NO. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff-Petitioner, v. 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; and THE STATE OF NORTH CAROLINA, Defendants-Respondents.	From Wake County 17-CVS-5084

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PLAINTIFF-PETITIONER GOVERNOR ROY A. COOPER, III'S PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR TEMPORARY STAY

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TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

Plaintiff-Petitioner Governor Roy A. Cooper, III ("Governor"), in his official capacity, respectfully submits this Petition for Writ of

Supersedeas, pursuant to North Carolina Rules of Appellate Procedure 2, 8, and 23, and asks this Court to issue a writ of supersedeas staying the effectiveness of the trial court's 1 June 2017 order granting Defendants' Motion to Dismiss pursuant to N.C. R. Civ. P. 12(b)(1) (the "Order"; *see* Appendix hereto ("App.") pp. 57-59) and suspending the operation of Sections 3 through 22 of Session Law 2017-6 (the "Act"; App. pp. 1-16). In addition, the Governor requests that the Court enter a temporary stay.

Introduction

Since 1901, the State Board of Elections has been composed of five members, with no more than three from any political party. In a special session held just weeks after the 2016 elections, however, the General Assembly sought to restructure that board in a way held unconstitutional by the same three-judge panel that decided this case. *See Cooper v. Berger and Moore*, Wake Co. Case 16-CVS-15636; COA 17-367 (hereinafter *Cooper I*).

Undeterred, the General Assembly then passed the Act, which restructured the State Board of Elections again in a way that intrudes even more deeply into executive function. As a result, the new law is no

better than the enjoined law; in fact, for the reasons detailed below, it is worse.

The Act dissolves the State Board of Elections; assigns its powers, functions, and staff to a new state board ("the New State Board"); legislatively appoints the Executive Director (i.e., the State's chief elections officer); and bars her from being replaced until May 2019. The Governor contends these sweeping changes in the administration of our State's elections and ethics laws violate the separation of powers clause of the North Carolina Constitution.

Nonetheless, following summary judgment briefing and a lengthy hearing, the same three-judge panel that expressly found it had subject matter jurisdiction in *Cooper I*, held in this case that it did not have subject matter jurisdiction and declined to rule on the merits of the claim. That decision was in error, but, as a result, the unconstitutional Act is now in effect, inflicting the very harm that this lawsuit was filed to avoid.

Because the trial court's Order is wrong as a matter of law, and because—if not stayed—the Act will prevent the Governor from fulfilling his core constitutional duty of ensuring execution of the State's elections and ethics laws, extraordinary relief is appropriate. Accordingly, and for

the reasons further detailed below, the Governor respectfully requests that this Court enter a temporary stay and issue its writ of supersedeas staying the effect of the Order and enjoining the Act during the pendency of this appeal.

Statement of Procedural History

The Governor filed his complaint on 26 April 2017, challenging the constitutionality of Sections 3 through 22 of Session Law 2017-6. (App. pp. 17-48.) On 27 April 2017, with the consent of all parties, the Chief Justice appointed the undersigned three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 to hear the Governor's constitutional challenges.

Following notice and a hearing, a temporary restraining order as to the Act was granted on 28 April 2017. (App. pp. 49-56.)

On 10 May 2017, the trial court entered a Consent Scheduling Order that extended, by agreement, the temporary restraining order until that court entered an order on the parties' dispositive motions.

The Legislative Defendants filed a Motion to Dismiss and Answer on 23 May 2017. Also on 23 May 2017, the Governor and the Legislative Defendants filed motions for summary judgment pursuant to N.C. Rule

of Civil Procedure 56. Defendant State of North Carolina answered the complaint on 30 May 2017.

The parties' respective motions were heard by the panel below at a duly noticed hearing on 1 June 2017, and that day the trial court entered the Order dismissing the Governor's claims for lack of subject matter jurisdiction. (App. pp. 57-59.)

On 6 June 2017, the Governor filed a Motion to Stay with the trial court, and on 15 June 2017 that Motion was denied.

Statement of Facts

The pertinent facts of this dispute—i.e., the provisions of the Act—are set forth in the Session Law attached in the Appendix (pp. 1-16). In the interest of brevity, additional detail or description of the structure and effect of the Act will be set forth below in Section III.C.

REASONS WHY THIS COURT'S WRIT OF SUPERSEDEAS SHOULD ISSUE

I. The extraordinary circumstances presented here warrant issuance of this Court's writ of supersedeas.

The purpose of a writ of supersedeas (and, by extension, a temporary stay under Rule 23(e)) is to preserve the status quo while legal questions are adjudicated. *See, e.g.*, *Craver v. Craver*, 298 N.C. 231, 237–

38, 258 S.E.2d 357, 362 (1979) ("The writ of supersedeas may issue only in the exercise of, and as ancillary to, the revising power of an appellate court; its office is to preserve the status quo pending the exercise of appellate jurisdiction.") (citing *New Bern v. Walker*, 255 N.C. 355, 121 S.E.2d 544 (1961) (per curiam)); N.C. R. APP. P. 23(c).

* * *

The Order does not detail the particular basis for the panel's ruling that it lacks subject matter jurisdiction, but the General Assembly has argued (1) the Governor's claims presented so-called "non-justiciable political questions," or (2) in the alternative, the claims are not yet ripe. As detailed below, the panel's decision contravenes more than 100 years of settled North Carolina jurisprudence holding that courts have a duty to resolve constitutional challenges arising from what a statute *allows*, not simply how that statute is actually being exercised. Moreover, it contradicts the same panel's ruling in *Cooper I*, an almost identical case it decided just a few months earlier.

Allowing the Order to stand would have grave consequences for the State's constitutional system of checks and balances and would render the separation of powers clause of our constitution nugatory. Put simply,

if the judicial branch of government does not have subject matter jurisdiction to decide whether a statute allows the legislative branch to encroach on the powers of the executive branch, then the constitutional restraints on legislative power will be unenforceable.

A. Developments since entry of the Order demonstrate the need for a stay.

The interests of justice here strongly favor issuance of this Court's writ of supersedeas to stay the Order and the Act while the Court reviews them. On 5 June 2017, four days after the panel entered its Order, the United States Supreme Court—for the second time in two weeks—ruled that the General Assembly engaged in unconstitutional racial gerrymandering with respect to congressional and legislative districts. See *North Carolina v. Covington*, 581 U.S. --- (June 5, 2017); *Cooper v. Harris*, 197 L. Ed. 2d 837 (U.S. May, 22, 2017).

