Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

GOVERNOR ALBERT BRYAN, JR., in his official capacity, and the GOVERNMENT OF THE VIRGIN ISLANDS, Appellants/Plaintiffs, **v.** **VIRGIN ISLANDS WATER AND POWER AUTHORITY,** Appellee/Defendant.	**S. Ct. Civ. No. 2023-0014** Re: Super. Ct. Civ. No. 361/2021 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Renee Gumbs-Carty

Considered and Filed: April 4, 2023

Cite as: 2023 VI 1U

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

OPINION OF THE COURT

PER CURIAM.

¶ 1 This matter comes before the Court pursuant to a March 30, 2023 motion for stay pending appeal, filed by Appellants Governor Albert Bryan, Jr. and the Government of the Virgin Islands (collectively "the Executive Branch"), requesting that this Court stay, pending appeal, the Superior Court's March 8, 2023 opinion and order which upheld the constitutionality of Act No. 8472[1] and

[1] Act No. 8472 originated as Bill No. 34-0026, which was passed by the Legislature on May 4, 2021, subsequently vetoed by Governor Bryan, and was enacted into law as Act No. 8472 when the Legislature voted to override the veto. As the Superior Court explained in its March 8, 2023 opinion,

vacated its September 20, 2021 temporary restraining order enjoining its enforcement.[2]

¶ 2 "To determine whether a litigant is entitled to a stay [or injunction] pending appeal, this Court considers: (1) whether the litigant has made a strong showing that he is likely to succeed on the merits; (2) whether the litigant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where

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> [T]he members of WAPA's Governing Board . . . since 1978 . . . consisted of nine (9) members, all of whom were appointed by the Governor. Three (3) of the nine were heads of cabinet-level executive departments or agencies and served at the pleasure of the Governor. The remaining six (6) were private citizens who are nominated by the Governor and confirmed by the Legislature. These private citizens must be non-United States or Virgin Islands government employees and are only removable "for cause" during their three-year term.
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> Bill No. 34-0026 reduced the number of Board members from nine (9) to seven (7) by eliminating two out of the three cabinet-level members and naming the Director of Energy as the sole cabinet-level board member. Additionally, the Bill established qualifications for the six non-governmental members, requiring the members to have formal education or experience in at least one of the following disciplines:
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> (1.) Engineering, power generation;
> (2.) Energy, natural resources conservation, environmental science, planning;
> (3.) Economics, accounting, finance;
> (4.) Public affairs;
> (5.) Law; or
> (6.) Computer Technology Information Systems.
>
> Since these members are removable only "for cause" the Director of Energy is the sole member that can be removed at will by the Governor. This revision effectively reduced the number of members who serve at the pleasure of the Governor from one-third (1/3) to one-seventh (1/7) of the Board.

Bryan v. V.I. Water & Power Auth., 2023 VI Super 5 ¶¶ 16-17 (internal citations omitted).

[2] Ordinarily, a motion for stay pending appeal must be considered by the Superior Court in the first instance. *See* V.I. R. APP. P. 8(b). Although the Executive Branch filed such a motion, it has not yet been adjudicated by the Superior Court. Nevertheless, given the urgency of the matter, we consider the Executive Branch's motion notwithstanding the pendency of the stay motion in the Superior Court.

the public interest lies." *In re Najawicz*, S. Ct. Crim. Nos. 2008-0098, 099, 2009 WL 321342, at *3 (V.I. Jan. 8, 2009) (unpublished). Nevertheless, "[t]he first of these factors is ordinarily the most important." *Rojas v. Two/Morrow Ideas Enterprises, Inc.*, S. Ct. Civ. No. 2008-0071, 2009 WL 321347, at *2 (V.I. Jan. 22, 2009) (unpublished) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).

