

2007 S 07272

STATE OF NORTH CAROLINA FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

10th JUDICIAL DISTRICT 2000 JUL -1 PM 2:03

WAKE COUNTY

DANIEL J. FOREST, as LIEUTENANT
GOVERNOR OF NORTH CAROLINA
and a MEMBER OF THE NORTH
CAROLINA COUNCIL OF STATE

Plaintiff

v.

ROY ASBERRY COOPER, III, in his
official capacity as GOVERNOR OF
NORTH CAROLINA

Defendant

COMPLAINT AND MOTION FOR
TEMPORARY AND PERMANENT
INJUNCTION; REQUEST FOR
EXCEPTIONAL CASE DESIGNATION
RECOMMENDATION

Plaintiff, complaining of Defendant, alleges and says:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Daniel J. Forest is the elected Lieutenant Governor of North Carolina having been re-elected in the 2016 General Election. He is a citizen and resident of Wake County.

2. As the Lieutenant Governor, Daniel J. Forest sits as a member of the North Carolina Council of State.

3. Defendant Roy Asberry Cooper, III is the elected Governor of North Carolina, having been elected in the 2016 General Election and having assumed office on January 1, 2017. He is a citizen and resident of Wake County. Governor Cooper is being sued in his official capacity as Governor of North Carolina.

4. The Court has subject matter jurisdiction over the matters contained in this complaint and has personal jurisdiction over all parties named in this complaint.

5. The Court has the authority to provide declaratory relief. N.C. Gen. Stat. § 1-253 (2020).

6. Venue is proper in Superior Court, Wake County.

7. The Court is authorized to provide injunctive relief. N.C. Gen. Stat. §§ 7A-245 & 1A-1, Rules 57 & 65 (2020).

8. Plaintiff respectfully requests that the Court recommend to the Chief Justice pursuant to N.C. R. Prac. Super. & Dist. Ct. 2.1 that this case be designated as exceptional.

BACKGROUND AND FACTUAL ALLEGATIONS

9. It is important to begin with what this action is not. This action does not concern whether defendant's actions in response to the spread of coronavirus disease 19 (COVID-19) were necessary, reasonable, wise, or driven by science, data, or facts. This action concerns the manner in which these actions were taken. The manner in which defendant took these actions is in violation of law as set out in this complaint.

10. This action is about the rule of law. That the chief executive must follow the law is as old as the idea of the rule of law itself. The legal maxims *rex legi subjectus est* (the king is subject to the law) and *lex non a rege est violanda* (the law is not to be violated by the king) make this principle absolutely clear.

11. The Constitution of North Carolina does not envision a unitary executive power. While the Constitution provides that "[t]he executive power of the State shall be vested in the Governor," N.C. Const. Art. III § 1, the Constitution also provides for other executive officers that reside outside of the executive power of the governor. See N.C. Const. Art. III § 7(1)

(establishing “[a] Secretary of State, an Auditor, a Treasurer, a Superintendent of Public Instruction, an Attorney General, a Commissioner of Agriculture, a Commissioner of Labor, and a Commissioner of Insurance”). Each member of the executive branch executes the law in some way, and thus wields executive power. (“[t]heir respective duties shall be prescribed by law.” N.C. Const. Art. III § 7(2)).

12. The executive power of the governor is not unlimited and portions of the overall executive power may be vested in other executive officials as “prescribed by law.”

13. Our statutes have long recognized that executive authority can be granted by both the General Assembly and the Governor. *See, e.g.* N.C. Gen. Stat. § 143A-20 (2016) (“The Secretary of State shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State.” (emphasis added)); N.C. Gen. Stat. § 143A-25 (2016) (“The State Auditor shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State.” (emphasis added)); *see also* N.C. Gen. Stat. § 143A-31 (Treasurer); N.C. Gen. Stat. § 143A-49.1 (Attorney General); N.C. Gen. Stat. § 143A-57 (Commissioner of Agriculture); N.C. Gen. Stat. § 143A-68 (Commissioner of Labor); N.C. Gen. Stat. § 143A-74 (Commissioner of Insurance); N.C. Gen. Stat. Chapter 115C (Superintendent of Public Instruction).

14. More specifically to the Lieutenant Governor, the only elected official to have both legislative and executive powers and duties, the Constitution sets out his duties, in part, as follows: “The Lieutenant Governor shall be President of the Senate, but shall have no vote unless the Senate is equally divided. He shall perform such *additional duties as the General Assembly* or the Governor may assign to him. . . .” N.C. Const. Art. III § 6. (emphasis added).

15. The North Carolina Emergency Management Act provides in N.C. Gen. Stat. § 166A-19.30(b) that the most expansive statewide powers of the Governor can only be exercised during a declared state of emergency “with the concurrence of the Council of State.”

16. The Council of State is comprised of the statewide elected executive officials of North Carolina whose offices are established by Article III of the North Carolina Constitution, N.C. Const. Art. III, § 8.