Those rulings demonstrate exactly why the Act must be stayed until our appellate courts can closely scrutinize the constitutionality of the General Assembly's enactment. Under Article III, Section 4 of the North Carolina Constitution, the Governor is required, before entering office, to take an oath "that he will support the Constitution and laws of

the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of governor."

As his oath made clear, the Governor must ensure execution of both state and federal law. That is what our Constitution and the Supremacy Clause of the United States Constitution require. The Governor's duty to ensure that the State complies with federal law is critical in the area of elections law and voting rights.

Since 2011, when the Republican Party took control of both legislative chambers, the General Assembly has made wholesale changes in the State's elections laws, including multiple rounds of redistricting at the local, state, and congressional level, limitations on early voting, and restrictions on individuals' ability to vote. There have been numerous challenges to all those changes in state and federal court. The result, so far, is that the legislature has lost every single challenge—one challenge to Session Law 2013-381, a law aimed at voter suppression, and six different challenges to local, state, and congressional redistricting. In invalidating Session Law 2013-381, the Fourth Circuit held that the law "targeted African-Americans with almost surgical precision." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). *See*

also Covington, 581 U.S. --- ; *Harris*, 197 L. Ed. 2d 837 (both ruling that the General Assembly relied on unconstitutional racial gerrymandering in drawing districts).

It is the Governor's duty to execute the laws. And under our Constitution, the United States Constitution, and the oath sworn by the Governor, it is his duty to ensure that the laws he executes do not violate federal law. That is why it is so critical that this Court enter a stay of the Act pending appeal.

Staying the effectiveness of the Act during the pendency of the Governor's appeal will preserve the ultimate relief that the Governor seeks. If the Governor is successful on appeal, he will not suffer injury from the Act taking effect before a final appellate determination of constitutionality can be made.

However, if the Act is allowed to continue to have effect during the Governor's appeal, the unconstitutionally structured New State Board will be in place for the 2017 election cycle and, most likely, the 2018 election cycle. As a result, if the Act is ultimately found to be unconstitutional, for at least two election cycles the Governor will have suffered the constitutional harm of the General Assembly—through the

Act—preventing him from his core duty to ensure faithful execution of the State's elections and ethics laws.

A stay of the Act pending appeal is especially important in light of the United States Supreme Court's rulings in *North Carolina v. Covington*, in which the Court (a) summarily affirmed a lower court ruling declaring 28 of the State's legislative districts to be unconstitutionally racially gerrymandered; and (b) ordered the lower court to decide whether new legislative elections should be held in 2017. Both rulings in *Covington* counsel in favor of a stay.

As to the first ruling, the United States Supreme Court has now summarily affirmed that a substantial portion of the General Assembly was elected as a result of unconstitutional racial gerrymandering. As detailed above, since the complaint in this case was filed, the United States Supreme Court has *twice* ruled that the General Assembly engaged in unconstitutional racial gerrymandering. In light of the General Assembly's inability to comply with federal and state law relating to voting rights, this Court should stay the effectiveness of the Act until it can rule on the constitutionality of the challenged statute. With respect to elections law and voting rights, recent history has

demonstrated that the General Assembly's enactments must be carefully scrutinized and squared with the federal and state constitutions.

As to the second *Covington* ruling, with the potential for special legislative elections to be held in about five months, it is critically important that the State Board of Elections be prepared to hold fair, orderly elections.[1] For that reason, a stay is appropriate. North Carolina's government has functioned since 1901 with a five-member State Board of Elections that provides the Governor adequate control over that core executive agency to ensure the faithful execution of the State's election laws. A stay of the Act during the pendency of the Governor's appeal will simply preserve the status quo that has existed, largely untouched, since 1901.

B. The Act, by its own terms, is unworkable.

By contrast, the Act, if allowed to continue to have effect, is simply unworkable as enacted. As just one example, under N.C. Gen. Stat. § 138A-22(a), all "covered person[s]" who are "elected, appointed, or employed" and not otherwise exempt "shall file a statement of economic

[1] The Governor, of course, will do everything in his power to execute the law and to ensure that any special elections ordered by the *Covington* Court will be promptly and fairly administered.

interest with the [State Ethics] Commission prior to the covered person's initial appointment, election, or employment." Under N.C. Gen. Stat. § 138A-3(10), a "covered person" includes a "public servant," which is specifically defined to include "Members of the [State Ethics] Commission, the executive director, and the assistant executive director of the Commission." *See* N.C. Gen. Stat. § 138A-3(30)(l).

Of course, under the Act, all references to the State Ethics Commission now include the New State Board. *See* Session Law 2017-6, § 3 (App. pp. 1-3). Accordingly, under N.C. Gen. Stat. § 138A-22(a), the putative members of the New State Board and the Executive Director "shall not be appointed, employed, or receive a certificate of election, prior to submission by the [State Ethics] Commission of the Commission's evaluation of the [Statement of Economic Interest] in accordance with this Article."

Yet, the Act has destroyed the Ethics Commission. As a result, there is no board to evaluate the Statements of Economic Interest of the putative new board members, meaning the new board members cannot be appointed.

By destroying the State Board of Elections and the State Ethics Commission before the New State Board was constituted and appointed, Defendants have created a board that cannot be filled, preventing the Governor from ensuring faithful execution of the law.[2]

II. The Governor is entitled to a stay because he is likely to succeed on the merits of his appeal.

In asserting that the trial court lacked subject matter jurisdiction, the General Assembly relied on two primary arguments. First, the General Assembly argued that the Governor's claims presented non-justiciable political questions. Second, it argued that the Governor had asserted only "speculative" harm not sufficient to confer subject matter jurisdiction. Both arguments fail as a matter of law.

A. Legal standard for subject matter jurisdiction.

Under North Carolina law, subject matter jurisdiction "depends on the existence of a justiciable case or controversy." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 220,

[2] Similarly, the Act, as part of the recodification of more than 550 pages of the General Statutes, directs the Revisor of Statutes to consult with the State Board of Elections and State Ethics Commission as he completes his work. But the same Act destroys those two entities, making the consultation impossible. (App. pp. 1-3.)

