STATE OF NORTH CAROLINA

COUNTY OF WAKE

FILED
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C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 015636

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

v.

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,

Defendants.

**MOTION FOR TEMPORARY RESTRAINING ORDER**

**AND**

**MOTION FOR PRELIMINARY INJUNCTION**

**(Advice and Consent Claim)**

Plaintiff Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina ("Governor"), by and through counsel and pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, moves the Court for a temporary restraining order and preliminary injunction to restrain the effectiveness of Part III of House Bill 17 (Session Law 2016-126, §§ 38-39) during the pendency of this litigation. In support of these Motions, the Governor shows the Court as follows:

## INTRODUCTION

1. As part of the Amended Complaint filed in this action, the Governor seeks a declaratory judgment that the advice and consent provisions of House Bill 17 (Session Law 2016-126, §§ 38-39) are unconstitutional and a permanent injunction restraining their effectiveness.

2. At the time the Amended Complaint was filed, the Governor believed that preliminary injunctive relief would not be necessary and that this issue could be addressed in a timely fashion in a hearing by this Court on the merits of that claim. The Governor based that belief on the following facts and law:

a. N.C. Gen. Stat. § 147-12(a)(3d) governs the time of the Senate confirmation process for any officials appointed by the Governor who are required by statute to be confirmed by the Senate. That statute states:

> Notwithstanding any other provision of law, whenever a statute calls for the Governor to appoint a person to an office subject to confirmation by the Senate, the Governor shall notify the President of the Senate by May 15 of the year in which the appointment is to be made of the name of the person the Governor is submitting to the General Assembly for confirmation.

N.C. Gen. Stat. § 147-12(a)(3d).

b. The Governor has not yet notified the President of the Senate as to the names of the persons to be submitted to the Senate for confirmation.

c. In addition, counsel for the Governor and for President Pro Tempore Berger and Speaker Moore have jointly submitted to this Court a proposed scheduling order which contemplates a hearing on the merits of the claims made in the Amended Complaint in early March of this year.

3. In summary, the Governor believed that the substantive issues raised in the Amended Complaint could be heard and ruled upon by the Court before the law contemplates the confirmation process (if constitutional) would begin.

4. The Governor has communicated these thoughts regarding the timing of this Court proceeding and any confirmation process to the leadership of the Senate and suggested that the parties should attempt to avoid a dispute created by the scheduling of any proposed confirmation process. Affidavit of Kristi Jones ("Jones Aff."), ¶ 19 and Exhibit B thereto (filed contemporaneously herewith).

5. Despite these overtures, the North Carolina Senate has scheduled the confirmation process to begin with hearings this Wednesday, February 8, 2017, and has indicated that Larry

Hall, the Governor's appointee as Secretary of Military and Veterans Affairs, should appear before a Senate Committee so that his fitness and qualifications to hold that office may be determined. The Senate has also scheduled confirmation hearings of the other Secretaries between February 8 and March 16, 2017. *Id.* ¶ 20 and Exhibit A thereto.

6. The demand for the confirmation process to begin on Wednesday, February 8th appears to be founded in Defendants' fundamental disrespect for the separation of powers. In their Answer to the Amended Complaint, Defendants admit that the three branches of government are separate and distinct, but—remarkably—deny "that the branches of government are equal under our state Constitution." Answer ¶ 1. This inequitable denial of a foundational principle of North Carolina government should not be condoned.

7. Because the Senate has insisted on moving forward with this process now, rather than waiting until the courts have ruled on the merits of the Governor's claims, and because the Governor believes and has alleged that this confirmation process violates the North Carolina Constitution, the Governor now comes before this Court and seeks a temporary restraining order and a preliminary injunction, enjoining the effectiveness of Part III of House Bill 17 (Session Law 2016-126, §§ 38-39) until such time as this Court can rule on the merits of the Governor's claim.

