
 NORTH CAROLINA COURT OF APPEALS

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 TO VACATE AND DISMISS, or ALTERNATIVELY,
MOTION TO REMAND JURISDICTION

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No. 17-367

TENTH JUDICIAL DISTRICT

 NORTH CAROLINA COURT OF APPEALS

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

v.)

From Wake County
 No. 16 CVS 15636

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 TO VACATE AND DISMISS, or ALTERNATIVELY,
MOTION TO REMAND JURISDICTION

Now Come Defendant Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Defendant Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, “Defendants”), by and through undersigned counsel, and pursuant to Appellate Rules 2 and 37, hereby move this Court to vacate the judgments of the three-judge Superior Court panel related to Part

1 of Session Law 2016-125 (regarding the Bipartisan Board) and Sections 7 and 8 of Session Law 2016-126 (regarding exempt positions as codified at N.C. Gen. Stat. § 126-5(d)(2c)). Alternatively, Defendants ask this Court to remand jurisdiction to the three-judge Superior Court panel for an indicative ruling on Defendants' Rule 60 motion being filed contemporaneously with this Motion. In support of the Motion before this Court, Defendants respectfully show that:

Procedural and Factual Background

1. On 16 December 2016, Session Law 2016-125 was signed into law by Governor Pat McCrory. (R p 141, 277). On 19 December 2016, Session Law 2016-126 was signed into law by Governor McCrory. (R p 161, 277).

2. Part I of Session Law 2016-125 reorganized two statutorily-created bodies, the State Board of Elections (the "Board of Elections") and the State Ethics Commission (the "Ethics Commission"), into one independent, regulatory and quasi-judicial body, the Bipartisan State Board of Elections and Ethics Enforcement (the "Bipartisan Board"). (R pp 115-129, 277). Sections 7 and 8 of Part I of Session Law 2016-126, codified at N.C. Gen. Stat. § 126-5(d)(2c), converted the designation of exempt employees to career State employees. (R pp 145-149, 277). Part III of Session Law 2016-126 amended N.C. Gen. Stat. § 143B-9 to provide for senatorial advice and consent of the Governor's appointment of the heads of principal State departments. (R pp 159-160, 277).

3. After various motions, arguments, and hearings, the trial court ultimately heard from the parties on cross-motions for summary judgment at the 7 March 2017 special session of Wake County Superior Court. (R p 276).

4. In its 17 March 2017 Memorandum of Order on Cross-Motions for Summary Judgment, the Court summarized the laws in Part I of Session Law 2016-125 as follows:

- The Bipartisan Board would be made of four gubernatorial appointees and four appointees from the General Assembly.
- Members of the Ethics Commission serving on 31 December 2016 would constitute the initial Bipartisan Board with new appointments being made in June 2017.
- Six members of the Bipartisan Board would constitute a quorum, and, except where required to act unanimously, a majority vote of the Bipartisan Board would require six members.
- The Chair and Vice Chair of the Ethics Commission also rolled over into those positions on the Bipartisan Board.
- After initial service, the Chair would rotate annually with a Democrat serving in odd years and a Republican serving in even years.

(R pp 280-281).

5. Interpreting *McCrory v. Berger*, 368 N.C. 633, 645-47, 781 S.E.2d 248, 256-57 (2016), the three-judge panel noted “[i]t is the assignment of powers and duties by statute that may (or may not) violate separation of powers—not how the challenged act operates in fact.” (R pp 284-285). The trial court noted that it was focusing its attention on “the degree of control that

the challenged legislation allows the General Assembly to exert.” (R p 285) (quoting *Berger*, 368 N.C. at 647, 781 S.E.2d at 257).

6. The trial court found that Part I of Session Law 2016-125 allocated appointments to the Bipartisan Board equally between the Governor and the legislature. (R pp 285-87). It created a supermajority vote for most actions. (*Id.*) And it transitioned the members of the Ethics Commission over to the Bipartisan Board from 1 January 2017 to 1 June 2017. (*Id.*)

7. The trial court found these provisions to be detrimental to the constitutionality of the legislation, holding that “[t]he Governor’s inability to appoint a controlling number of members of the New State Board means that the legislature retains control over that board and can prevent the Governor from taking action.” (R p 291). “Because they reserve too much control in the legislature—and thus block the Governor from ensuring faithful execution of the laws—the Court concludes that the Board of Elections Amendments are unconstitutional.” (*Id.*)

8. As to the Exempt Positions Amendments, the Court also concluded that “they violate separation of powers.” (R p 303).

9. The trial court then granted Plaintiff’s motion for summary judgment as to these two issues and denied Defendants’ motion for summary judgment on these issues. (R p 304). Based on these rulings, and pursuant to its injunctive powers, the trial court declared that:

- a. “Sections 1 to 19 of Session Law 2016-125 (‘the Board of Elections Amendments’) are Unconstitutional and are therefore permanently enjoined.” (R p 304).
- b. “Those portions of Sections 7 and 8 of Session Law 2016-126 codified at N.C. Gen. Stat. § 126-5(d)(2c) (‘the Exempt Positions Amendments’) are Unconstitutional and are therefore permanently enjoined.” (R pp 304-305).

**Repeal of Prior Law Through Enactment of Senate Bill 68
Moots Issues and Requires Vacating and Dismissal**

10. Whether the trial court’s determination as to constitutionality was correct or not, the General Assembly has since repealed N.C. Gen. Stat § 126-5(d)(2c) and repealed and replaced the laws governing the structure of the Bipartisan Board, therefore rendering further review of the prior law moot.

11. On 11 April 2017, the General Assembly passed Senate Bill 68 and sent it to the Governor for his signature. Governor Cooper vetoed Senate Bill 68, and claimed it too was unconstitutional. On 25 April 2017, the General Assembly overrode that veto and enacted Senate Bill 68 into law, a copy of which is attached as Exhibit 1. Senate Bill 68:

- a. Repeals Part I of S.L. 2016-125.
- b. Repeals G.S. 126-5(d)(2c), as enacted by S.L. 2016-126.

A. Exempt Position Amendment Repeal

12. Senate Bill 68 does not replace N.C. Gen. Stat. § 126-5(d)(2c), regarding exempt positions, with anything further. The repeal of the exempt positions amendment renders the cause of action concerning it moot. “It has been repeatedly held that where, pending an appeal, the subject–matter of an action, or the cause of action, is destroyed in any manner whatever, this court will not go into a consideration of the abstract question which party should rightly have won[.]” *Wikel v. Bd. of Comm’rs of Jackson Cty.*, 120 N.C. 451, 27 S.E. 117 (1897); *Benvenue Parent-Teacher Ass’n v. Nash Cty. Bd. of Ed.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969) (“Such a situation may arise . . . where, by the repeal of a statute, an administrative board is deprived entirely of a power which the plaintiff sought to restrain it from exercising in alleged disregard of procedural requirements in effect when the judgment below was rendered . . .”).

13. In *Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 158, 749 S.E.2d 451, 454 (2013), the General Assembly instituted changes to North Carolina’s prekindergarten program in the 2011 biennial budget law, and the plaintiffs sued to enjoin the act, arguing it was unconstitutional. The trial court held that certain aspects of the law were unconstitutional. *Id.* at 158, 749 S.E.2d at 454. However, while the matter was on appeal, the General Assembly made substantial changes to the law in question. *Id.* at 158-59, 749 S.E.2d at 454.

The North Carolina Supreme Court held that the substantial changes rendered a decision on the constitutionality of the matter moot.

Whenever, during the course of litigation it develops that ... the questions originally in controversy between the parties are no longer at issue, *the case should be dismissed*, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. This Court consistently has refused to consider an appeal raising grave questions of constitutional law where, pending the appeal to it, the cause of action had been destroyed so that the questions had become moot.

Id. at 159, 749 S.E.2d at 454 (internal quotations and citations omitted) (emphasis added).

14. Here, the unqualified repeal of N.C. Gen. Stat. § 126-5(d)(2c) renders moot the question of its constitutionality. *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972).