225 (2001) (citations omitted). Our courts have repeatedly held that in cases seeking a declaratory judgment, the plaintiff need not show that the alleged harm has already occurred to satisfy the "case or controversy" requirement.

In *Ferrell v. Dep't of Trans.*, 104 N.C. App. 42, 407 S.E.2d 601 (1991), which involved a claim by a landowner for declaratory relief brought under N.C. Gen. Stat. § 136-19, the DOT asserted, among other things, that "the complaint [did] not allege a justiciable controversy and [was] not ripe for adjudication." *Id.* at 45, 407 S.E.2d at 603. More specifically, the DOT argued that the case was "not a justiciable controversy because negotiations [were] still under way, the DOT [had] not yet declared the property to be surplus, and the Board of Transportation, Council of State and Governor [had] not approved the disposition of the property." *Id.* at 45, 407 S.E.2d at 604. In holding that an "actual and justiciable controversy [did] exist," the Court of Appeals said:

> The plaintiffs were placed in a position where their statutory rights under N.C.G.S. § 136-19 were placed in peril. The declaratory action is therefore a justiciable controversy insofar as litigation is unavoidable, and the dispute involves more than a mere disagreement about the rights of the parties. . . . [W]here the plaintiffs

> contend that they are being deprived of their statutory rights with respect to the terms of the sale, it is unreasonable to require plaintiffs to wait until the Board, the Council of State and the Governor approve of the disposition of the property before taking action.

Id.

Similarly, in *Bland v. Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971), the Supreme Court held that a justiciable controversy existed where city firemen claimed the right under N.C. Gen. Stat. § 160-115.1 (now-repealed) to live outside the city limits. *Id.* at 659, 180 S.E.2d at 815. The court held that an "actual controversy" existed:

> The rights of these parties are affected by G.S. 160-115.1, G.S. 160-25, and other statutes. To the end that they may be relieved "from uncertainty and insecurity," plaintiffs are entitled to have the applicable statutes construed and their rights declared. A real controversy exists between the parties, and a fireman is not required to risk his employment by moving outside the City in order to make a test case. Such a requirement would thwart the remedial purpose of the Declaratory Judgment Act.

Id.

Taken together, these two cases stand for the principle that plaintiffs seeking to vindicate rights in claims brought under the Declaratory Judgment Act need not wait until their rights have actually been violated before bringing suit.

B. It is the judiciary's duty to decide constitutional disputes just like this one.

While legislative enactments do enjoy a presumption of constitutionality, "it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) (citations omitted). The presumption of constitutionality is not the end—or even the beginning—of the analysis, but rather a decisional tool that assists in cases where the constitutional question is close enough that a determination of unconstitutionality cannot be confidently reached. *Cf. N.C. Ass'n of Educators v. State*, 368 N.C. 777, 786, 786 S.E.2d 255, 262 (2016); *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992) ("The presumption of constitutionality is not, however, and should not be, conclusive.").

When reviewing a separation of powers challenge, the court must examine how the statutory scheme allocates power between the branches of government and how that allocation impacts the powers and duties of

the effected branches. *See State ex rel. McCrory v. Berger,* 368 N.C. 633, 645-47, 781 S.E.2d 248, 256-57 (2016)

It 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. *See id.* at 647, 781 S.E.2d at 257 (holding that the reviewing court "must examine the degree of control that the challenged legislation *allows* the General Assembly to exert," and not whether the General Assembly actually exerted that control (emphasis added)).

This is why, in *McCrory*, which was resolved on cross-motions for judgment on the pleadings, the Supreme Court found that the statutes at issue violated separation of powers, despite the lack of evidence that the commissions at issue had *actually* undermined the policy views and priorities of the Governor. Because of *McCrory's* procedural posture, there were no records facts at all, just the bare allegations of the unverified complaint and Defendants' answer. The focus of the Supreme Court's analysis was the structure created by the legislation being challenged. *See id.* at 636-38, 781 S.E.2d at 250-52.

The *McCrory* Court's analytical framework is in accord with binding precedent dating back over 100 years. In *Lang v. Carolina Land*

& Development Co., 169 N.C. 662, 86 S.E. 599 (1915), which dealt with the constitutionality of a statute permitting a three-fifths majority of landowners to enter a contract to drain swamplands owned by all the landowners in a particular area, certain landowners claimed this statute was unconstitutional because it allowed a taking of private land without just compensation. The Court agreed, holding:

> It is no answer to this position that, in the particular case before us, no harm is likely to occur or that the power is being exercised in a considerate or benevolent manner, for where a statute is being squared to requirement of constitutional provision, *it is what the law authorizes and not what is being presently done under it that furnishes the proper test of its validity*.

Id. at 664, 86 S.E. at 600 (emphasis added).

C. The Governor's claims do not raise non-justiciable "political questions."

The General Assembly argued below—and the panel apparently agreed—that the Act should be shielded from constitutional scrutiny because any judicial review would constitute a non-justiciable political question. That is incorrect.

"The principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our

government as the doctrine of separation of powers." *News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007).

The political question doctrine is a narrow exception to the rules of subject matter jurisdiction that arises out of separation of powers concerns. "The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch." *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (citations omitted). The political question doctrine is only applicable where a question involves "a *textually demonstrable constitutional commitment of the issue* to a coordinate political department." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) (emphasis added)). However, as always, "fundamental questions of constitutional interpretation remain with the judiciary." *Haugh v. Cty. of Durham*, 208 N.C. App. 304, 313, 702 S.E.2d 814, 821 (2010).

In arguing that this challenge presents a political question, the General Assembly pointed to Article III, Section 5(10) of the North Carolina Constitution for the purported "textually demonstrable

constitutional commitment" to the General Assembly of the question whether the Act violates separation of powers. That provision reads:

> Administrative reorganization. The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

N.C. CONST. art III, § 5(10).

While Article III, Section 5(10) commits to the General Assembly the authority to prescribe "the functions, powers, and duties" of the New State Board, it says nothing about how an executive board is structured or how board members are appointed or removed. Those issues, in short, are not "committed to the legislature" by Article III, Section 5(10) of the Constitution and therefore are not political questions.