17. Thus, the Emergency Management Act is an exercise of the General Assembly’s authority to “prescribe by law” the powers and duties of the members of the Council of State, including the Lieutenant Governor, as the Emergency Management Act places the duty on the Council of State to consider carefully the exercise of the most expansive of the Governor’s emergency actions, and places the power to check the exercise of those powers with the Council of State by requiring concurrence in those actions.

18. Defendant, on March 10, 2020, issued Executive Order 116 declaring a state of emergency in response to the spread of COVID-19. Executive Order 116 is attached to this complaint as Exhibit A.

19. In further response to the COVID-19 pandemic, defendant issued multiple executive orders. At issue in this complaint is section 1 of Executive Order No. 118, and Executive Order Nos. 121, 135, 138, 141, and 147. These orders will be referred to collectively as the “Shutdown Orders.” Executive Order Nos. 118, 121, 135, 138, 141, and 147 are attached to this complaint as Exhibits B-G, respectively.

20. Defendant issued Executive Order No. 118 on March 17, 2020, entitled “Limiting Operations of Restaurants and Bars and Broadening Unemployment Insurance Benefits in Response to COVID-19.”

21. Executive Order No. 118 contained Section 1, entitled "Limiting the Sale of Food and Beverages, to Carry-Out, Drive-Through, and Delivery Only."

22. On March 17, 2020, prior to the issuance of Executive Order No. 118, defendant sought concurrence from the Council of State to prohibit indoor or outdoor seating in restaurants.

23. A majority of the Council of State voted to not concur in defendant's request.

24. An email exchange between members of the Council of State regarding Executive Order No. 118 is attached as Exhibit H to this complaint.

25. Despite failing to receive the concurrence of the Council of State, defendant still issued Executive Order No. 118, including section 1, exercising the very authority that was prohibited by the Council of State's vote.

26. On March 27, 2020, defendant issued Executive Order No. 121 entitled, "Stay at Home Order and Strategic Directions for North Carolina in Response to Increasing COVID-19 Cases."

27. Defendant did not seek and did not receive the concurrence of the Council of State for Executive Order No. 121.

28. On April 23, 2020, defendant issued Executive Order No. 135 entitled "Extending Stay at Home Order and Orders Limiting Mass Gatherings, Requiring Social Distancing, and Restricting Visitation at Long Term Care Facilities."

29. Defendant did not seek and did not receive the concurrence of the Council of State for Executive Order No. 135.

30. On May 5, 2020, defendant issued Executive Order No. 138 entitled "Easing Restrictions on Travel, Business Operations, and Mass Gatherings: Phase 1."

31. Defendant did not seek and did not receive the concurrence of the Council of State for Executive Order No. 138.

32. On May 20, 2020 defendant issued Executive Order No. 141 entitled "Easing Restrictions on Travel, Business Operations, and Mass Gatherings: Phase 2."

33. Defendant did not seek and did not receive the concurrence of the Council of State for Executive Order No. 141.

34. On June 24, 2020, defendant issued Executive Order No. 147 entitled "Extension of Phase 2 Order and New Measures to Save Lives in the COVID-19 Pandemic"

35. Defendant did not seek and did not receive the concurrence of the Council of State for Executive Order No. 147.

36. N.C. Gen. Stat. § 166A-19.30(c) provides that defendant has certain powers if local control is insufficient to manage the emergency, however, the language of the Shutdown Orders themselves and ordinary principles of statutory construction demonstrate that N.C. Gen. Stat. § 166A-19.30(c) does not grant defendant the power he purports to exercise in the Shutdown Orders.

37. N.C. Gen. Stat. § 130A-145 grants the State Health Director quarantine and isolation authority.

38. The quarantine and isolation authority granted under N.C. Gen. Stat. § 130A-145 may only be exercised by the State Health Director when "all other reasonable means for correcting the problem have been exhausted, and no less restrictive alternative exists." N.C. Gen. Stat. § 130A-145(a).

39. The Shutdown Orders further appear to be an exercise of the authority provided to the State Health Director under N.C. Gen. Stat. § 130A-145.

40. In Executive Order 118, defendant states, “pursuant to N.C. Gen. Stat. § 130A-145(a), the State Health Director has the power to exercise quarantine and isolation authority when the public health is endangered;” and further “Per N.C. Gen. Stat. § 130A-145(a), the State Health Director is exercising quarantine and isolation authority to limit access to facilities that sell food and beverage to carry-out, drive-through and delivery services only.”

41. N.C. Gen. Stat. § 130A-145(d) provides in part “The official who exercises the quarantine or isolation authority shall give the persons known by the official to be substantially affected by the limitation reasonable notice under the circumstances of the right to institute an action to review the limitation.”

42. Upon information and belief, neither the State Health Director, nor the defendant, who is purporting to exercise the State Health Director’s authority, has issued to any person reasonable notice of their right to institute an action to review the limitations prescribed by the Shutdown Orders.

43. N.C. Gen. Stat. § 130A-145(d) further provides that quarantine or isolation limits that restrict the freedom of movement or access of a person “shall not exceed 30 calendar days.”