15. “If the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss *the action*.” *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997) (emphasis added). Here, the cause of action for declaratory judgment as to the Exempt Positions is moot, and this Court should vacate the lower court’s opinion and dismiss the appeal as to that cause of action. *See, e.g., Town of Chapel Hill*, 346 N.C. at 261, 485 S.E.2d at 270 (Supreme Court vacates Court of Appeals opinion); *Hoke Cty. Bd. of Educ.*, 367 N.C. at 160, 749 S.E.2d at 455 (“We dismiss this appeal as moot *ex mero motu* and vacate the opinion of the

Court of Appeals. This case is remanded to the Court of Appeals with instructions to vacate the 18 July 2011 order of Superior Court, Wake County.”); *Cape Fear River Watch v. N. Carolina Env'tl. Mgmt. Comm'n*, 368 N.C. 92, 772 S.E.2d 445, 451 (2015) (“As a result, we hereby vacate the trial court’s order and remand this case to the trial court with instructions to dismiss petitioners’ appeal from the Commission’s declaratory ruling on mootness grounds.”).

16. These cases rest on the premise that the lower court’s decision should not be maintained “as a precedent when, but for intervening mootness, it might not have remained so.” *State ex rel. Utilities Comm’n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 325 (1976). Therefore, the “better practice” is to vacate the decision of the lower court. *Id.*

17. Here, this Court should enter an Order vacating the 17 March 2017 opinion of the three-judge panel as to the constitutionality or unconstitutionality of N.C. Gen. Stat. § 126-5(d)(2c) as moot and dismiss Defendants’ notice of appeal as to that issue for the same reason.

B. Bipartisan Board Repeal and Replace

18. These same authorities support the same ruling as to Part I of Session Law 2016-125, despite new provisions governing the formation of the Bipartisan Board being put in place by Senate Bill 68.

19. Section 2 of Senate Bill 68 specifically repeals the portion of the prior Session Law that the three-judge panel found unconstitutional and enjoined. The new law is materially and substantially different than prior law.

20. The differences between Part I of Session Law 2016-125 and Sections 3-22 of Senate Bill 68 address the constitutional issues raised by the three-judge panel.

21. The Governor now has not half, not most, but *all* appointments to the Bipartisan Board. The General Assembly has none. The supermajority vote is eliminated. The members of the Bipartisan Board are chosen by the Governor in the same manner as members of the Board of Elections have been previously chosen under Chapter 163: lists of names from the party chairpersons are submitted to the Governor. The law takes effect on May 1, 2017, meaning there is no transition Board made up of a mix of legislative and gubernatorial appointees. The Governor can remove all eight appointees—even for simply not showing up—which is removal power similar to what he would have enjoyed under the law as it existed on 31 December 2016. And, the supervision of the Governor over the Board, to the extent that existed prior to 31 December 2016, is still the same.

22. The legislature does not reserve control of the Bipartisan Board at all; it does not appoint any members to the Bipartisan Board, much less a

controlling number either by direct majority vote or indirect minority vote to block action.

23. The constitutionality of enacted Senate Bill 68 is not only presumed by law, but, similar to *McCluney*, directly designed by the General Assembly to answer the concerns expressed by the three-judge panel.

We can find nothing in the 1971 Act, which repealed G.S. s 14—189.1 outright and enacted G.S. s 14—190.1, to indicate an intent to leave the old law unrepealed, or to reaffirm it. On the contrary, the clear implication is that the legislature intended to get rid of a law of dubious constitutionality and to prevent the post-conviction problems which would immediately result were this Court or the United States Supreme Court to hold the law unconstitutional. The enactment of G.S. s 14—190.1 was an obvious attempt to provide a new law which would meet the latest tests enunciated by the United States Supreme Court in order that State law enforcement officers might proceed with assurance against the rampant public dissemination and pandering of obscenity.

McCluney, 280 N.C. at 406, 185 S.E.2d at 871–72.

24. The repeal of the prior law followed by enactment of these material and substantial changes as compared to that repealed law render any decision on the prior law moot. Based on the prior authorities, this Court should vacate the decision of the three-judge panel as to the unconstitutionality or constitutionality of Part I of Session Law 2016-125 as moot and dismiss Defendants' notice of appeal from that issue for the same reason.

C. Similar Procedural Treatment in Federal Courts for Repeal

25. This is the same procedure followed by our federal courts when facing similar repeal and replace circumstances. In *Maryland Highways Contractors Ass'n, Inc. v. State of Maryland*, 933 F.2d 1246, 1248 (4th Cir. 1991), in between the district court's decision and the appeal to the Fourth Circuit, the Maryland legislature repealed a Minority Business Enterprise statute and replaced it with a new one. Finding that the repeal and subsequent enactment of a new law rendered the case moot, the Fourth Circuit vacated the district court's decision and remanded with instructions to dismiss. *Id.*

When a case is rendered moot while on appeal, the established practice is to reverse or vacate the judgment below and remand with a direction to dismiss. *United States v. Munsingwear*, 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). Because we hold that the Association's claim against Maryland is moot, we vacate the district court's order granting summary judgment to Maryland, and we direct that court to dismiss this case as moot.

Maryland Highways Contractors Ass'n, Inc., 933 F.2d at 1250.

26. "When a law no longer remains in effect, cases challenging that law and requesting only prospective equitable relief ordinarily become moot." *Cox v. Phillips*, No. 97-2207, 1998 WL 231229, at *2 (4th Cir. May 5, 1998) (citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-15 (1972) ("The only relief sought in the complaint was a declaratory judgment that the now repealed Fla. Stat. § 192.06(4) is unconstitutional as applied to a church

parking lot used for commercial purposes and an injunction against its application to said lot. This relief is, of course, inappropriate now that the statute has been repealed.”)).

27. “When a case becomes moot on appeal, the ordinary course is to vacate the judgment below and remand the case for dismissal.” *Id.* at *2 (citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39, 71 S.Ct. 104, 95 L.Ed. 36 (1950)); *but see Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 122 (4th Cir. 2000) (vacating injunction is different analysis than vacating a declaratory judgment in federal courts) *and Diffenderfer, Fla.*, 404 U.S. at 415 (rather than remand for dismissal, remand to the district court with leave for amendment of pleadings was a possible remedy).

D. No Impact on Appeal from Advice and Consent

28. The passing of Senate Bill 68 does not have an impact on the Governor’s appeal from the three-judge panel finding advice and consent constitutional. That appeal should proceed in the normal course of events. However, as noted above, this Court should vacate the decisions of the three-judge panel as to the unconstitutionality or constitutionality of Part I of Session Law 2016-125 and Sections 7 and 8 of Session Law 2016-126, codified as N.C. Gen. Stat. § 126-5(d)(2c), as moot and dismiss Defendants’ notice of appeal from those issues for the same reason.

Remand of Jurisdiction under *Bell v. Martin*
is an Alternative Solution

29. Should this Court, for whatever reason, believe that despite the appeals at issue being moot, vacatur of the trial court's decision on summary judgment or injunctive relief is a matter for the trial court to determine first, Defendants' alternatively ask this Court, under *Bell v. Martin*, 43 N.C. App. 134, 258 S.E.2d 403 (1979), *reversed on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980), to remand jurisdiction to the three-judge panel for an indicative ruling on that point based on Defendants' Rule 60(b) Motion contemporaneously filed with the trial court.

30. Defendants' Rule 60(b) Motion asks the trial court to vacate the portions of the Order related to the Exempt Positions Amendments and the Board of Elections Amendments. Such a request is appropriate because there has been a significant change in the law (specifically, the repeal of the Exempt Positions Amendments and the repeal and replacement of the Board of Elections Amendments) such that the issues raised as to constitutionality of those amendments are now moot. *See Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 160, 749 S.E.2d 451, 455 (2013); *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972). A copy of that motion is attached hereto as Exhibit 2.

31. “The trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion.” *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) (citing *Bell v. Martin*).

WHEREFORE, 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, pray this Court:

1. Based on the enactment of Senate Bill 68, which repeals Part I of Session Law 2016-125 and N.C. Gen. Stat. 126-5(d)(2c), determine that the appeal from the three-judge panel involving the Bipartisan Board and the Exempt Position Amendments is moot;
2. Order that the 17 March 2017 Memorandum of Order on Cross-Motions for Summary Judgment be vacated as to the declaratory relief on the constitutionality of and permanent injunction against the Bipartisan Board Amendments in Part I of Session Law 2016-125 and the Exempt Position Amendments in Sections 7 and 8 of Session Law 2016-126, then codified as N.C. Gen. Stat. § 126-5(d)(2c) (2016);
3. Order that the matter be remanded to the three-judge panel with further instruction to dismiss those claims and provide whatever further relief is necessary in the case; or alternatively,

4. Pursuant to *Bell v. Martin*, remand jurisdiction to the three-judge panel in order for it to provide an indicative ruling as to Defendants' Rule 60(b) Motion regarding vacatur of the relevant portions of the 17 March 2017 Memorandum of Order on Cross-Motions for Summary Judgment, and provide whatever further relief is necessary in the case; and
5. For such other relief as this Court deems fair and just.