To be clear, the Governor does not dispute the authority of the General Assembly to combine the State Board of Elections and the State

Ethics Commission, so long as the result complies with the separation of powers and doesn't otherwise violate the Constitution.[3]

The problem here is that in combining the State Board of Elections and the State Ethics Commission, the General Assembly has violated the separation of powers by creating a New State Board that will—*by its very structure*—prevent the Governor from carrying out his core duty of taking care that the laws are faithfully executed. It is not about the "functions, powers, and duties" of the New State Board; it is about how that board is structured.

Under the General Assembly's theory of the political question doctrine, the Supreme Court lacked subject matter jurisdiction to decide *McCrory v. Berger* because that was simply a case of the legislature reorganizing certain boards and commissions, a decision, the General Assembly contends, that should be beyond the purview of the judiciary. *See McCrory*, 368 N.C. 633, 781 S.E.2d 248. This, of course, is not the law.

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[3] The Governor is not asking the judiciary to intrude into legislative process that resulted in the ratification of the Act. To do so would involve a political question. *Cf. State ex rel. Scarborough v. Robinson*, 81 N.C. 409, 426 (1879). Instead, the Governor is asking the judiciary to examine the legislation itself, which plainly intrudes into the executive branch.

In *McCrory*, as here, the constitutional problem arises not from the legislative decision to reorganize executive branch boards; rather it arises from the decision to do so in a way that prevents the Governor from fulfilling his duty to ensure the execution of the state's election laws.

Indeed, our courts have consistently undertaken their duty of adjudicating constitutional disputes involving separation of powers challenges to legislative enactments. *See, e.g.*, *State ex rel. Martin v. Melott*, 320 N.C. 518, 359 S.E.2d 783 (1987) (reviewing constitutionality of statute empowering the Chief Justice to appoint the head of the Office of Administrative Hearings); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982) (reviewing constitutionality of statute reorganizing the Environmental Management Commission).

The case primarily relied upon by the General Assembly, *Bacon v. Lee*, 353 N.C. 696, 549 S.E.2d 840 (2001), supports the Governor's arguments here. In *Bacon*, several prisoners who had applied to Governor Easley for clemency filed due process and equal protection challenges to the Governor's exercise of his clemency powers because he had been either the prosecutor or the Attorney General during the time the plaintiffs' convictions and appeals were being litigated.

The Governor argued that because Article III, Section 5(6) of the North Carolina Constitution expressly grants the Governor the power to grant clemency "upon such conditions as he may think proper," the judiciary could not inject itself into that process by imposing a due process requirement. In short, the Governor argued that because the clemency power was allocated solely to the executive, a court could not weigh in on *how* the Governor made clemency decisions without violating the separation of powers. The Supreme Court agreed that, "judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive." *Bacon*, 353 N.C. at 717-18, 549 S.E.2d at 854.

Bacon was about how one branch of government chooses to exercise power granted solely to that branch by the Constitution. This case—like *McCrory*, *Melott*, and *Wallace*—is about whether one branch of government may interfere with the core duties of a coordinate branch. Change the facts of *Bacon*, and the fallacy of the General Assembly's argument becomes clear. Assume the legislature had passed a law asserting that it could veto a Governor's clemency decision, and the Governor challenged that enactment as a violation of the separation of

powers. There is no question that the judiciary could—and should—decide that challenge, just as it can and should decide this one.

D. The Governor's asserted harm is not speculative.

Under the North Carolina Constitution, "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. CONST. art. I, § 6. When he was sworn in on 1 January 2017, the Governor was vested with the executive power of the State of North Carolina. *Id.* art. III, § 1. He now has the constitutional duty to "take care that the laws be faithfully executed." *Id.* art. III, § 5(4). The Act immediately interferes with the Governor's constitutional duty to execute the election laws, violating separation of powers.

This harm is not speculative or hypothetical; it is real and immediate. Indeed, as a result of the Order, the constitutional harm has occurred and is occurring. The Act has severely constrained the Governor's powers of appointment and removal, necessarily limiting his ability to supervise the important work of the New State Board. The evenly split 4-4 board with five votes required to take action creates a structure that allows deadlock on any controversial issues (whether the

board splits along political party lines or along other divisions). (App. pp. 3-5.)

Finally, and most egregiously, the legislative appointment of the Executive Director of the New State Board and the mandate that she not be replaced until May 2019, along with the requirement that her replacement be selected by a five-vote majority, means the legislature has exercised sole control over the chief State elections and campaign finance official and the person most responsible for the day-to-day execution of those laws. (App. pp. 14-15.)

For the reasons detailed below, the Act, as a whole and as now in effect, violates separation of powers.

III. The Act violates separation of powers by interfering with the Governor's duty of faithful execution.

A. The New State Board, like the existing State Board of Elections, is part of the executive branch of North Carolina government.

In *Cooper I*, the panel concluded—correctly—that the State Board of Elections is primarily administrative or executive in character. *See Cooper I*, Order on Cross-Motions for Summary Judgment pp. 13-15 at ¶¶ 9-14. (March 17, 2017); *compare McCrory*, 368 N.C. at 645, 781 S.E.2d

at 256 (noting the three commissions challenged there were "primarily administrative or executive in character").

Accordingly, Defendants are precluded from disputing the executive nature of the State Board of Elections. *See Jabez Consol. Holdings, Inc. v. Wells Fargo Bank, N.A.*, 238 N.C. App. 198, 768 S.E.2d 64 (2014) ("The elements of collateral estoppel are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.").

Similarly, the New State Board created by the Act to execute and enforce the elections, ethics, lobbying, and campaign finance laws is also primarily administrative or executive in character. *See, e.g.*, Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-5, which directs the New State Board to "exercise its statutory powers, duties, functions, and authority and . . . have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10."); *Wallace v. Bone*, 304 N.C.

591, 608, 286 S.E.2d 79, 88 (finding it "crystal clear" that the Environmental Management Commission is an executive agency).[4]

B. Under the North Carolina Constitution, the Governor must have "enough control" over executive agencies to ensure that the laws are faithfully executed.

