.

Finally, Plaintiffs quote *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.* for the proposition that "[o]nly in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant," but here, Plaintiffs do not focus on the facts of their particular circumstances. 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016). Instead, they focus on the facts surrounding the OSP's implementation generally. They confirm this when they later say that they "raise claims that turn on facts regarding the Program's implementation, and the specific policies of particular schools funded by the Program." Pls.-Appellees' Br. 28.

Thus, this case contains both "hallmarks of a facial claim": 1) the relief sought extends beyond the plaintiffs; and 2) the Court must make a generalized inquiry to resolve their claims instead of an inquiry into their own particular actions. *Frye*, 109 F. Supp. 2d at 440.

II. Interlocutory review is appropriate here either as-of-right or via a writ of certiorari.

A. Plaintiffs' claims implicate mandatory venue and therefore affect a substantial right.

Review of an interlocutory order is mandatory when it "affects a substantial right." *Estes v. Battiston*, 850 S.E.2d 557, 559 (N.C. Ct. App. 2020); *see also Cryan v. Nat'l Council of Young Men's Christian Ass'ns of the U.S.A.*, No. 2021-NCCOA-612, ¶ 17. When statutes create a mandatory venue for a claim, depriving a litigant of that venue affects a "substantial right." *Gardner v. Gardner,* 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980). The three-judge panel procedure found in N.C.G.S. § 1-267.1(a1) and § 1-81.1(a1) expressly involves venue. *See Stephenson v. Bartlett*, 358 N.C. 219, 228, 595 S.E.2d 112, 118 (2004).

Stephenson holds that the three-judge panel statute establishes, as the statute says, a mandatory rule governing *venue*. There, the Supreme Court expressly held the three-judge panel statute "does not affect jurisdiction" but, instead, does "no more than establish venue for lawsuits that challenge redistricting." *Id.*, 595 S.E.2d at 118.

The subsequent amendments to Section 1-81.1 merely extend that same rule governing venue to cases presenting facial challenges. Indeed, the new subsection (a1) explicitly uses the word "venue." Likewise, the new subsection (a1) in Section 1-267.1 mirrors the wording of subsection (a), which was at issue in *Stephenson*. 358 N.C. at 228, 595 S.E.2d at 118; *see also* S.L. 2014-100, § 18B.16.(a), N.C. Sess. Laws 193, 194.[2] Section 1-81.1(a1) also speaks of *transferring* facial challenges to a three-

[2] Available at https://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S744v9.pdf

judge panel. It does not divest the superior court of jurisdiction to hear a facial challenge but merely transfers the challenge from one court to another court. That is a function of venue.

To be sure, Rule 42, which was not considered in *Stephenson*, was amended to clarify that the trial court "in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity," but the three-judge panel procedure for facial challenges was added to a statute dealing with "venue" (Section 81.1), nonetheless. Reading Section 81.1 in harmony with Rule 42 leads to the conclusion that, for constitutional challenges to state statutes, the three-judge panel is an issue of *both* subject matter jurisdiction and venue.

Plaintiffs' attempt to distinguish *Stephenson* is unavailing. *See* Pls.-Appellees' Br.14-15. Plaintiffs point out that the three-judge panel hears the "entirety" of a redistricting case and only the facial claim in an action challenging a state statute, but this rests on a mistaken assumption that their case involves both facial and as-applied claims. In cases involving only facial claims, like the one at bar, the panel will hear the "entirety" of the case. The "all other questions of law" that Section 1-81.1 refers to are as-applied claims. But in this case, there are no as-applied claims.

There was not a substantial right to a three-judge panel in *Cryan* because this Court reasoned that the three-judge panel statute for facial challenges implicates subject matter jurisdiction and not venue, but, respectfully, that conflicts with

Stephenson.[3] Because the trial court's order affected venue and thus a substantial right, it is immediately appealable.

B. In the alternative, certiorari is appropriate given the importance of the OSP to thousands of students and the newness of the three-judge panel process.