[Electronic Signatures on Next Page]

Respectfully submitted this 25th day of April, 2017.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Electronically submitted

D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 877-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612

N.C. R. App. P. 33(b) Certification: I
certify that all of the attorneys listed below
have authorized me to list their names on this
document as if they had personally signed it.

Noah H. Huffstetler
N.C. State Bar No. 7170
noah.huffstetler@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612

Candace Friel
N.C. State Bar No. 36763
Tel: (336) 774-3300
candace.friel@nelsonmullins.com
380 Knollwood Street
Winston-Salem, NC 27103

*Counsel for Defendant-Respondents 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*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Defendant-Respondents' MOTION TO VACATE AND DISMISS, or ALTERNATIVELY, REMAND JURISDICTION was served upon the persons indicated below via electronic mail and U.S. Mail, postage prepaid, addressed as follows:

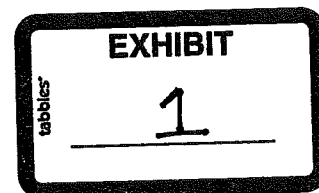
Jim W. Phillips, Jr.
Eric M. David
Daniel F.E. Smith
Brooks, Pierce, McLendon, Humphrey &
Leonard, L.L.P.
Suite 2000, Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
jphillips@brookspierce.com
edavid@brookspierce.com
dsmith@brookspierce.com

Grayson G. Kelley
Chief Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
gkelley@ncdoj.gov

This the 25th day of April, 2017.

/s/ Electronically submitted
D. Martin Warf
N.C. State Bar No. 32982
Tel: (919) 877-3800
martin.warf@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017



SENATE BILL 68
RATIFIED BILL

AN ACT TO REPEAL G.S. 126-5(D)(2C), AS ENACTED BY S.L. 2016-126; TO REPEAL PART I OF S.L. 2016-125; AND TO CONSOLIDATE THE FUNCTIONS OF ELECTIONS, CAMPAIGN FINANCE, LOBBYING, AND ETHICS UNDER ONE QUASI-JUDICIAL AND REGULATORY AGENCY BY CREATING THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT.

Whereas, the General Assembly finds that bipartisan cooperation with elections administration and ethics enforcement lend confidence to citizens in the integrity of their government; and

Whereas, the General Assembly finds that the State Board of Elections, which is charged with elections administration and campaign finance enforcement, is an "independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department" pursuant to G.S. 163-28; and

Whereas, the General Assembly finds that the State Ethics Commission, which is charged with interpretation of the State Government Ethics Act and the Lobbying Law, is "located within the Department of Administration for administrative purposes only, but shall exercise all of its powers, including the power to employ, direct, and supervise all personnel, independently of the Secretary of Administration" pursuant to G.S. 138A-9; and

Whereas, the functions of ethics, elections, and lobbying affect and regulate a similar group of persons; and

Whereas, the rights of that group of persons affected may include issues directly related to the First Amendment right of free speech; and

Whereas, the General Assembly finds it beneficial and conducive to consistency to establish one quasi-judicial and regulatory body with oversight authority for ethics, elections, and lobbying; and

Whereas, the General Assembly also finds it imperative to ensure protections of free speech rights and increase public confidence in the decisions to restrict free speech; and

Whereas, the General Assembly finds that voices from all major political parties should be heard in decisions relating to First Amendment rights of free speech; and

Whereas, the General Assembly finds that important governmental and First Amendment rights will be impacted in the decisions of the quasi-judicial and regulatory body regulating ethics, elections, and lobbying; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 126-5(d)(2c), as enacted by S.L. 2016-126, is repealed.

SECTION 2. Part I of S.L. 2016-125 is repealed.

SECTION 3. Recodification; Technical and Conforming Changes. – The Revisor of Statutes shall recodify Chapter 138A of the General Statutes, Chapter 120C of the General Statutes, as well as Chapter 163 of the General Statutes, as amended by this act, into a new Chapter 163A of the General Statutes to be entitled "Elections and Ethics Enforcement Act," as



enacted by Section 4 of this act. The Revisor may also recodify into the new Chapter 163A of the General Statutes other existing statutory laws relating to elections and ethics enforcement that are located elsewhere in the General Statutes as the Revisor deems appropriate. The new Chapter 163A of the General Statutes shall have the following structure:

SUBCHAPTER I. GENERAL PROVISIONS.

Article 1. Bipartisan State Board of Elections and Ethics Enforcement.

SUBCHAPTER II. ETHICS AND LOBBYING.

Article 5. General Provisions.

Article 6. Public Disclosure of Economic Interests.

Article 7. Ethical Standards for Covered Persons.

Article 8. Lobbying.

Part 1. Registration.

Part 2. Prohibitions and Restrictions.

Part 3. Reporting.

Part 4. Liaison Personnel.

Part 5. Exemptions.

Part 6. Miscellaneous.

Article 9. Violation Consequences.

SUBCHAPTER III. ELECTION AND ELECTION LAWS.

Article 15. Time of Primaries and Elections.

Part 1. Time of Primaries and Elections.

Part 2. Time of Elections to Fill Vacancies.

Article 16. Election Officers.

Part 1. State Board Powers and Duties.

Part 2. County Boards of Elections.

Part 3. Political Activities by Board of Elections Members and Employees.

Part 4. Precinct Election Officials.

Article 17. Qualifying to Vote.

Part 1. Qualifications of Voters.

Part 2. Registration of Voters.

Part 3. Challenges.

Part 4. HAVA Administrative Complaint Procedure.

Article 18. Political Parties.

Article 19. Nomination of Candidates.

Part 1. Primary Elections.

Part 2. Nomination by Petition.

Part 3. Challenge to Candidacy.

Article 20. Conduct of Primaries and Elections.

Part 1. Precincts and Voting Places.

Part 2. Precinct Boundaries.

Part 3. Voting.

Part 4. Counting Official Ballots, Canvassing Votes, Hearing Protests, and Certifying Results.

Part 5. Members of United States House of Representatives.

Part 6. Presidential Electors.

Part 7. Presidential Preference Primary Act.

Part 8. Petitions for Elections and Referenda.

Article 21. Absentee Voting.

Part 1. Absentee Ballot.

Part 2. Uniform Military and Overseas Voters Act.

Article 22. Regulation of Election Campaigns.

- Part 1. Corrupt Practices and Other Offenses Against the Elective Franchise.
- Article 23. Regulating Contributions and Expenditures in Political Campaigns.
 - Part 1. In General.
 - Part 2. Disclosure Requirements for Media Advertisements.
 - Part 3. Municipal Campaign Reporting.
- Article 24. The North Carolina Public Campaign Fund.
- Article 25. The Voter-Owned Elections Act.
- Article 26. Legal Expense Funds.
- Article 27. Municipal Elections.
 - Part 1. Municipal Election Procedure.
 - Part 2. Conduct of Municipal Elections.
- Article 28. Nomination and Election of Appellate, Superior, and District Court Judges.

When recodifying, the Revisor is authorized to change all references to the State Ethics Commission, to the State Board of Elections, or to the Secretary of State, to instead be references to the Bipartisan State Board of Elections and Ethics Enforcement. The Revisor may separate subsections of existing statutory sections into new sections and, when necessary to organize relevant law into its proper place in the above structure, may rearrange sentences that currently appear within subsections. The Revisor may modify statutory citations throughout the General Statutes, as appropriate, and may modify any references to statutory divisions, such as "Chapter," "Subchapter," "Article," "Part," "section," and "subsection," adjust the order of lists of multiple statutes to maintain statutory order, correct terms and conform names and titles changed by this act, eliminate duplicative references to the Bipartisan State Board of Elections and Ethics Enforcement that result from the changes authorized by this section, and make conforming changes to catch lines and references to catch lines. The Revisor may also adjust subject and verb agreement and the placement of conjunctions. The Revisor shall consult with the State Ethics Commission, the State Board of Elections, the Secretary of State, and the new Bipartisan State Board of Elections and Ethics Enforcement on this recodification.

SECTION 4.(a) The General Statutes are amended by adding a new Chapter to read:

"Chapter 163A.

"Elections and Ethics Enforcement Act."