In *McCrory*, the Court laid down a black letter principle of law to guide the separation of powers analysis: "the Governor must have enough control" over an agency exercising "final executive authority" so as to "perform his constitutional duty" to faithfully execute the laws. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Thus, a reviewing court presented with a separation of powers challenge must resolve the critical question of whether the Governor has sufficient control over an executive branch board or agency so that he can perform his constitutional duty.

Applying that rule, the *McCrory* Court examined the statutes governing the three commissions *as a whole* to determine what impact the commissions' structures had "on [the Governor's] ability to [1] ***appoint*** the [members], [2] to ***supervise*** their day-to-day activities, and [3] to ***remove*** them from office." 368 N.C. at 646, 781 S.E.2d at 256

[4] The General Assembly does not appear to dispute this issue and did not raise such an argument before the panel below.

(emphases added). The Supreme Court did not separately analyze and opine on the constitutionality of each of those three facets of the challenged commissions; instead, it analyzed the overall effect of the challenged statutes.

Viewing the challenged legislation as a whole, the reviewing court must determine whether the Governor has enough "control over the views and priorities of the officers" that implement "executive policy" to allow the Governor to fulfill his constitutional duty to "take care that the laws are faithfully executed. . . ." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

C. The Act prevents the Governor from ensuring faithful execution of the election, ethics, campaign finance, and lobbying laws.

Like *McCrory*, the provisions challenged here "prevent the Governor from performing his constitutional duty to take care that the laws are faithfully executed. By doing so, these provisions violate the separation of powers clause." *Id.* at 649, 781 S.E.2d at 258. The best way to examine the Act's violation of separation of powers is to examine the Act's impact on the Governor's powers of appointment, removal, and supervision, keeping in mind that it is the cumulative impact—rather

than the egregiousness of any individual provision—that controls the analysis.

Before delving into that analysis, it is important to note that the Act designates the New State Board as "an independent regulatory and quasi-judicial agency [that] shall not be placed within any principal administrative department." Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-5). The *McCrory* Court noted as a constitutional problem that similar statutory directives to the Coal Ash Management Commission to "exercise its powers and duties 'independently,' without the 'supervision, direction, or control' of" executive agencies "insulate[d]" that commission from the Governor's control. *See* 368 N.C. at 646, 781 S.E.2d at 257. In other words, a statutory designation of an executive agency as independent makes it more likely that a separation of powers violation will occur.

1. The Act interferes with the Governor's power of appointment over the New State Board.

Under the Act, the board charged with enforcement of elections laws grows from five members to eight. Session Law 2017-6 § 4(c) (enacting N.C. Gen. Stat. § 163A-2). Five members must vote to take

action, rather than a simple majority of those members present. *Id.* (enacting N.C. Gen. Stat. § 163A-3, -4).

While the Governor nominally appoints all eight board members, he must choose four of his appointees from a list of six provided by the Republican Party state chair and the other four from a list of six provided by the Democratic Party chair. *Id.* (enacting N.C. Gen. Stat. § 163A-2(a)). The Governor has no ability or authority under the Act to reject the slate of nominees provided by either party or to request a new and different list. These constraints on the Governor's appointment authority apply no matter which party holds the Governor's office. *See id.*

Even before Session Law 2017-6 had been passed into law over the Governor's veto, the Republican Party chair had already announced his six nominees. *See* Verified Compl. ¶ 50 (App. p. 50). If allowed to appoint the people he believes would support his policy views and priorities, the Governor would not appoint any of these nominees and certainly would not appoint them to make up half of the New State Board. *Id.*

As a result, with regard to at least half the members of the New State Board (i.e., those nominated by the party different from the Governor), the Governor's appointment authority is sharply constrained.

The Supreme Court in *McCrory* made clear that the Governor must have the ability to control the "views and priorities" of the officers who make executive policy so that he can ensure the laws are faithfully executed. 368 N.C. at 647, 781 S.E.2d at 257. The Act fails to give the Governor this control by failing to empower him to appoint the majority of the seats on the New State Board with candidates that he has selected.

2. Through the Act, the General Assembly directly exercises executive power by appointing the Executive Director of the New State Board, who will continue to serve indefinitely.

The Act's interference with the Governor's appointment authority is exacerbated by the Act's legislative appointment of the Executive Director of the New State Board. Session Law 2017-6, § 17 ("Notwithstanding G.S. 163A-6, the [New State Board] shall not appoint an Executive Director until May 2019. Until such time as the [New State Board] 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. . . .").

Despite the New State Board's position as an executive agency, the General Assembly, through the Act, has taken it upon itself to appoint

the Executive Director to serve for at least the next two years. *Id.* That Executive Director—among other powers discussed more fully below—is empowered to staff the New State Board and to administer the elections, ethics, lobbying, and campaign finance laws. *Id.* § 4(c) (enacting N.C. Gen. Stat. § 163A-6). The Executive Director—as under current law—remains "the chief State elections official." *Id.* The Executive Director also executes any decisions made by the New State Board and performs "such other responsibilities as may be assigned. . . ." *Id.*

It bears emphasis that the Governor has *no input* in who serves as Executive Director, either directly or indirectly through the members of the New State Board selected by him. And that Executive Director will continue to serve indefinitely if the New State Board deadlocks with an even 4-4 vote split along party lines or any other ideological division.

Plainly, selecting the person to serve as Executive Director is the most important thing that the board does. That is evidenced by the fact that the hiring of the current Executive Director of the State Board of Elections was the first act taken by that board once appointed by Governor McCrory. Strach Dep. p. 43.

3. The Act sharply constrains the Governor's power of removal over the New State Board.

McCrory makes plain that when the Governor may only remove a board member for misfeasance, malfeasance, or nonfeasance, the Governor's power of removal is "sharply constrain[ed]." 368 N.C. at 646, 781 S.E.2d at 257.

That "feasance" standard is the exact removal power over members of the New State Board granted to the Governor by the Act. Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-2(c)). And only the New State Board (and not the Governor) may remove the Executive Director. *See id.* (enacting N.C. Gen. Stat. § 163A-6(b)).

Before the Act, the Governor had plenary authority to remove members of the State Board of Elections for failing to attend meetings, *see* N.C. Gen. Stat. § 163-40, and had broad, perhaps plenary, power to remove a member of the State Board of Elections for any cause he deemed appropriate. *See* N.C. Gen. Stat. § 143B-2 (providing that the default removal provisions of Chapter 143B do not apply to the State Board of Elections); *cf. James v. Hunt*, 43 N.C. App. 109, 120-21, 258 S.E.2d 481, 488 (1979) (holding that the Governor had plenary authority to set the

procedure for removal of state officers and employees unless a specific statute or constitutional provision limited that authority).