Alternatively, *Cryan* shows that this Court can hear Legislative Intervenors' appeal by granting their petition for a writ of certiorari. As this Court recognized in *Cryan*, the three-judge panel procedure for facial challenges to acts of the General Assembly is "relatively new" with "limited jurisprudence surrounding it." 2021-NCCOA-612, ¶ 18. Providing additional guidance is especially appropriate here, given that the case involves a state program that affect thousands of children across the State.

It is exactly for situations like the one at bar that the legislature enacted the three-judge panel procedure in the first place. The legislature passed the statute shortly after a single superior court judge had granted a statewide injunction against the OSP, which the Supreme Court ultimately reversed in *Hart* and *Richardson*. Thus, this case raises the important policy considerations contemplated by the three-judge panel statute.

C. Defendants' Motion to Transfer was timely.

Plaintiffs argue transfer is "premature," but Section 1-81.1 shows otherwise. Pls.-Appellees' Br. 15. Plaintiffs suggest the superior court should oversee discovery

[3] It is also true that *Hull v. Brown* cited Section 1-81.1, but that case did not decide whether the three-judge panel statute was a matter of venue or not, so it is inapposite. 2021-NCCOA-525, ¶ 16, 866 S.E.2d 485, 489.

for facial claims, pointing to the language in Section 1-81.1 that "after all other questions of law 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 issues in the case." *Id.* (quoting N.C.G.S. § 1-81.1(a1)). But that section juxtaposes "any claim" seeking an injunction to restrain a state statute "based upon an allegation that the act of the General Assembly is facially invalid" with "all other questions of law." The "other questions of law" are as-applied claims. The statute does not say that the superior court may sever portions of a facial claim, such as discovery, and oversee them piecemeal. The reason for the language is to give those defending a statute the opportunity to test a facial challenge through a motion to dismiss in front of a three-judge panel before the case goes through discovery. Thus, the appropriate court to test the sufficiency of a facial claim remains the three-judge panel: after any jurisdictional motions to dismiss, the entire facial challenge from start to end must be transferred there.

Still, Plaintiffs resist *certiorari* by pointing to the motion to amend the complaint that they filed after Legislative Intervenors noticed this appeal. Pls.-Appellees' Br. 22-23. This Court should not consider this proposed amendment. Once the Legislative Intervenors and the other Defendants noticed this appeal, the trial court lost jurisdiction over all matters contained within the matter appealed from. N.C. Gen. Stat. § 1-294; *SED Holdings, LLC v. 3 Star Props., LLC*, 250 N.C. App. 215, 219, 791 S.E.2d 914, 918 (2016). The trial court agreed with Defendants and did not

rule on the motion. (R pp 210-11). That decision to stay the motion to amend is not before this Court in this appeal.

In any event, the proposed amended complaint's gravamen remains the same, as Plaintiffs still seek relief beyond their circumstances. They also ask the Court to make a generalized inquiry into the OSP's implementation. *See Frye*, 109 F. Supp. 2d at 441. Thus, under any version of the complaint, the issue before this Court is not "academic" as Plaintiffs claim. Pls.-Appellees' Br. 24. It is practical for tens of thousands of children. It impacts matters of great significance and public importance. Thus, this appeal is appropriate for review via writ of certiorari.

CONCLUSION

The trial court's order denying Legislative Intervenors' motion to transfer this case to a three-judge panel should be reversed, and this Court should enter an order transferring the case to a three-judge panel.

This is the 4th day of April, 2022.

Respectfully submitted,

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Pursuant to Rule 33(b) I certify that all the attorneys listed have authorized me to list their names on this document as if they had personally signed it.

CERTIFICATE OF COMPLIANCE

I certify that a copy of the foregoing document complies with the word count limitations of North Carolina Rule of Appellate Procedure 28(j) because excluding the portions exempted in Rule 28(j)(1), this brief contains 3,675 words.

/s/ Matthew F. Tilley
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been sent to the attorneys below, per agreement of the attorneys, by sending an e-mail to the addresses below on this 4th day of April, 2022.

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