**I. The Advice and Consent Amendment.**

8. Prior to the passage of House Bill 17, all prior Governors of the State of North Carolina enjoyed the authority to appoint the heads of the principal departments of the executive branch who were not elected, and those department heads served at the Governor's pleasure.

9. Effective December 19, 2016, Part III of House Bill 17 ("the Advice and Consent Amendment") purports, for the first time, to subject the Governor's appointed principal department

heads (commonly referred to as cabinet secretaries) to advice and consent by the North Carolina Senate. *See* Session Law 2016-126, § 38 (amending N.C. Gen. Stat. § 143B-9(a)).

## II. The Governor will be irreparably harmed if the Advice and Consent Amendment is not enjoined.

10. When the Amended Complaint was filed, the Governor believed that the constitutionality of the Advice and Consent Amendment could be addressed during the merits hearing proposed for early March 2017. This is because the existing statutes governing the advice and consent process (for those executive officers for whom it is constitutionally appropriate) do not require the Governor to submit the names of his appointees to the President of the North Carolina Senate until May 15. *See* N.C. Gen. Stat. § 147-12(a)(3d); Am. Compl. ¶¶ 73, 86.

11. As confirmed by the Affidavit of Kristi Jones, the Governor has *not* notified the President of the Senate (i.e. the Lieutenant Governor) of the names of his appointees, either verbally or in writing. Jones Aff. ¶ 12.

12. Despite the existing statutory deadline of May 15, 2017, and the Governor's attempts to resolve this matter without the need for preliminary injunctive relief, the North Carolina Senate has demanded that the Governor's appointees appear for confirmation hearings. As shown by the schedule published to the website of the Senate Select Committee on Nominations, hearings are scheduled to begin on this Wednesday, February 8, 2017. *See* Jones Aff., Exhibit A thereto. That schedule was set without consultation with the Governor's Office. Transcript 7:2-11.

13. Without injunctive relief preventing the confirmation process from taking place pursuant to the schedule demanded by the North Carolina Senate, the Governor will suffer four distinct irreparable harms:

a. The existing statute governing the submission of nominees by the Governor to the Senate will be violated. *See* N.C. Gen. Stat. § 147-12(a)(3d); *State ex rel. Ross v. Overcash*, No. COA08-127, 2008 N.C. App. LEXIS 1669, at *9 (Ct. App. Sep. 16, 2008) (unpublished) (where state statute is shown to be violated, that violation constitutes harm sufficient to warrant entry of injunction). There are two specific statutory violations: (1) the Senate has disregarded the May 15, 2017 deadline for the Governor to submit the names of nominees; and (2) the Senate has proceeded with the confirmation process before the Governor has notified the President of the Senate pursuant to the statutory scheme.

b. The Governor's appointees and the Governor's staff will be required to spend significant time and resources to rapidly prepare for and appear at multiple confirmation hearings, instead of focusing on the important work each appointee has to supervise a principal department of the State. Among the many day-to-day issues principal department heads and their staffs must address are: (a) issues affecting public health and safety; (b) budget review; (c) legislative issues; (d) hiring new staff and meeting existing employees; (e) unanticipated crises (e.g., major weather events); and (f) the key policies and priorities of their departments. The time, effort, and focus that will be required to prepare for the confirmation hearings set by Defendants will distract the principal department heads and their staffs from their day-to-day work carrying out the business of the State and implementing the Governor's policy priorities. *See* Jones Aff. ¶¶ 15-18. And at least eight more hearings before the Senate Select Committee on Nominations will presumably be required. Transcript 4:5-20. Indeed, the published schedule of the

confirmation hearings shows that eight hearings are scheduled to occur in the next six weeks. Jones Aff., Exhibit A thereto. The time and effort expended on confirmation hearings harms the Governor's ability—through his immediate staff and appointees to the principal departments—to fulfill his duty to ensure faithful execution of the laws. N.C. CONST. art. III, § 5(4).