In short, the Act assigns the Governor a removal power that is "sharply constrained" as a matter of law and that is significantly restricted from the removal power that he enjoyed prior to the Act.

4. The Act interferes with the Governor's power to supervise the New State Board, most egregiously by legislatively appointing an Executive Director who will be able to serve indefinitely.

The Governor's ability to supervise the New State Board and ensure that it is executing the laws is seriously restricted by the Act. The constraints on the Governor's powers of appointment and removal matter in this context because they create accountability. *See, e.g.*, *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. And absent that accountability, the Governor has no way to fulfill his constitutional duty.

The most troubling interference with the Governor's power of supervision comes from the Act's legislative appointment of the Executive Director. As noted, with the board deadlocked pursuant to legislative design, the legislatively appointed Executive Director will be able to serve indefinitely.

The New State Board has the powers and duties of a principal department. Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat § 163A-5(a)). The Executive Director is a full-time employee who ensures completion of the day-to-day tasks necessary to enforce election, ethics, lobbying, and campaign finance laws. *Id.* (enacting § 163A-6). But the New State Board is only required to meet monthly—unlike the Executive Director, board members serve in part-time positions. *Id.* (enacting § 163A-3).

Both the Act and preexisting statutes grant the Executive Director significant authority. She is solely responsible for staffing, administers the New State Board, and executes the board's decisions. *See id.* (enacting § 163A-6). She has the authority under certain circumstances (e.g. a hurricane) to exercise emergency powers and the authority, *on her own*, to adopt rules setting those powers. *See* N.C. Gen. Stat. § 163-27.1. As Ms. Strach admitted in her deposition, the Executive Director is "responsible for making sure that the Board is carrying out some of the most important policies and laws in our state." Strach Dep. p. 40:12-15.

Among her duties and discretionary powers, the Executive Director:

- Determines if candidates are entitled to recounts and runoffs. *See* N.C. Gen. Stat. § 163-182.7(c)(2) (providing that if "the

Executive Director determines subsequently that the margin is within the threshold set out in this subsection" she "shall notify the eligible candidate immediately" of the right to a recount); *id.* § 163-111(c)(1) (similar provision regarding runoff elections).

- Provides "directives" to county boards of elections. *See* N.C. Gen. Stat. § 163-132.4; *see also, e.g.*, *id.* N.C. Gen. Stat. § 163-82.15A (regarding administrative changes in voter registration related to county boundaries).

- Decides whether to retain or fire county directors of elections if a majority of a county board recommends termination—and she has the power to suspend such county directors unilaterally. N.C. Gen. Stat. § 163-35.

- Must approve a county plan for out-of-precinct voting places, even though such plans must be unanimously adopted by the county board of elections. N.C. Gen. Stat. § 163-130.1.

- Must approve a county plan to temporarily use two voting places for the same precinct, even though such plans must be unanimously adopted by the county board of elections. N.C. Gen. Stat. § 163-130.2.

- Must approve county plans to transfer voters from one precinct to an adjacent precinct. N.C. Gen. Stat. § 163-128(a).

- Must approve changes to the names of precincts submitted by county boards of elections. N.C. Gen. Stat. § 163-132.3A.

- "[M]ay grant special permission for a county board of elections to enter into an agreement with the owners or managers of a nonpublic building to use the building as a voting place. . . ." if certain conditions are met. *See* N.C. Gen. Stat. § 163-166.4(b).

- "[M]ay permit a county board of elections to provide more than one type of voting system in a precinct, but only upon a finding that doing so is necessary to comply with federal or State law." N.C. Gen. Stat. § 163-165.10.

- Provides opinions to candidates and political committees on campaign finance issues. If her opinion is followed, those candidates and committees are immune from prosecution. *See* N.C. Gen. Stat. § 163-278.23.

- Approves plans submitted by political campaign treasuries for goods or services sold by political parties. *See* N.C. Gen. Stat. § 163-278.8A.

- Coordinates the North Carolina's "responsibilities under the National Voter Registration Act." *See* N.C. Gen. Stat. § 163-82.2; *see also* N.C. Gen. Stat. § 163-82.21 (registration of members of the military).

Exacerbating the constitutional harm of the legislative appointment of the Executive Director is the evenly split structure created by the Act for the New State Board. If the board deadlocks 4-4, the Executive Director will be responsible for administering the elections, ethics, campaign finance, and lobbying laws ***without any direction*** by the New State Board. Since a vote of five members is required for the board to act, the Executive Director cannot be compelled to execute any decision made by the New State Board—or complete other assigned responsibilities—if a majority of the board does not so order.

Despite the ability of the Executive Director to exercise substantial executive authority, because she was hired by the General Assembly and can be replaced only by five members of the New State Board, the Governor has *no supervisory control whatsoever*.

The *McCrory* Court could not have been clearer that the Governor must have "enough control over [executive agencies] to perform his constitutional duty." 368 N.C. at 646, 781 S.E.2d at 256. The Act—by having half of the New State Board chosen by the rival political party and legislatively appointing the Executive Director of the New State Board—fails to provide sufficient control to pass that test.

5. The Act also interferes with the Governor's power to supervise the New State Board by mandating that a Board member, not chosen by the Governor, preside in the most important election years.

The Act extends a concept that was present in the legislation previously enjoined by the panel below. A member of the New State Board, not chosen by the Governor or even nominated by his political party, must chair the Board in every year in which the elections for President, Governor, and Council of State are held. *See* Session Law 2017-6 § 4(c) (enacting N.C. Gen. Stat. § 163A-2(f)). A board member of the current General Assembly's political majority will have the reins in

every year in which the elections board is most active, when the most issues arise, and when most people vote. This provision, yet again, diminishes the Governor's power to supervise because the chair will not be someone who the Governor really appointed or someone he can remove.

6. The Act makes corresponding changes to the composition and powers of county boards of elections, making it more difficult for them to take action and increasing the likelihood of deadlock.