SECTION 4.(b) Chapter 163A of the General Statutes, as enacted by this act, is amended by adding a new Subchapter to read:

"SUBCHAPTER I. GENERAL PROVISIONS."

SECTION 4.(c) Subchapter I of Chapter 163A of the General Statutes, as enacted by this act, is amended by adding a new Article to read:

"Article 1.

"Bipartisan State Board of Elections and Ethics Enforcement.

"§ 163A-1. Bipartisan State Board of Elections and Ethics Enforcement established.

There is established the Bipartisan State Board of Elections and Ethics Enforcement, referred to as the State Board in this Chapter.

"§ 163A-2. Membership.

(a) The State Board shall consist of eight individuals registered to vote in North Carolina, appointed by the Governor, four of whom shall be of the political party with the highest number of registered affiliates and four of whom shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. The Governor shall appoint four members each from a list of six nominees submitted by the State party chairs of the two political parties with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board.

- (b) Members shall serve for two-year terms, beginning May 1 of the odd-numbered year.
- (c) Members shall be removed by the Governor from the State Board only for misfeasance, malfeasance, or nonfeasance. Violation of G.S. 163A-3(d) shall be considered nonfeasance.
- (d) Any vacancy occurring on the State Board shall be filled by an individual affiliated with the same political party of the vacating member. Any vacancy occurring in the State Board shall be filled by the Governor, and the person so appointed shall fill the unexpired term. The Governor shall fill the vacancy from a list of two names submitted by the State party chair of the political party with which the vacating member was affiliated if that list is submitted within 30 days of the occurrence of the vacancy.
- (e) At the first meeting held after new appointments are made, the members of the State Board shall take the following oath:
"I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain, and defend the Constitution of said State; and that I will well and truly execute the duties of the office of member of the Bipartisan State Board of Elections and Ethics Enforcement according to the best of my knowledge and ability, according to law, so help me God."
- (f) At the first meeting in May, the State Board shall organize by electing one of its members chair and one of its members vice-chair, each to serve a two-year term as such. In 2017 and every four years thereafter, the chair shall be a member of the political party with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the second highest number of registered affiliates. In 2019 and every four years thereafter, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.
- (g) At the first meeting held after new appointments are made after taking the oath, the State Board shall elect one of its members secretary, to serve a two-year term as such.
- (h) No person shall be eligible to serve as a member of the State Board who:
- (1) Holds any elective or appointive office under the government of the United States, the State of North Carolina, or any political subdivision thereof.
 - (2) Holds any office in a political party or organization.
 - (3) Is a candidate for nomination or election to any office.
 - (4) Is a campaign manager or treasurer of any candidate in a primary or election.
 - (5) Has served two full consecutive terms.
- (i) No person while serving on the State Board shall:
- (1) Make a reportable contribution to a candidate for a public office over which the State Board would have jurisdiction or authority.
 - (2) Register as a lobbyist under Article 8 of this Chapter.
 - (3) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the nomination or election of one or more clearly identified candidates for public office.
 - (4) Make written or oral statements intended for general distribution or dissemination to the public at large supporting or opposing the passage of one or more clearly identified referendum or ballot issue proposals.
 - (5) Solicit contributions for a candidate, political committee, or referendum committee.

(j) Members of the State Board shall receive per diem, subsistence, and travel, as provided in G.S. 138-5 and G.S. 138-6.

"§ 163A-3. Meetings; quorum; majority.

(a) The State Board shall meet at least monthly and at other times as called by its chair or by a majority of its members. In the case of a vacancy in the chair, meetings may be called by the vice-chair.

(b) A majority of the members constitutes a quorum for the transaction of business by the State Board.

(c) Unless otherwise specified in this Chapter, an affirmative vote of at least five members of the State Board shall be required for all actions by the State Board.

(d) If any member of the State Board fails to attend a meeting, and by reason thereof there is no quorum, the members present shall adjourn from day to day for not more than three days. By the end of which time, if there is no quorum, the Governor may summarily remove any member failing to attend and appoint a successor.

"§ 163A-4. Powers of the State Board in the execution of State Board duties.

(a) In the performance of the duties enumerated in Article 8 of Subchapter II of this Chapter and Subchapter III of this Chapter, the State Board shall have power to issue subpoenas, summon witnesses, and compel the production of papers, books, records, and other evidence. Such subpoenas for designated witnesses or identified papers, books, records, and other evidence shall be signed and issued by the chair.

(b) In the absence of the chair or upon the chair's refusal to act, the vice-chair may sign and issue subpoenas, summon witnesses, and compel the production of papers, books, records, and other evidence approved in accordance with subsection (a) of this section.

(c) In the performance of the duties enumerated in this Chapter, the State Board, acting through the chair, shall have the power to administer oaths. In the absence of the chair or upon the chair's refusal to act, any member of the State Board may administer oaths.

(d) Except as provided in subsection (a) of this section, the State Board, upon a vote of five or more of its members, may petition the Superior Court of Wake County for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of violations of the remainder this Chapter. The court shall authorize subpoenas under this subsection when the court determines they are necessary for the enforcement of this Chapter. Subpoenas issued under this subsection shall be enforceable by the court through contempt powers. Venue shall be with the Superior Court of Wake County for any nonresident person, or that person's agent, who makes a reportable expenditure under this Chapter, and personal jurisdiction may be asserted under G.S. 1-75.4.

"§ 163A-5. Independent agency, staff, and offices.

(a) The State Board shall be and remain an independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department. The State Board shall exercise its statutory powers, duties, functions, and authority and shall have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10.

(b) The State Board may employ professional and clerical staff, including an Executive Director.

"§ 163A-6. Executive Director of the State Board.

(a) There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

(b) The State Board shall appoint an Executive Director for a term of two years with compensation to be determined by the Office of State Human Resources. The Executive Director shall serve beginning May 15 after the first meeting held after new appointments to the State Board are made, unless removed for cause, until a successor is appointed. In the event of a vacancy, the vacancy shall be filled for the remainder of the term.

(c) The Executive Director shall be responsible for staffing, administration, and execution of the State Board's decisions and orders and shall perform such other responsibilities as may be assigned by the State Board.

(d) The Executive Director shall be the chief State elections official."

SECTION 5.(a) G.S. 138A-6 is repealed.

SECTION 5.(b) G.S. 138A-7 is repealed.

SECTION 5.(c) G.S. 138A-8 is repealed.

SECTION 5.(d) G.S. 138A-9 is repealed.

SECTION 5.(e) G.S. 138A-12(r) is repealed.

SECTION 5.(f) G.S. 138A-13 reads as rewritten:

"§ 138A-13. Request for advice.

...

(a2) A request for a formal advisory opinion under subsection (a) of this section shall be in writing, electronic or otherwise. The ~~Commission~~ State Board shall issue formal advisory opinions having prospective application only. A public servant or legislative employee who relies upon the advice provided to that public servant or legislative employee on a specific matter addressed by the requested formal advisory opinion shall be immune from all of the following:

- (1) Investigation by the ~~Commission~~ State Board, except for an inquiry under G.S. 138A-12(b)(3).
- (2) Any adverse action by the employing entity.
- (3) ~~Investigation by the Secretary of State.~~

...

(b1) A request by a legislator for a recommended formal advisory opinion shall be in writing, electronic or otherwise. The ~~Commission~~ State Board shall issue recommended formal advisory opinions having prospective application only. Until action is taken by the Committee under G.S. 120-104, a legislator who relies upon the advice provided to that legislator on a specific matter addressed by the requested recommended formal advisory opinion shall be immune from all of the following:

- (1) Investigation by the Committee or ~~Commission~~ State Board, except for an inquiry under G.S. 138A-12(b)(3).
- (2) Any adverse action by the house of which the legislator is a member.
- (3) ~~Investigation by the Secretary of State.~~

Any recommended formal advisory opinion issued to a legislator under this subsection shall immediately be delivered to the chairs of the Committee, together with a copy of the request. Except for the Lieutenant Governor, the immunity granted under this subsection shall not apply after the time the Committee modifies or overturns the advisory opinion of the Commission in accordance with G.S. 120-104.

...."

SECTION 6. Chapter 120C of the General Statutes reads as rewritten:

"Chapter 120C.

"Lobbying.

...

"§ 120C-101. Rules and forms.

