

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

2021 JAN -6 A 11:41 20-CVS-8346

TAMIKA WALKER KELLY, KRISTY)
MOORE, AMANDA HOWELL, KATE)
MEININGER, ELIZABETH)
MEININGER, JOHN SHERRY, AND)
RIVCA RACHEL SANOGUEIRA,)

WAKE CO., C.S.C.

BY)

PLAINTIFFS,)

v.)

LEGISLATIVE INTERVENOR-
DEFENDANTS'

THE STATE OF NORTH CAROLINA,)
NORTH CAROLINA STATE)
EDUCATION ASSISTANCE)
AUTHORITY,)

MOTION FOR TRANSFER
TO THREE-JUDGE PANEL

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,)

INTERVENOR-)
DEFENDANTS, *and*)

JANET NUNN, CHRISTOPHER AND)
NICHOLE PEEDIN, *and* KATRINA)
POWERS,)

INTERVENOR-)
DEFENDANTS.)

COME NOW Intervenor-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 (“Legislative Intervenor-Defendants”), by and through undersigned counsel, and move, pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. R.

Civ. P. 42(b)(4), that this case be transferred to a three-judge panel. In support of this Motion, Legislative Intervenor-Defendants state the following:

1. In their Prayer for Relief, Plaintiffs request that the Court declare the entire Opportunity Scholarship Program (the “Program”) unconstitutional under the North Carolina Constitution. (Compl. at 38.)

2. In their Prayer for Relief, Plaintiffs also request that the Court enter a permanent injunction enjoining the entire Program.

3. Such relief, if granted, constitutes a facial challenge to the Program, which is an act of the General Assembly.¹

4. Under N.C. Gen. Stat. § 1-267.1 and N.C. R. Civ. P. 42(b)(4), any facial challenge to the validity of such an act “shall” be transferred for resolution by a three-judge panel.

5. Reaching an incorrect legal conclusion and couching their lawsuit as “an as-applied challenge,” (Compl. ¶ 1), does not allow Plaintiffs to escape the law that a facial constitutional challenge shall be transferred to a three-judge panel. *See Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999).

6. On October 26, 2020, Legislative Intervenor-Defendants raised the motion to transfer to a three-judge panel as a defense in their Answer and Motion to Dismiss filed with this Court. (Legislative Ans. and Mot. to Dismiss at 2.)

7. On October 20, 2020, Defendants filed with this Court a motion to transfer to a three-judge panel.

¹ The program does not involve apportioning or redistricting State legislative or congressional districts, and thus that exception does not apply.

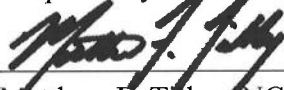
8. On December 4, 2020, Defendants submitted to the Court a calendar request that the hearing for their motion to transfer to a three-judge panel be set for the afternoon session of January 21, 2021 via WebEx.

9. Legislative Intervenor-Defendants request that this Court, for the sake of judicial economy, also hear their motion to transfer to a three-judge panel at the same hearing.

WHEREFORE, Legislative Intervenor-Defendants move that this case be transferred to a three-judge panel appointed by the Chief Justice of North Carolina and request that this motion be heard with the same motion set by Defendants for hearing during the afternoon session of January 21, 2021 via WebEx.

This is the 6th day of January, 2021.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been sent to the attorneys listed below by depositing the same in the First Class mail, postage prepaid, at the following addresses and by sending an e-mail to the e-mail addresses below on this 6th day of January, 2021.

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