The Act also restructures county boards of elections. Under existing law before the Act, county boards of elections consist of three members, no more than two of whom may be of the same political party. *See* N.C. Gen. Stat. § 163-30. Two members constitute a quorum and aside from a few situations where the chair can act alone or a particular act requires a unanimous vote, a simple majority of two of three votes is all that is needed to take action. *See* N.C. Gen. Stat. § 163-31.

If the Act is allowed to take effect, county boards of election will consist of four members, two of the political party with the highest number of registered affiliates and two of the political party with the second highest number of registered affiliates, with a vote of three members required to take action. *Id.* §§ 7(h) (amending § 163-30), 7(i)

(amending 163-31). As with the New State Board, the Republican Party holds the chairmanship in even-numbered years, when the vast majority of statewide and federal elections (presidential, Congressional, gubernatorial, Council of State, General Assembly, and judicial) take place. *See id.*

As set forth in the affidavits of Courtney Patterson and Stella Anderson, who have served, respectively, on the Lenoir County Board of Elections and the Watauga County Board of Elections, an evenly-divided four-member board with a bipartisan vote of three required to take action likely will be unable to avoid deadlock on controversial issues, meaning that the execution of laws will not occur or, at best, will default to a minimum standard set forth in certain statutory schemes (e.g. early voting sites). *See* Affidavits of Courtney Patterson and Stella Anderson (on file with trial court); *see also* Strach Dep. pp. 46-52.

7. The Act prevents the Governor from implementing the policy he was elected to pursue.

Collectively, the structures created by the Act interfere with the Governor's ability to implement policy. The most apparent example of the impact of the deadlocked structure of the New State Board is the early voting laws—how easy or hard it is for citizens to vote. The statutes

governing early voting set a minimum number of days and a single location. *See* N.C. Gen. Stat. § 163-227.2(g). Historically, many county boards of election have expanded early voting opportunities. *See* Anderson Aff. ¶¶ 9-15; Patterson Aff. ¶¶ 4-11; Strach Dep. pp. 46-52. But the New State Board must approve such expansions by a majority vote, meaning that a deadlock will result in the statutory minimum of early voting opportunities. N.C. Gen. Stat. § 163-227.2(g); Session Law 2017-6, § 4(c) (enacting N.C. Gen. Stat. § 163A-3(c)).

Thus, if the Governor's policy view is that it should be easier for citizens to vote, the Act ensures that such a policy will not be implemented. The structure of the existing State Board of Elections allows the Governor to control such policy, but not so with the New State Board.

* * *

As a whole, the Act prevents the Governor from fulfilling his core duty of taking care that the State's election laws are faithfully executed. The evenly divided New State Board—*in combination with* quorum and voting requirements, the Governor's limited removal power, the rotating chair provision, the legislative appointment of the Executive Director,

along with the other provisions detailed above—strips the Governor of the requisite control mandated by *McCrory*. The Act is intentionally designed to ensure that the Governor cannot enforce the election laws. Accordingly, the Act violates the separation of powers guaranteed by the North Carolina Constitution and is therefore unconstitutional

Motion for Temporary Stay

A temporary stay is appropriate, if not essential, in this case during the pendency of the Governor's Petition for Writ of Supersedeas. For the reasons detailed above, without a stay, the Governor is now facing, and will continue to face, the very constitutional harm he filed this lawsuit to avoid. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (affirming entry of a preliminary injunction enjoining a county from terminating certain government employees for speech-related activities and holding: "It is clear, therefore, that First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Conclusion

For the foregoing reasons, the Governor respectfully requests that this Court:

1. Issue a temporary stay enjoining the effectiveness of the Act as this Court considers the Governor's underlying Petition;

2. Issue a temporary stay enjoining the trial court's 1 June 2017 Order as this Court considers the Governor's underlying Petition;

3. Issue its writ of supersedeas enjoining the effectiveness of the Act as this Court considers the Governor's appeal;

4. Issue its writ of supersedeas enjoining the trial court's 1 June 2017 Order as this Court considers the Governor's appeal; and

5. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted this the 15th day of June, 2017.

Electronically Submitted
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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.

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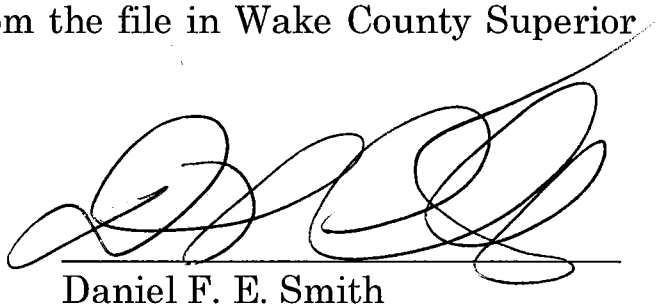
VERIFICATION

The undersigned attorney for Plaintiff-Petitioner Governor Roy A. Cooper, III, being first duly sworn, deposes and says:

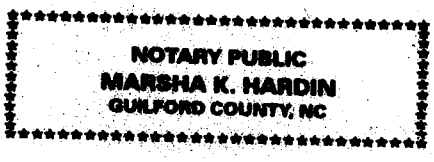
Pursuant to Rule 23 of the Rules of Appellate Procedure, I hereby certify that the contents of the foregoing Petition for Writ of Supersedeas and the documents attached thereto are true and correct copies of the pleadings and other documents from the file in Wake County Superior Court.



Daniel F. E. Smith

Guilford County, North Carolina

Sworn to and subscribed before me this the 15th day of June, 2017.



Marsha K Hardin
Notary Public

My Commission expires: 9-23-2021

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing document was served upon the parties by email and by deposit of the same in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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This the 15th day of June, 2017.

Electronically Submitted
Daniel F. E. Smith

NO. TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

Plaintiff-Petitioner,

v.

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; and THE STATE OF NORTH CAROLINA,

Defendants-Respondents.