(a) The ~~Commission~~ State Board shall adopt any rules or definitions necessary to interpret the provisions of this ~~Chapter~~ Article and adopt any rules necessary to administer the provisions of this ~~Chapter~~, except for Articles 2, 4 and 8 of this ~~Chapter~~. The ~~Secretary of State shall adopt any rules, orders, and forms as are necessary to administer the provisions of Articles 2, 4 and 8 of this Chapter. The Secretary of State may appoint a council to advise the Secretary in adopting rules under this section.~~ Article.

(b) With respect to the forms adopted under subsection (a) of this section, the ~~Secretary of State~~ State Board shall adopt rules to protect from disclosure all confidential information under Chapter 132 of the General Statutes related to economic development initiatives or to industrial or business recruitment activities. The information shall remain confidential until the State, a unit of local government, or the business has announced a commitment by the business to expand or locate a specific project in this State or a final decision not to do so, and the business has communicated that commitment or decision to the State or local government agency involved with the project.

(c) In adopting rules under this ~~Chapter, Article,~~ the ~~Commission~~ State Board is exempt from the requirements of Article 2A of Chapter 150B of the General Statutes, except that the ~~Commission~~ State Board shall comply with G.S. 150B-21.2(d). At least 30 business days prior to adopting a rule, the ~~Commission~~ State Board shall:

- (1) Publish the proposed rules in the North Carolina Register.
- (2) Submit the rule and a notice of public hearing to the Codifier of Rules, and the Codifier of Rules shall publish the proposed rule and the notice of public hearing on the Internet to be posted within five business days.
- (3) Notify those on the mailing list maintained in accordance with G.S. 150B-21.2(d) and any other interested parties of its intent to adopt a rule and of the public hearing.
- (4) Accept written comments on the proposed rule for at least 15 business days prior to adoption of the rule.
- (5) Hold at least one public hearing on the proposed rule no less than five days after the rule and notice have been published.

A rule adopted under this subsection becomes effective the first day of the month following the month the final rule is submitted to the Codifier of Rules for entry into the North Carolina Administrative Code, and applies prospectively. A rule adopted by the Commission that does not comply with the procedural requirements of this subsection shall be null, void, and without effect. For purposes of this subsection, a rule is any ~~Commission~~ State Board regulation, standard, or statement of general applicability that interprets an enactment by the General Assembly or Congress, or a regulation adopted by a federal agency, or that describes the procedure or practice requirements of the ~~Commission~~ State Board.

~~(d) For purposes of G.S. 150B-21.3(b2), a written objection filed by the Commission to a rule adopted by the Secretary of State pursuant to this Chapter shall be deemed written objections from 10 or more persons under that statute. Notwithstanding G.S. 150B-21.3(b2), a rule adopted by the Secretary of State pursuant to this Chapter objected to by the Commission under this subsection shall not become effective until an act of the General Assembly approving the rule has become law. If the General Assembly does not approve a rule under this subsection by the day of adjournment of the next regular session of the General Assembly that begins at least 25 days after the date the Rules Review Commission approves the rule, the permanent rule shall not become effective and any temporary rule associated with the permanent rule expires. If the General Assembly fails to approve a rule by the day of adjournment, the Secretary of State may initiate rulemaking for a new permanent rule, including by the adoption of a temporary rule.~~

"§ 120C-102. Request for advice.

(a) At the request of any person, State agency, or governmental unit affected by this ~~Chapter, Article,~~ the ~~Commission~~ State Board shall render advice on specific questions involving the meaning and application of this ~~Chapter Article~~ and that person's, State agency's, or any governmental unit's compliance therewith. Requests for advice and advice rendered in response to those requests shall relate to real or reasonably anticipated fact settings or circumstances.

(a1) A request for a formal opinion under subsection (a) of this section shall be in writing, electronic or otherwise. The ~~Commission-State Board~~ shall issue formal advisory opinions having prospective application only. An individual, State agency, or governmental unit who relies upon the advice provided to that individual, State agency, or governmental unit on a specific matter addressed by a requested formal advisory opinion shall be immune from all of the following:

- (1) Investigation by the ~~Commission-State Board~~.
- (2) Any adverse action by the employing entity.
- (3) ~~Investigation by the Secretary of State.~~

(b) Staff to the ~~Commission-State Board~~ may issue advice, but not formal advisory opinions, under procedures adopted by the ~~Commission-State Board~~.

(c) The ~~Commission-State Board~~ shall publish its formal advisory opinions within 30 days of issuance, edited as necessary to protect the identities of the individuals requesting opinions.

(d) Except as provided under subsections (c) and (d1) of this section, a request for advice, any advice provided by ~~Commission-State Board~~ staff, any formal advisory opinions, any supporting documents submitted or caused to be submitted to the ~~Commission-State Board~~ or ~~Commission-State Board~~ staff, and any documents prepared or collected by the ~~Commission State Board~~ or the ~~Commission-State Board~~ staff in connection with a request for advice are confidential. The identity of the individual, State agency, or governmental unit making the request for advice, the existence of the request, and any information related to the request may not be revealed without the consent of the requestor. An individual, State agency, or governmental unit who requests advice or receives advice, including a formal advisory opinion, may authorize the release to any other person, the State, or any governmental unit of the request, the advice, or any supporting documents.

For purposes of this section, "document" is as defined in G.S. 120-129. Requests for advice, any advice, and any documents related to requests for advice are not "public records" as defined in G.S. 132-1.

~~(d1) Staff to the Commission may share all information and documents related to requests under subsection (a) and (a1) of this section with staff of the Office of the Secretary of State. The information and documents in the possession of the staff of the Office of the Secretary of State shall remain confidential and not public records. The Commission shall forward an unedited copy of each formal advisory opinion under this section to the Secretary of State at the time the formal advisory opinion is issued to the requestor, and the Secretary of State shall treat that unedited advisory opinion as confidential and not a public record.~~

(e) Requests for advisory opinions may be withdrawn by the requestor at any time prior to the issuance of a formal advisory opinion.

...

"§ 120C-601. Powers and duties of the ~~Commission-State Board~~.

(a) The ~~Commission-State Board~~ may investigate complaints of violations of this Chapter and shall refer complaints related solely to Articles 2, 4, or 8 of this Chapter to the ~~Secretary of State~~.~~Article.~~

(b) ~~The Commission may petition the Superior Court of Wake County for the approval to issue subpoenas and subpoenas duces tecum as necessary to conduct investigations of violations of this Chapter. The court shall authorize subpoenas under this subsection when the court determines they are necessary for the enforcement of this Chapter. Subpoenas issued under this subsection shall be enforceable by the court through contempt powers. Venue shall be with the Superior Court of Wake County for any nonresident person, or that person's agent, who makes a reportable expenditure under this Chapter, and personal jurisdiction may be asserted under G.S. 1-75.4.~~

(c) Complaints of violations of this ~~Chapter Article~~ and all other records accumulated in conjunction with the investigation of these complaints shall be considered confidential records and may be released only by order of a court of competent jurisdiction. Any information obtained by the ~~Commission State Board~~ from any law enforcement agency, administrative agency, or regulatory organization on a confidential or otherwise restricted basis in the course of an investigation shall be confidential and exempt from G.S. 132-6 to the same extent that it is confidential in the possession of the providing agency or organization.

(d) The ~~Commission State Board~~ shall publish annual statistics on complaints, including the number of complaints, the number of apparent violations of this ~~Chapter Article~~ referred to a district attorney, the number of dismissals, and the number and age of complaints pending.

"§ 120C-602. Punishment for violation.

(a) Whoever willfully violates any provision of ~~Article 2 or Article 3 of this Chapter Part 2 or Part 3 of this Article~~ shall be guilty of a Class 1 misdemeanor, except as provided in those Articles. In addition, no lobbyist who is convicted of a violation of the provisions of this ~~Chapter Article~~ shall in any way act as a lobbyist for a period of two years from the date of conviction.

(b) ~~In addition to the criminal penalties set forth in this section, the Secretary of State may levy civil fines for a violation of any provision of Articles 2, 4, or 8 of this Chapter up to five thousand dollars (\$5,000) per violation.~~ In addition to the criminal penalties set forth in this section, the ~~Commission State Board~~ may levy civil fines for a violation of any provision of this ~~Chapter except Article 2, 4, or 8 of this Chapter Article~~ up to five thousand dollars (\$5,000) per violation.

"§ 120C-603. Enforcement by district attorney and Attorney General.

