

THREE-JUDGE PANELS FOR CONSTITUTIONAL CHALLENGES

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The basics of three-judge panels — § 18B.16 of Session Law 2014-100 (the 2014 Appropriations Act) amends various statutes to provide for three-judge panels of superior court to hear facial challenges to the constitutionality of state laws in civil cases. The legislature previously had provided for such panels to hear redistricting lawsuits. The basic provisions of the new law are:

- The new law applies to facial challenges to the constitutionality of state laws raised in civil cases. It does not apply to as-applied challenges (more on that distinction below). It does not apply to constitutional issues raised in criminal proceedings or in taxpayer appeals under GS 105-241.17.
- The law applies to facial challenges raised in either district or superior court.
- As provided in amended GS 1-267.1, all such challenges are to be heard by a panel of three resident superior court judges appointed by the chief justice, to sit in Wake County. One judge is to come from the First, Second or Fourth Division, one from the Seventh or Eighth Division, and one from the Third, Fifth or Sixth Division. The chief justice will designate the presiding judge of the panel.
- Decisions of the panel are by majority vote.
- The statute prohibits any other court from deciding facial constitutional challenges in civil cases. The act amends GS 1-81.1 to provide that venue for such challenges is exclusive to Wake County, and that when such claims are raised in cases in other counties they are to be transferred to Wake (see below for more on transfers to Wake).
- The act applies to facial challenges raised in a complaint or amended complaint or in the defendant's answer or other responsive pleading or by other means within 30 days of the filing of the answer or responsive pleading.
- The act amends Rule 42 of the Rules of Civil Procedure to provide that the court in which the facial challenge is raised is to first resolve all other matters in the case and, then, if the determination of the facial validity is still necessary to finally resolve the case, transfer the constitutional claim to Wake County Superior Court for a three-judge panel. If the case can be resolved without addressing the constitutional issue, there is no need to transfer it to a three-judge panel. The original trial court stays all other proceedings in the case while the constitutional claim is before the three-judge panel.
- GS 7A-27 is amended to provide that a determination by the three-judge panel that a law is facially unconstitutional is subject to immediate direct appeal to the supreme court, regardless of whether that decision is final or interlocutory. If the three-judge panel denies the facial challenge, decides the law is constitutional, any appeal would be to the court of appeals and, under existing law, an interlocutory appeal would be available only if the decision affected a substantial right.

- Once the facial challenge is resolved by the three-judge panel, and after any appeal, the case is to be returned to the original trial court to resolve any outstanding matters.

Appeals of decisions on facial constitutionality — As noted above, GS 7A-27 is amended to provide for immediate direct appeal to the supreme court of a decision from a three-judge panel holding a law to be facially unconstitutional. Such direct appeal does not apply to a decision that the law is constitutional. An appeal of a decision in favor of constitutionality would have to be to the court of appeals and, if interlocutory, would have to affect a substantial right.

Appeals of decisions on as-applied constitutionality — The new law also addresses appeals of decisions involving as-applied challenges to the constitutionality of state laws in civil cases. The provisions on three-judge panels do not apply to as-applied challenges; the three-judge panel is only for facial challenges. But if any trial court restrains the state or a local government from enforcing a state law based on a determination that the law is unconstitutional as applied, GS 7A-27 and Rule 62 of the Rules of Civil Procedure are amended to provide for an immediate interlocutory appeal. The new provisions apply only when the state or a local government is a party to the case, however. The interlocutory appeal would be to the court of appeals. And the new provisions about interlocutory appeals do not apply when the trial court denies an as-applied challenge.

The constitutionality of three-judge panels — In *Stephenson v. Bartlett*, 358 NC 219 (2004), the North Carolina Supreme Court upheld the constitutionality of the statute requiring three-judge panels for redistricting cases. The court determined that the statute did not create a new court in violation of the state constitution, nor did it improperly infringe on the chief justice's constitutional authority to assign judges.

The meaning of “facial challenge” — The provisions on three-judge panels are applicable only to “facial” challenges to the constitutionality of a state law, as opposed to “as applied” challenges. The difference between the two kinds of challenges can be confusing, but here are the basics:

- A facial challenge is an assertion that the statute is unconstitutional on its face, that there is no circumstance under which it could be constitutional.
- In *United States v. Salerno*, 481 US 739, 745 (1987), the US Supreme Court said that a facial challenge “is the most difficult challenge to mount successfully” and requires the challenger to “establish that no set of circumstances exists under which the Act would be valid.” That is, “that the law is unconstitutional in all of its applications.” *Washington State Grange v. Washington State Republican Party*, 552 US 442, 449 (2008).
- The US Supreme Court disfavors facial challenges, saying that “facial challenges are best when infrequent” and that they carry the risk of premature interpretation of statutes based on barebones factual records. *Sabri v. United States*, 541 US 600, 608-609 (2004). Facial challenges are contrary to the principle of judicial restraint, that courts should not

anticipate questions of constitutionality in advance of having to decide them, and that courts should not formulate constitutional rules broader than required by the facts to which they are to be applied. *Washington State Grange, supra*, at 450.

- When a facial challenge involves First Amendment issues, however, the test is somewhat different, the law may invalidated for over-breadth. That is, a law may be found unconstitutional if a substantial number of its applications are unconstitutional in relation to its plainly legitimate sweep, even though it may be constitutional as applied to the plaintiff. *United States v. Stevens*, 559 US 460 (2010). Stated another way, a law affecting free speech may be challenged by someone to whom it may be applied constitutionally, on the grounds that it violates others' free speech rights, because of the potential of the law to deter protected speech. For a discussion of facial challenges involving First Amendment issues, and the over-breadth doctrine, in a North Carolina context, see *Preston v. Leake*, 660 F3d 726 (4th Cir 2011).
- The North Carolina Supreme Court follows the US Supreme Court's expression of the test for a facial challenge, requiring that there be no set of circumstances under which the act could be valid. *State v. Thompson*, 349 NC 483 (1998). In *Thompson*, the court denied a facial challenge to the constitutionality of a legislative act providing for a defendant in a domestic violence case to be released on bail only on the order of a judge, and allowing the defendant to be held for up to 48 hours until a judge set bail. After turning away the facial challenge the court then considered the constitutionality of the act as applied to the defendant and found its application in that situation unconstitutional because the defendant had been held even after sessions of both district and superior court had opened and judges had been available to determine conditions of release.
- Discussions of facial challenges, and the difference between facial and as-applied challenges, may also be found in *State v. Whitaker*, 201 NC App 190 (2009); *Affordable Care, Inc., v. North Carolina State Board of Dental Examiners*, 153 NC App 527 (2002); and *State v. Guice*, 141 NC App 177 (2000), *modified and affirmed*, 151 NC App 293 (2002).
- Most North Carolina lawyers will not be familiar with the distinction between facial and as-applied challenges, and in practice many challenges to constitutionality may be both facial and as-applied.