c. The principal department heads duly selected by the Governor will face the potential for rejection by the Senate and, pursuant to the Advice and Consent Amendment, could no longer serve following any such rejection. *See* House Bill 17, § 38 (amending N.C. Gen. Stat. § 143B-9(a)(1)). If the Advice and Consent Amendment is ultimately held to be unconstitutional, its implementation during the pendency of this litigation would destroy the Governor's constitutional right to appoint his chosen department heads without legislative interference. Any department head rejected by the Senate would lose the ability to supervise and control a principal executive department. Following a later holding that the Advice and Consent Amendment is unconstitutional, the uncertain status of an (unconstitutionally) rejected appointee would inject unnecessary confusion into the operations of the executive branch.

d. The relief sought by the Governor in his underlying constitutional challenge will be destroyed as the unconstitutional advice and consent procedure will begin while litigation is pending. That constitutional injury is *per se* irreparable harm. *See, e.g.*, *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (citing *Pleasants*); *S. S. Kresge Co. v. Tomlinson*, 275 N.C. 1, 8, 165 S.E.2d 236, 240

(1969) (same). This "injury is one to which the complainant should not be required to submit or the other party permitted to inflict. . . ." *See A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 405-07, 302 S.E.2d 754, 762-3 (1983) (citations and internal quotations mark omitted). Indeed, North Carolina law specifically grants trial courts the power to enjoin challenged legislation even when the trial court determines that legislation is constitutional, in order to avoid irreparable harm to the plaintiff. *See* N.C. Gen. Stat. § 1-500; *see also G I Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 125 S.E.2d 764 (1962) (trial court applied N.C. Gen. Stat. § 1-500 to enjoin act it found to be constitutional; North Carolina Supreme Court reversed).

14. Any of these irreparable harms, standing alone, would be sufficient to support a temporary restraining order and preliminary injunction. The Governor has more than met his burden of showing irreparable harm if the North Carolina Senate is permitted to begin to implement the Advice and Consent Amendment.

15. The likelihood of these harms occurring is increased by the fact that the Senate has not followed its own rules related to the confirmation process and has been vague and unclear as to the consequences of the votes to be taken by committees during the process.

16. Senate Rule 49, adopted by the full Senate at the beginning of this session states in pertinent part that:

> RULE 49. **Consideration of Gubernatorial Nominations or Appointments.** – When received by the Principal Clerk, written notice of a gubernatorial nomination or appointment that requires confirmation by the General Assembly or the Senate shall be read in session and shall be referred by the Chairman of the Committee on Rules and Operations of the Senate, or in his absence the President Pro Tempore of the Senate, to the appropriate Senate committee.

Senate Resolution 1 for the Regular Session of the 2017 General Assembly (adopted 1/11/2017).

17. As the Governor has not yet notified the President of the Senate of his nominations to head the principal departments, the President of the Senate could not have provided written notice to the Principal Clerk as required by this rule.

18. Based upon the transcript of the meeting held by the Senate Select Committee on Nominations on January 31, 2017, a copy of which is attached to the Affidavit of Eric David, the Senate plans to have the nominees appear first in a Senate committee which is charged with considering legislation related to that nominee's principal department and then, a second time before the Senate Select Committee on Nominations. Votes will be taken by both committees. Based upon Senator Rabon's description of the process in the meeting transcript, it appears that a vote to disapprove the nominee in either committee and certainly in the Select Committee on Nominations would mean that the Governor's appointee could no longer serve as a principal department head. But even this is not clear.

19. Put plainly, the Senate's failure to follow its own rules and lack of clarity regarding the process of senatorial confirmation and the impact of a vote exacerbates the potential injury to the Governor.