(a) ~~The Commission or the Secretary of State, as appropriate, State Board~~ may investigate complaints of violations of this ~~Chapter Article~~ and shall report apparent violations of this ~~Chapter Article~~ to the district attorney of the prosecutorial district as defined in G.S. 7A-60 of which Wake County is a part, who shall prosecute any person or governmental unit who violates any provisions of this ~~Chapter Article~~.

(b) Complaints of violations of this ~~Chapter Article~~ involving the ~~Commission State Board~~ or any member employee of the ~~Commission State Board~~ shall be referred to the Attorney General for investigation. The Attorney General shall, upon receipt of a complaint, make an appropriate investigation thereof, and the Attorney General shall forward a copy of the investigation to the district attorney of the prosecutorial district as defined in G.S. 7A-60 of which Wake County is a part, who shall prosecute any person or governmental unit who violates any provisions of this ~~Chapter Article~~.

...."

SECTION 7.(a) G.S. 163-19 is repealed.

SECTION 7.(b) G.S. 163-20 reads as rewritten:

"§ 163-20. Meetings of Board; quorum; minutes.

(a) ~~Call of Meeting. — The State Board of Elections shall meet at the call of the chairman whenever necessary to discharge the duties and functions imposed upon it by this Chapter. The chairman shall call a meeting of the Board upon the written application or applications of any two members thereof. If there is no chairman, or if the chairman does not call a meeting within three days after receiving a written request or requests from two members, any three members of the Board shall have power to call a meeting of the Board, and any duties imposed or powers conferred on the Board by this Chapter may be performed or exercised at that meeting, although the time for performing or exercising the same prescribed by this Chapter may have expired.~~

(b) ~~Place of Meeting. — Except as provided in subsection (c), below, the State Board of Elections shall meet in its offices in the City of Raleigh, or at another place in Raleigh to be~~

designated by the chairman. However, subject to the limitation imposed by subsection (c), below, upon the prior written request of ~~any four~~ a majority of its members, the State Board of Elections shall meet at any other place in the State designated by ~~the four~~ a majority of its members.

(c) Meetings to Investigate Alleged Violations of This Chapter. – When called upon to investigate or hear sworn alleged violations of this Chapter, the State Board of Elections shall meet and hear the matter in the county in which the violations are alleged to have occurred.

(d) Quorum. — ~~A majority of the members constitutes a quorum for the transaction of business by the State Board of Elections. If any member of the Board fails to attend a meeting, and by reason thereof there is no quorum, the members present shall adjourn from day to day for not more than three days, by the end of which time, if there is no quorum, the Governor may summarily remove any member failing to attend and appoint his successor.~~

(e) Minutes. – The State Board of Elections shall keep minutes recording all proceedings and findings at each of its meetings. The minutes shall be recorded in a book which shall be kept in the office of the Board in Raleigh."

SECTION 7.(c) G.S. 163-21 is repealed.

SECTION 7.(d) G.S. 163-23 is repealed.

SECTION 7.(e) G.S. 163-26 is repealed.

SECTION 7.(f) G.S. 163-27 is repealed.

SECTION 7.(g) G.S. 163-28 is repealed.

SECTION 7.(h) G.S. 163-30 reads as rewritten:

"§ 163-30. County boards of elections; appointments; terms of office; qualifications; vacancies; oath of office; instructional meetings.

In every county of the State there shall be a county board of elections, to consist of ~~three~~ four persons of good moral character who are registered voters in the county in which they are to act. ~~Members—Two of the members of the county board of elections shall be of the political party with the highest number of registered affiliates, and two shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. In 2017, members of county boards of elections shall be appointed by the State Board on the second Tuesday in July. In 2019, members of county boards of elections shall be appointed by the State Board of Elections on the last Tuesday in June 1985,~~ and every two years thereafter, and their terms of office shall continue for two years from the specified date of appointment and until their successors are appointed and qualified. ~~Not more than two members of the county board of elections shall belong to the same political party.~~

No person shall be eligible to serve as a member of a county board of elections who holds any elective office under the government of the United States, or of the State of North Carolina or any political subdivision thereof.

No person who holds any office in a state, congressional district, county or precinct political party or organization, or who is a campaign manager or treasurer of any candidate or political party in a primary or election, shall be eligible to serve as a member of a county board of elections, provided however that the position of delegate to a political party convention shall not be considered an office for the purpose of this section.

No person shall be eligible to serve as a member of a county board of elections who is a candidate for nomination or election.

No person shall be eligible to serve as a member of a county board of elections who is the wife, husband, son, son-in-law, daughter, daughter-in-law, mother, mother-in-law, father, father-in-law, sister, sister-in-law, brother, brother-in-law, aunt, uncle, niece, or nephew of any candidate for nomination or election. Upon any member of the board of elections becoming ineligible, that member's seat shall be declared vacant. This paragraph only applies if the county board of elections is conducting the election for which the relative is a candidate.

The State ~~chairman~~ chair of each political party shall have the right to recommend to the State Board of Elections three registered voters in each county for appointment to the board of elections for that county. If such recommendations are received by the Board 15 or more days before the last Tuesday in June ~~1985~~, 2017, and each two years thereafter, it shall be the duty of the State Board of Elections to appoint the county boards from the names thus recommended.

Whenever a vacancy occurs in the membership of a county board of elections for any cause the State ~~chairman~~ chair of the political party of the vacating member shall have the right to recommend two registered voters of the affected county for such office, and it shall be the duty of the State Board of Elections to fill the vacancy from the names thus recommended.

At the meeting of the county board of elections required by G.S. 163-31 to be held on Tuesday following the third Monday in July in the year of their appointment the members shall take the following oath of office:

"I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of North Carolina and to the constitutional powers and authorities which are or may be established for the government thereof; that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States; and that I will well and truly execute the duties of the office of member of the _____ County Board of Elections to the best of my knowledge and ability, according to law; so help me God."

At the first meeting in July annually, the county boards shall organize by electing one of its members chair and one of its members vice-chair, each to serve a one-year term as such. In the odd-numbered year, the chair shall be a member of the political party with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the second highest number of registered affiliates. In the even-numbered year, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.

Each member of the county board of elections shall attend each instructional meeting held pursuant to G.S. 163-46, unless excused for good cause by the ~~chairman~~ chair of the board, and shall be paid the sum of twenty-five dollars (\$25.00) per day for attending each of those meetings."

SECTION 7.(i) G.S. 163-31 reads as rewritten:

"§ 163-31. Meetings of county boards of elections; quorum; majority; minutes.

In each county of the State the members of the county board of elections shall meet at the courthouse or board office at noon on the Tuesday following the third Monday in July in the year of their appointment by the State Board of Elections and, after taking the oath of office provided in G.S. 163-30, they shall organize by electing one member ~~chairman~~ chair and another member secretary of the county board of elections. On the Tuesday following the third Monday in August of the year in which they are appointed the county board of elections shall meet and appoint precinct chief judges and judges of elections. The board may hold other meetings at such times as the ~~chairman~~ chair of the board, or any ~~two~~ three members thereof, may direct, for the performance of duties prescribed by law. A majority of the Three members shall constitute a quorum for the transaction of board business. Except where required by law to act unanimously, a majority vote for action of the board shall require three of the four members. The ~~chairman~~ chair shall notify, or cause to be notified, all members regarding every meeting to be held by the board.

The county board of elections shall keep minutes recording all proceedings and findings at each of its meetings. The minutes shall be recorded in a book which shall be kept in the board office and it shall be the responsibility of the secretary, elected by the board, to keep the

required minute book current and accurate. The secretary of the board may designate the director of elections to record and maintain the minutes under his or her supervision."

SECTION 7.(j) G.S. 163-182.13 reads as rewritten:

"§ 163-182.13. New elections.

(a) ~~When State Board May Order New Election.~~ – The State Board ~~of Elections~~ may order a new election, upon agreement of at least ~~four~~ five of its members, in the case of any one or more of the following:

- (1) Ineligible voters sufficient in number to change the outcome of the election were allowed to vote in the election, and it is not possible from examination of the official ballots to determine how those ineligible voters voted and to correct the totals.
- (2) Eligible voters sufficient in number to change the outcome of the election were improperly prevented from voting.
- (3) Other irregularities affected a sufficient number of votes to change the outcome of the election.
- (4) Irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness.

(b) ~~State Board to Set Procedures.~~ – The State Board ~~of Elections~~ shall determine when a new election shall be held and shall set the schedule for publication of the notice, preparation of absentee official ballots, and the other actions necessary to conduct the election.