44. The Shutdown Orders have persisted for longer than 30 days.

45. N.C. Gen. Stat. § 130A-145(d) further provides “[i]f the State Health Director . . . determines that a 30-calendar-day limitation on freedom of movement or access is not adequate to protect the public health, the State Health Director . . . must institute in superior court in the county in which the limitation is imposed an action to obtain an order extending the period of limitation of freedom of movement or access.”

46. Upon information and belief, neither the State Health Director, nor the defendant who is purporting to exercise the State Health Director's authority, has instituted an action in superior court, Wake County, to obtain an extension order.

47. Despite the impact on the freedom of movement the Shutdown Orders have in all 100 of North Carolina's counties, upon information and belief, neither the State Health Director, nor the defendant who is purporting to exercise the State Health Director's authority, has instituted an action in superior court in any county to obtain an extension order.

CLAIM FOR RELIEF #1 – VIOLATION OF EMERGENCY MANAGEMENT ACT

48. The above paragraphs are hereby incorporated by reference as if set forth herein.

49. The Shutdown Orders are in violation of the Emergency Management Act in that defendant failed to receive the concurrence of the Council of State prior to the Shutdown Orders being issued. N.C. Gen. Stat. § 166A-19.30(b).

50. The Shutdown Orders are in violation of the Emergency Management Act in that defendant was not authorized by the Emergency Management Act, specifically N.C. Gen. Stat. § 166A-19.30(c) as the statutory criteria of insufficient local control for the exercise of those powers by defendant was not met. In fact, many of the Shutdown Orders provide that local government orders that are "more strict" than the Shutdown Orders remain in effect and control over the terms and conditions of the Shutdown Orders.

51. Because the statutory criteria for gubernatorial action under N.C. Gen. Stat. § 166A-19.30(c) was not met, defendant would be authorized to act pursuant to N.C. Gen. Stat. § 166A-19.30(b), but only with the concurrence of the Council of State.

52. Even if the statutory criteria for gubernatorial action under N.C. Gen. Stat. § 166A-19.30(c) had been met, ordinary principles of statutory construction make it clear that

when the Governor exercises statewide emergency authority as used in the Shutdown Orders, it is required that Council of State concurrence is obtained pursuant to N.C. Gen. Stat. § 166A-19.30(b).

53. Defendant's publicly stated legal rationale and the multiple statutory authorities cited in the Shutdown Orders, if correct, would render N.C. Gen. Stat. § 166A-19.30(b) a superfluity, and thus Defendant's rationale cannot be correct.

54. As the Shutdown Orders were executed in violation of the Emergency Management Act, specifically in violation of N.C. Gen. Stat. § 166A-19.30, they are null, void, and without effect.

55. Plaintiff, as a member of the Council of State, is entitled to relief so that he may execute the duties of his office, which includes the duty to concur or not concur with certain proposed gubernatorial actions like those found in the Shutdown Orders.

56. Should defendant desire to take executive action in the future like those actions found in the Shutdown Orders, he may only do so with the concurrence of majority of the Council of State.

**CLAIM FOR RELIEF #2 – VIOLATIONS OF THE QUARANTINE &
ISOLATION STATUTES**

57. The above paragraphs are hereby incorporated by reference as if set forth herein.

58. Defendant's Shutdown Orders are effectively acting as a statewide exercise of quarantine and isolation authority.

59. This exercise was in violation of N.C. Gen. Stat. § 130A-145, as stated in the above paragraphs, as the Shutdown Orders seek to circumvent the procedures, including judicial review, as found in N.C. Gen. Stat. § 130A-145.

60. The Emergency Management Act and the Quarantine and Isolation Statutes make it abundantly clear that neither defendant nor his subordinates have unchecked power during these situations.

61. If defendant seeks to act under the Emergency Management Act, then defendant must comply with the provisions of the act and seek the concurrence of the Council of State where required.

62. If defendant seeks to act through the State Health Director under quarantine and isolation authority, then that action is subject to the standards, judicial review, and notice requirements of N.C. Gen. Stat. § 130A-145.

63. As neither defendant nor his State Health Director complied with the provisions of N.C. Gen. Stat. § 130A-145, the Shutdown Orders are null, void, and of no effect.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays the Court for relief as follows:

1. That the Court recommend to the Chief Justice that this case be designated exceptional under Rule 2.1 of the Rules of Practice for Superior and District Court.

2. A temporary restraining order prohibiting defendant and anyone under the defendant's control from enforcing the Shutdown Orders until the provisions of those orders have the concurrence of a majority of the members of the Council of State.

3. A permanent injunction prohibiting defendant and anyone under the defendant's control from enforcing the Shutdown Orders until the provisions of those orders have the concurrence of a majority of the members of the Council of State.

4. An order declaring the defendant's Shutdown Orders to be null, void, and of no effect as violative of N.C. Gen. Stat. § 166A-19.30 and N.C. Gen. Stat. § 130A-145, and

prohibiting the issuance of subsequent orders of a similar nature without the concurrence of a majority of the members of the Council of State.

5. To recover the costs of this action.
6. Any and all other relief to which the plaintiff is entitled.

This 1st day of July, 2020.



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