¶ 3 We conclude that the Executive Branch has failed to satisfy its burden with respect to any of these factors. With respect to the first factor—likelihood of success on the merits—we conclude that the likelihood that the Executive Branch will succeed in obtaining a reversal of the March 8, 2023 opinion and order are low. Because Act No. 8472, like all legislation, is presumed valid, *see City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), to succeed on the merits the Executive Branch bears the burden of rebutting that presumption. The gravamen of both the Executive Branch's complaint and its motion for a stay pending appeal is that Act No. 8472 purportedly violates the separation of powers doctrine by infringing on the powers of the Governor codified in section 11 of the Revised Organic Act; specifically, that "[t]he Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of the Virgin Islands" and that the Governor "shall appoint, and may remove, all officers and employees of the executive branch of the government of the Virgin Islands." 48 U.S.C. § 1591. According to the Executive Branch, the Legislature encroached on these powers when it enacted Act No. 8472 "by decreasing the Governor's supervision and control of the Board by reducing the number of Cabinet Board members that served at his pleasure from three out of nine Board members or one-third to one of seven Board members or one-seventh." (Mot. 3-4.) But even if the WAPA is within the executive branch of the Government—a question this Court need not reach—the Executive Branch ignores

the important fact that section 11 of the Revised Organic Act contains express language restricting the appointment power of the Governor:

> The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of the Virgin Islands. . . . He shall appoint, and may remove, all officers and employees of the executive branch of the government of the Virgin Islands, except as otherwise provided in this or any other Act of Congress, or under the laws of the Virgin Islands, and shall commission all officers that he may be authorized to appoint.

48 U.S.C. § 1591 (emphasis added). Thus, the plain text of section 11 expressly provides that "the laws of the Virgin Islands" may restrict the power of the Governor to appoint and remove officers and employees of the Executive Branch. Since the Revised Organic Act provides that the Legislature passes bills which then become law if either (1) approved by the Governor; or (2) vetoed by the Governor and subsequently overridden by a two-thirds majority of the Legislature, *see* 48 U.S.C. § 1575(d), it would appear that Act No. 8472 is among "the laws of the Virgin Islands" which impose limitations on the appointment and removal powers of the Governor by reducing the size of the WAPA Board, establishing qualifications for appointees to the Board, and prohibiting the removal of such appointees except for cause.[3]

¶ 4 We also conclude that the Executive Branch has failed to establish that it will suffer from irreparable harm if a stay is not granted or that the balance of harms to other parties favors a stay.

[3] In its stay motion, the Executive Branch cites to federal court decisions, such as *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020), which found unconstitutional statutes limiting the authority of the President of the United States to remove federal executive branch officials only for cause. We do not find this federal case law persuasive, however, because Article II of the United States Constitution—which delineates the powers of the President of the United States—contains markedly different language than found in section 11 of the Revised Organic Act. Most notably, unlike section 11, Article II does not contain a provision that expressly permits Congress to enact laws that restrict the appointment and removal powers of the President.

To qualify as irreparable, the alleged harm must be both "certain and imminent." *Yusuf v. Hamed*, 59 V.I. 841, 854 (V.I. 2013). While the Executive Branch asserts that it will suffer irreparable harm absent a stay due to "concerns over the Governor's ability to implement his energy policy," Mot. 15, it has provided no evidence whatsoever that this would occur if Act No. 8472 went into effect, nor is it clear why the changes imposed by Act No. 8472 could have this effect given that it preserves the authority of the Governor to either nominate or appoint every member of the WAPA Board. And while six of those members may only be removed for cause, that had already been the case even prior to Act No. 8472. Yet in contrast, the Legislature—which is not a party to the underlying lawsuit—would suffer substantial harm if a stay were granted, in that it would further delay the implementation of Act No. 8472, a measure which absent the September 20, 2021 temporary restraining order would have already gone into effect.

¶ 5 Finally, we do not agree that the public interest favors a stay. While the Executive Branch asserts that "maintaining the pre-enactment status quo, at least for the moment, is both urgent and pragmatic, because the Fiscal Year 2022 Electric System Operating Budget, Electric System Capital Budget, Water System Capital Budget, and health benefits for almost 600 workers are currently pending before the Board" and "[t]here is no restructured Board ready yet to take WAPA's helm," this—even if true—is a problem of the Executive Branch's own making due to its successful efforts to enjoin the implementation of Act No. 8472, and is also one within the Governor's power to resolve by expeditiously filling any vacancies to the restructured Board. Moreover, granting a stay would in fact impair the public interest, since effectuating the intent of the Legislature and following statutory law are both factors that generally favor the public interest. *See In re Elliot*, 54 V.I. 423, 432 (V.I. 2010). Accordingly, the motion for a stay pending appeal is denied.

Dated this 4th day of April, 2023.

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: /s/ Reisha Corneiro
Deputy Clerk II

Dated: April 4, 2023