(c) ~~Eligibility to Vote in New Election.~~ – Eligibility to vote in the new election shall be determined by the voter's eligibility at the time of the new election, except that in a primary, no person who voted in the initial primary of one party shall vote in the new election in the primary of another party. The State Board ~~of Elections~~ shall ~~promulgate~~ adopt rules to effect the provisions of this subsection.

(d) ~~Jurisdiction in Which New Election Held.~~ – The new election shall be held in the entire jurisdiction in which the original election was held.

(e) ~~Which Candidates to Be on Official Ballot.~~ – All the candidates who were listed on the official ballot in the original election shall be listed in the same order on the official ballot for the new election, except in either of the following:

- (1) If a candidate dies or otherwise becomes ineligible between the time of the original election and the new election, that candidate may be replaced in the same manner as if the vacancy occurred before the original election.
- (2) If the election is for a multiseat office, and the irregularities could not have affected the election of one or more of the candidates, the new election, upon agreement of at least ~~four~~ five members of the State Board, may be held among only those candidates whose election could have been affected by the irregularities.

(f) ~~Tie Votes.~~ – If ineligible voters voted in an election and it is possible to determine from the official ballots the way in which those votes were cast and to correct the results, and consequently the election ends in a tie, the provisions of G.S. 163-182.8 concerning tie votes shall apply."

SECTION 7.(k) G.S. 163-278.22(7) reads as rewritten:

"(7) To make investigations to the extent the State Board deems necessary with respect to statements filed under the provisions of this Article and with respect to alleged failures to file any statement required under the provisions of this Article or Article 22M of the General Statutes and, upon complaint under oath by any registered voter, with respect to alleged violations of any part of this Article or Article 22M of the General Statutes. The State Board shall conclude all investigations no later than one year from the date of the start of the investigation, unless the State Board has reported an apparent

violation to the proper district attorney and additional investigation of the apparent violation is deemed necessary by the State Board."

SECTION 8. G.S. 120-70.141 reads as rewritten:

"§ 120-70.141. Purpose and powers of Committee.

(a) The Joint Legislative Elections Oversight Committee shall examine, on a continuing basis, election administration and campaign finance regulation in North Carolina, in order to make ongoing recommendations to the General Assembly on ways to improve elections administration and campaign finance regulation. In this examination, the Committee shall do the following:

- (1) Study the budgets, programs, and policies of the Bipartisan State Board of Elections and Ethics Enforcement and the county boards of elections to determine ways in which the General Assembly may improve election ~~administration and campaign finance regulation~~ administration.
- (1a) Study the budgets, programs, and policies of the Bipartisan State Board of Elections and Ethics Enforcement and the county boards of elections to determine ways in which the General Assembly may improve campaign finance regulation.
- (2) Examine election statutes and court decisions to determine any legislative changes that are needed to improve election administration and campaign finance regulation.
- (3) Study other states' initiatives in election administration and campaign finance regulation to provide an ongoing commentary to the General Assembly on these initiatives and to make recommendations for implementing similar initiatives in North Carolina; and
- (4) Study any other election matters that the Committee considers necessary to fulfill its mandate.

(b) The Committee may make interim reports to the General Assembly on matters for which it may report to a regular session of the General Assembly. A report to the General Assembly may contain any legislation needed to implement a recommendation of the Committee."

SECTION 9. Notwithstanding G.S. 163A-2, as enacted by Section 4 of this act, the chairs of the two political parties shall submit a list of names to the Governor on or before April 20, 2017, and the Governor shall make appointments from those lists no later than May 1, 2017. The State chairs of the two political parties shall not nominate, and the Governor shall not appoint, any individual who has served two or more full consecutive terms on the State Board of Elections or State Ethics Commission, as of April 30, 2017.

SECTION 10. Notwithstanding G.S. 163A-2(f) and (g), as enacted by Section 4 of this act, the Governor shall appoint a member of the State Board to serve as chair, a member to serve as vice-chair, and a member to serve as secretary of the State Board until its first meeting in May 2019, at which time the State Board shall select it a chair and vice-chair in accordance with G.S. 163A-2(f) and select a secretary in accordance with G.S. 163A-2(g).

SECTION 11. Any previous assignment of duties of a quasi-legislative or quasi-judicial nature by the Governor or General Assembly to the agencies or functions transferred by this act shall have continued validity with the transfer under this act. Except as otherwise specifically provided in this act, each enumerated commission, board, or other function of State government transferred to the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act, is a continuation of the former entity for purposes of succession to all the rights, powers, duties, and obligations of the former. Where the former entities are referred to by law, contract, or other document in their former name, the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act, is charged with exercising the functions of the former named entity.

SECTION 12. No action or proceeding pending on May 1, 2017, brought by or against the State Board of Elections, the State Ethics Commission, or the Secretary of State regarding the lobbyist registration and lobbying enforcement of the Secretary of State shall be affected by any provision of this act, but the same may be prosecuted or defended in the name of the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act. In these actions and proceedings, the Bipartisan State Board of Elections and Ethics Enforcement or its Executive Director, as appropriate, shall be substituted as a party upon proper application to the courts or other administrative or quasi-judicial bodies.

Any business or other matter undertaken or commanded by any State program or office or contract transferred by this act to the Bipartisan State Board of Elections and Ethics Enforcement pertaining to or connected with the functions, powers, obligations, and duties set forth herein, which is pending on May 1, 2017, may be conducted and completed by the Bipartisan State Board of Elections and Ethics Enforcement in the same manner and under the same terms and conditions and with the same effect as if conducted and completed by the original program, office, or commissioners or directors thereof.

SECTION 13. The consolidation provided for under this act shall not affect any ongoing investigation or audit. Any ongoing hearing or other proceeding before the State Ethics Commission or State Board of Elections on May 1, 2017, shall be transferred to the Bipartisan State Board of Elections and Ethics Enforcement, as created by this act, on May 1, 2017. Prosecutions for offenses or violations committed before May 1, 2017, are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

SECTION 14. Rules and forms adopted by the State Ethics Commission, Secretary of State related to lobbying, and the State Board of Elections shall remain in effect as provided in G.S. 150B-21.7. Policies, procedures, and guidance shall remain in effect until amended or repealed by the Bipartisan State Board of Elections and Ethics Enforcement. The list of covered boards adopted by the State Ethics Commission under G.S. 138A-11 as of April 30, 2017, shall continue in effect until amended or repealed by the Bipartisan State Board of Elections and Ethics Enforcement.

SECTION 15. Any evaluation of a statement of economic interest issued by the State Ethics Commission pursuant to Article 3 of Chapter 138A of the General Statutes in 2016 shall remain in effect until amended or repealed by the Bipartisan State Board of Elections and Ethics Enforcement.

SECTION 16. The authority, powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the State Ethics Commission are transferred to the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act. The authority, powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the State Board of Elections are transferred to the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act. The authority, powers, duties and functions, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds, including the functions of budgeting and purchasing, of the lobbying registration and lobbying enforcement functions of the Secretary of State are transferred to the Bipartisan State Board of Elections and Ethics Enforcement, as created in this act. The Director of the Budget shall resolve any disputes arising out of this transfer.

SECTION 17. Notwithstanding G.S. 163A-6, the Bipartisan State Board of Elections and Ethics Enforcement shall not appoint an Executive Director until May 2019. Until such time as the Bipartisan State Board of Elections and Ethics Enforcement appoints an Executive Director in accordance with G.S. 163A-6, as enacted by this act, the Executive

Director of the State Board of Elections under G.S. 163-26, as of December 31, 2016, shall be the Executive Director.

SECTION 18. The appropriations and resources of the State Ethics Commission is transferred to the Bipartisan State Board of Elections and Ethics Enforcement, and the transfer shall have all the elements of a Type I transfer under G.S. 143A-6.

SECTION 19. The appropriations and resources of the State Board of Elections, including any office space of the State Board of Elections, is transferred to the Bipartisan State Board of Elections and Ethics Enforcement, and the transfer shall have all the elements of a Type I transfer under G.S. 143A-6, with the Budget Code for the newly established State Board being the previous State Board of Elections Budget Code of 18025.

SECTION 20. The appropriations and resources of the lobbying registration and lobbying enforcement functions of the Secretary of State are transferred to the Bipartisan State Board of Elections and Ethics Enforcement, and the transfers shall have all the elements of a Type I transfer under G.S. 143A-6. Specifically, the following positions shall be transferred: Lobbying Compliance Director (Position 60008800), Law Enforcement Agent (Position 60008806), Administrative Assistant II (Position 60008801), Administrative Assistant II (Position 60008802), and Administrative Assistant II (Position 60008803).