## III. The Governor is likely to succeed in showing that the Advice and Consent Amendment is unconstitutional.

20. N.C. Gen. Stat. § 143B-6 lists the principal departments in the executive branch of North Carolina state government: Natural and Cultural Resources; Health and Human Services; Revenue; Public Safety; Environmental Quality; Transportation; Administration; Commerce; Community Colleges System Office; Information Technology; and Military and Veterans Affairs. Both N.C. Gen. Stat. §§ 143B-9 and 147-12(a)(3) authorize the Governor to appoint the heads of these principal departments.

21. The power to appoint and remove executive officers to serve the Governor, to lead the principal departments within the executive branch, and to carry out the Governor's responsibility to "take care that the laws be faithfully executed" is a core executive power.

22. The Advice and Consent Amendment purports to insinuate the legislative branch into an activity which is at the core of the executive's power and authority. By its terms, the Advice and Consent Amendment would allow the Senate to veto the Governor's choices of the individuals to run the principal departments of state government.

23. In order for the General Assembly to exercise such authority there must be some constitutional provision which authorizes that action. *See, e.g.*, *Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring) ("[T]he power of senatorial confirmation is . . . an exception to constitutional doctrine of separation of governmental powers and requires an express grant of such power, just as the Governor's exercise of legislative power in the form of vetoing legislative enactments must be expressly granted."). None exists.

24. The General Assembly, as part of the Advice and Consent Amendment, cited to Article III, Section 5(8) of the North Carolina Constitution ("the Appointments Clause") as the *source* of authority for the North Carolina Senate to require the Governor's appointed department heads to be subject to senatorial advice and consent. It is not.

25. Our Supreme Court last year, in *McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), discussed at length the history and meaning of the Appointments Clause. While acknowledging that the language of that clause had changed over the past 150 years, the Court "conclude[d] that this clause gives the Governor the exclusive authority to appoint *constitutional* officers whose appointments are not otherwise provided for *by the constitution*." *Id.* at 639, 781

S.E.2d at 252 (emphasis in original) (reviewing interpretive precedent from 1868 Constitution through 2016).

26. In fact, the Court repeated that holding—that the Appointments Clause relates only to constitutional offices and not statutory ones—twice more in its opinion.

27. The Court explained:

> The appointments clause did not change again until the people adopted the current version of the clause in the Constitution of 1971. The current appointments clause states:
>
> > Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.
>
> N.C. Const. art. III, § 5(8). When the people enacted the current version of the clause, they deleted the phrase "whose offices are established by this Constitution." But, as in 1876, they did not disturb the phrase "whose appointments are not otherwise provided for." *Compare* N.C. Const. of 1868, art. III, § 10 (1876), *with* N.C. Const. art. III, § 5(8).
>
> We conclude that the latter phrase still means "whose appointments are not otherwise provided for *by the Constitution.*"

*McCrory*, 368 N.C. at 642, 781 S.E.2d at 254 (emphasis original).

28. *McCrory* concluded its analysis by stating, "the appointments clause means the same thing now that is did in 1876. It authorizes the Governor to appoint all *constitutional* officers whose appointments are not otherwise *provided for by the constitution.*" *Id.* at 644, 781 S.E.2d at 255 (emphasis added).

29. In summary, the *McCrory* court held that the Appointments Clause should be read as follows:

> Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all [***constitutional***] officers whose appointments are not otherwise provided for [***in this constitution***].

*See* N.C. CONST. art. III, § 5(8); *McCrory*, 368 N.C. at 644, 781 S.E.2d at 255.

30. The Governor's appointed principal department heads are not constitutional officers. The eleven principal administrative departments that they head are created by statute, not the North Carolina Constitution. *See* N.C. Gen. Stat. § 143B-6.

31. Consequently, because they are statutory officers, the North Carolina Constitution does not allow the North Carolina Senate to exercise the power of advice and consent over the Governor's appointed principal department heads.

32. Without constitutional authority, the Advice and Consent Amendment violates the separation of powers by assigning core executive functions to a portion of the legislative branch, thus encroaching upon the Governor's constitutional authority to control the executive branch of state government and to carry out his constitutional duty to "take care that the laws be faithfully executed." N.C. CONST. art. I, § 6, art. III, §§ 1, 5(4), 5(8).

33. As *McCrory* observed, the Governor must be able to control "the views and priorities" of the officers with "the final say on how to execute the laws. . . ." 368 N.C. at 647, 781 S.E.2d at 257. In another recent opinion dealing with a sheriff's dismissal of a deputy, the North Carolina Supreme Court recognized an elected executive official's right to fill key policymaking and managerial positions with appointees who share his views and priorities, "[t]o ensure the execution of policies on which the winning candidate campaigned. . . ." *See Young v. Bailey*, 368 N.C. 665, 670-71, 781 S.E.2d 277, 281 (2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 367 (1976)). Similarly, this principle was recognized by the founders of the United States who successfully argued during the First Congress that the President must have unfettered power to remove immediate subordinates, lest he have "fasten[ed] upon him, as subordinate executive officer, men who by their inefficient service under him, by their lack of loyalty to the service, or

by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Myers v. United States*, 272 U.S. 52, 131 (1926).

34. The Advice and Consent Amendment is analogous to a governor, without constitutional authority, asserting the power to veto legislation passed by the state legislature. Such a unilateral assertion of power is ineffective. Instead, as in North Carolina, the authority for the executive to exercise legislative power through veto must be authorized by the people through their constitution. *See* N.C. CONST. art. II, § 22; Session Law 1995-5 (submitting constitutional amendment to Article II, Section 22 to the people of North Carolina).

35. Accordingly, the Governor is likely to succeed in showing that the Advice and Consent Amendment is unconstitutional.

## IV. The balance of equities and the public interest favor granting a temporary restraining order and preliminary injunction.

36. If not enjoined, the Advice and Consent Amendment will allow the North Carolina Senate to unconstitutionally exert control over the implementation of executive policy—by approving or disapproving of the Governor's appointed heads of principal departments—thus preventing the Governor from complying with his constitutional duty to ensure that the laws are faithfully executed.

37. The Governor and his staff spent months identifying and recruiting experienced, effective leaders with the subject-matter expertise to run a principal department in accordance with the Governor's policy priorities and goals. The Advice and Consent Amendment would render that work meaningless, instead requiring the Governor to appoint principal department heads who will mollify the Senate.

38. The actions of the North Carolina Senate are in complete disregard of the existing statute setting a May 15, 2017 deadline for the Governor to ***begin*** the confirmation process by

submitting the names of his appointees to head the principal departments. *See* N.C. Gen. Stat. § 147-12(a)(3d). The balance of equities and the public interest favor the enforcement of duly enacted—and constitutional—statutes.

39. The actions of the North Carolina Senate appear designed to precipitate an unnecessary constitutional crisis. The parties have previously agreed to and jointly proposed to the Court a schedule that would allow the merits of the Governor's challenge to the Advice and Consent Amendment to be heard in early March and addressed by the Court before the existing May 15th deadline. Indeed, if the North Carolina Senate had complied with the statutorily required May 15th deadline, these Motions would have been unnecessary and taxpayers would have been saved the costs of these proceedings.

40. For all of these reasons, the balance of equities and the public interests weighs in favor of the issuance of temporary restraining order and preliminary injunction.

* * *

WHEREFORE, Plaintiff Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina, prays the Court:

a. Issue a temporary restraining order and preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65 barring Part III of House Bill 17 (Session Law 2016-126, §§ 38-39) from taking effect during the pendency of this litigation; and

b. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 6th day of February, 2017.

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## CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing document was served on the following parties via U.S. mail, with a courtesy copy by e-mail:

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This the 6th day of February, 2017.

BROOKS, PIERCE, McLENDON,
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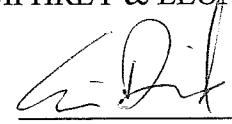
By: 

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