SECTION 21. The Bipartisan State Board of Elections and Ethics Enforcement shall report to the Joint Legislative Commission on Governmental Operations, Joint Legislative Elections Oversight Committee, and the Legislative Ethics Committee on or before April 1, 2018, and again on or before March 1, 2019, as to recommendations for statutory changes necessary to further implement this consolidation.

SECTION 22. Notwithstanding the recodification in Section 3 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall not administer or enforce Part 1, Part 3, or Part 6 of Article 8 of Chapter 163A of the General Statutes, and the Secretary of State shall maintain the authority to administer and enforce Articles 2, 4, and 8 of Chapter 120C of the General Statutes, as those Articles existed on May 1, 2017, until October 1, 2017. Section 20 of this act becomes effective October 1, 2017. Sections 9 and 10 of this act become effective when it becomes law. G.S. 163-30, as amended by Section 7(h) of this act, and G.S. 163-31, as amended by Section 7(i) of this act, become effective July 1, 2017. G.S. 163-278.22(7), as amended by Section 7(k) of this act, becomes effective May 1, 2017, and applies to investigations initiated on or after that date. Except as otherwise provided, this act becomes effective May 1, 2017.

In the General Assembly read three times and ratified this the 11th day of April, 2017.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

Roy Cooper
Governor

Approved _____m. this _____ day of _____, 2017

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 15636

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

Plaintiff,

vs.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY K.
MOORE, in his official capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES,

Defendants.

**DEFENDANTS'
MOTION TO VACATE, IN PART,
MEMORANDUM OF ORDER ON
CROSS MOTIONS FOR SUMMARY
JUDGMENT**

Pursuant to *Bell v. Martin, infra*, and Rules 60(b)(5) and (b)(6) of the North Carolina Rules of Civil Procedure, 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 (collectively, "Defendants"), hereby move this Court to enter an indicative ruling to vacate the portions of its Memorandum of Order on Cross-Motions for Summary Judgment (the "Order") granting summary judgment in favor of Plaintiff and denying summary judgment in favor of Defendants as to the Board

of Elections Amendments¹ and the Exempt Positions Amendments² and permanently enjoining said amendments. In support of this Motion, Defendants show the Court as follows:

1. On March 17, 2017, this Court entered the Order, finding and concluding that the Bipartisan State Board of Elections and Ethics Enforcement (the “Bipartisan Board”):

is, as constituted under [Session Law 2016-125], substantially similar to the commissions that *McCrorry* held unconstitutional as violating separation of powers. The Governor’s inability to appoint a controlling number of members of the [Bipartisan] Board means that the legislature retains control over that board and can prevent the Governor from taking action.

Because they reserve too much control in the legislature—and thus block the Governor from ensuring faithful execution of the laws—the Court concludes that the Board of Elections Amendments are unconstitutional.

See Order at p. 16.

2. The Court also found the Exempt Positions Amendments unconstitutional. *See* Order at p. 28.

3. Thus, the Court granted Plaintiff’s Motion for Summary Judgment as to the Board of Elections Amendments and Exempt Positions Amendments and permanently enjoined those amendments.

¹ As used in the Order, the “Board of Elections Amendments” means Sections 1 through 19 (“Part I”) of Session Law 2016-125.

² As used in the Order, the “Exempt Positions Amendments” means Sections 7 and 8 of Session Law 2016-126.

4. On April 25, 2017, Senate Bill 68 was enacted, repealing the Exempt Positions Amendments and repealing and replacing the Board of Elections Amendments. A copy of Senate Bill 68 is attached hereto as Exhibit 1.

5. Senate Bill 68 reorganizes the State Board of Elections and the State Ethics Commission into the Bipartisan Board. It also establishes the following elements of governance and structure of the Bipartisan Board:

- All eight members of the Bipartisan Board are to be appointed by the Governor, four from the Republican Party and four from the Democratic Party. The appointees are to be chosen from lists of six nominees submitted by the party chairs;
- The Governor has the power to remove all members from the Bipartisan Board for misfeasance, malfeasance, or nonfeasance;
- Any vacancy occurring on the Bipartisan Board is to be filled by the Governor with an individual affiliated with the same political party of the vacating member; and
- A majority of the Bipartisan Board constitutes a quorum for the transaction of business, and an affirmative vote of at least five members of the Bipartisan Board (i.e., a simple majority) is required for the Bipartisan Board to act.

6. Under Rule 60(b), the court may relieve a party from a final judgment where “it is no longer equitable that the judgment should have prospective application,” *see* Rule 60(b)(5), and for “[a]ny other reason justifying relief from the operation of the judgment,” *see* Rule 60(b)(6).

7. Vacatur of the portions of the Order related to the Exempt Positions Amendments and the Board of Elections Amendments is appropriate because there has been a significant change in the law (specifically, the repeal of the Exempt Positions Amendments and the repeal and replacement of the Board of Elections

Amendments) such that the issues raised as to constitutionality of those amendments are now moot. *See Hoke Cty. Bd. of Educ. v. State*, 367 N.C. 156, 160, 749 S.E.2d 451, 455 (2013); *State v. McCluney*, 280 N.C. 404, 407, 185 S.E.2d 870, 872 (1972).

8. Both parties have appealed this Court's March 17, 2017 Memorandum of Order on Cross-Motions for Summary Judgment, and as of April 11, 2017, the Record on Appeal was docketed in the North Carolina Court of Appeals. Ordinarily, a perfected notice of appeal divests this Court of jurisdiction to hear anything further in the cause on appeal. However, "[t]he trial court retains limited jurisdiction to indicate how it is inclined to rule on a Rule 60(b) motion." *Hall v. Cohen*, 177 N.C. App. 456, 458, 628 S.E.2d 469, 471 (2006) (citing *Bell v. Martin*, 43 N.C. App. 134, 258 S.E.2d 403 (1979), *reversed on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980)). In *Hall v. Cohen*, our North Carolina Court of Appeals held:

Upon the appellate court's notification of a Rule 60(b) motion filed with the trial court, this Court will remand the matter to the trial court so the trial court may hold an evidentiary hearing and indicate "how it [is] inclined to rule on the motion were the appeal not pending." *Id.* at 142, 258 S.E.2d at 409. This practice allows the appellate court to "delay consideration of the appeal until the trial court has considered the [Rule] 60(b) motion. [So that upon] an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered." *Id.*

Hall, 177 N.C. App. at 458, 628 S.E.2d at 471 (2006) (quoting *Bell*, 43 N.C. App. at 140-43, 258 S.E.2d at 408-09) ("[B]etter practice is to allow the trial court to

consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending.”).

WHEREFORE, 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, pray this Court (1) enter an indicative ruling to vacate the granting of summary judgment in favor of Plaintiff and the denial of summary judgment in favor of Defendants as related to the Board of Elections Amendments and the Exempt Positions Amendments, and (2) enter an indicative ruling to vacate the permanent injunction of the Board of Elections Amendments and the Exempt Positions Amendments and dismiss all claims in this case related to said amendments.

[Signatures on Next Page]

Respectfully submitted, this the 25th day of April, 2017.

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982
Candace S. Friel
N.C. State Bar No. 36763

By: _____



D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com
candace.friel@nelsonmullins.com

*ATTORNEYS FOR 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*

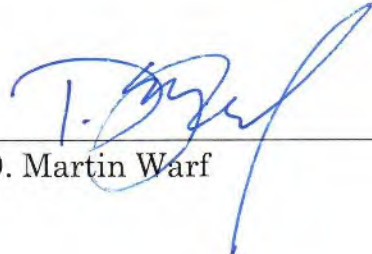
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing DEFENDANTS' MOTION TO VACATE, IN PART, MEMORANDUM OF ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT was served upon the persons indicated below via electronic mail and U.S. Mail postage prepaid and addressed as follows:

Jim W. Phillips, Jr.
Eric M. David
Daniel F.E. Smith
Brooks, Pierce, McLendon, Humphrey &
Leonard, L.L.P.
Suite 2000, Renaissance Plaza
230 North Elm Street
Greensboro, NC 27401
jphillips@brookspierce.com
edavid@brookspierce.com
dsmith@brookspierce.com

Grayson G. Kelley
Chief Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
gkelley@ncdoj.gov

This the 25th day of April, 2017.



D. Martin Warf