From Wake County
17-CVS-5084

****

APPENDIX

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GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2017-6
SENATE BILL 68

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

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 10:06 a.m. this 25th day of April, 2017.

s/ James White
House Principal Clerk

17CV005084

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

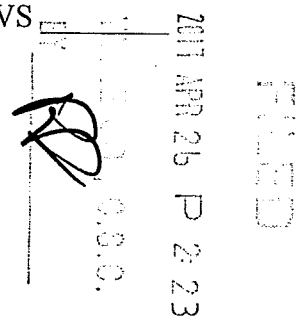
Plaintiff,

v.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS



VERIFIED COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER, AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Roy A. Cooper, III, individually and in his official capacity as Governor of the State of North Carolina, seeking a declaratory judgment under N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57; and seeking a temporary restraining order, preliminary injunction, and permanent injunction under North Carolina Rule of Civil Procedure 65, hereby alleges and says:

INTRODUCTION

1. The leadership of the North Carolina General Assembly moved on the eve of Plaintiff's assumption of the Office of the Governor to curtail, in significant ways, the executive powers that passed to him on January 1, 2017. In a hastily called session from December 14 to December 16, 2016, the General Assembly passed two bills—Senate Bill 4 and House Bill 17—that radically changed the structure and composition of the executive agency responsible for administrating our State's election laws, embedded political loyalists from the previous

administration within managerial and policymaking positions in the Cooper administration, and required Senate confirmation of principal department heads.

2. On March 17, 2017, a duly appointed three-judge panel found the destruction of the State Board of Elections and the embedding of McCrory loyalists in the Cooper administration were unconstitutional. *See Cooper v. Berger and Moore*, Wake County Case No. 16-CVS-15636, Order on Cross-Motions for Summary Judgment (March 17, 2017) (declaring unconstitutional (a) the provisions of Session Law 2016-125 giving the legislature effective control over the State Board of Elections; and (b) amendments to the State Personnel Act allowing the legislature to embed within the executive branch "career" employees loyal to the legislature). That matter is now on appeal.

3. Undeterred by the judicial check on its unconstitutional actions, on April 25, 2017, the General Assembly enacted Session Law 2017-6, which repeals the acts enjoined in *Cooper v. Berger and Moore*, including the portions of Senate Bill 4 relating to the State Board of Elections, and enacts new provisions that again destroy the State Board of Elections and State Ethics Commission and replace them with an unconstitutionally structured and staffed new Bipartisan State Board of Elections and Ethics Enforcement ("New State Board").

4. This General Assembly's continued, direct attacks on executive authority unconstitutionally infringe on the Governor's executive powers in violation of separation of powers and improperly delegate legislative power without adequate guiding standards. N.C. CONST. art. I, § 6; *id.* art. II, § 1; *id.* art. III, §§ 1, 5(4).

5. As our Supreme Court recently observed, "The election of a particular candidate signifies public support for that candidate's platform, policies, and ideology." *Young v. Bailey*, 368 N.C. 665, 671, 781 S.E.2d 277, 281 (2016). Here, the General Assembly's efforts to

disempower the Office of the Governor fail to respect the will of the electorate in selecting him as North Carolina's chief executive.

6. The constitutional allocation of powers between the Office of the Governor and the legislature must be protected, no matter the political affiliation of the Governor or the majority of the legislature.

7. This General Assembly's actions fail to respect fundamental principles of representative government and the basic guarantees of the North Carolina Constitution, thus requiring the Governor to again enforce his constitutional rights—and protect the constitutional powers allocated to the Executive Branch of State Government by the people—through this lawsuit.

PARTIES AND JURISDICTION

8. On November 8, 2016, the voters of the State of North Carolina chose Plaintiff Governor Roy A. Cooper III ("Governor Cooper") to be their governor for a four-year term that commenced on January 1, 2017. Governor Cooper is a resident of Wake County, North Carolina.

9. Defendant State of North Carolina is a sovereign state with its capital in Wake County, North Carolina. The State's laws, as enacted by the General Assembly, are being challenged as unconstitutional in this action.

10. Defendant Philip E. Berger is the President Pro Tempore of the North Carolina Senate and, upon information and belief, is a resident of Rockingham County, North Carolina.

11. Defendant Timothy K. Moore is the Speaker of the North Carolina House of Representatives and, upon information and belief, is a resident of Cleveland County, North Carolina.

12. Defendants lack sovereign immunity for the claims alleged herein, all of which arise under the exclusive rights and privileges enjoyed by—and duties assigned to—the Governor of the State of North Carolina by the North Carolina Constitution.

13. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, Governor Cooper seeks judgment declaring unconstitutional Sections 3 through 22 of Session Law 2017-6, a true and correct copy of which is attached as **Exhibit A**.

14. As further alleged below, a present and real controversy exists between the parties as to the constitutionality of Sections 3 through 22 of Session Law 2017-6.

15. Governor Cooper also seeks to restrain and enjoin the application of Sections 3 through 22 of Session Law 2017-6. Accordingly, this action is properly brought in the Superior Court Division of the General Court of Justice pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and 7A-245(a).

16. This Court has jurisdiction over the parties and subject matter of this lawsuit, and venue is proper.

CONSTITUTIONAL PRINCIPLES

Separation of Powers

17. As the Supreme Court of North Carolina reaffirmed in 2016:

> Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty. The Constitution of North Carolina therefore vests each of these powers in a different branch of government and declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

State ex rel. McCrory v. Berger, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016) (quoting N.C. CONST. art. I, § 6).

18. "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982).

19. Indeed, our founders embedded separation of powers in our state Constitution. *See, e.g.*, N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); art. III, § 1 ("The executive power of the State shall be vested in the Governor."); art. III, § 5(4) ("The Governor shall take care that the laws be faithfully executed."); art. II, § 1 ("The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives."); art. IV, § 1 ("The judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice.").

20. These core principles guided our Supreme Court in *McCrory v. Berger*, when it held that the General Assembly had unconstitutionally encroached on the province of the Governor by establishing three commissions (including the Coal Ash Management Commission), according them executive authority, and then limiting the Governor's ability to control those commissions.

21. "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." 368 N.C. at 645, 781 S.E.2d at 256. The constitutional guarantee of separation of powers also "requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *See id.* at 636, 781 S.E.2d at 250.

22. The *McCrory* Court made clear that the Governor's ability to control executive branch officers, boards, and commissions—and, concomitantly, the exercise of final executive authority by those executive entities—depends on the Governor's ability to appoint such officials,

"to supervise their day-to-day activities, and to remove them from office." *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256.

23. As further detailed below, Sections 3 through 22 of Session Law 2017-6 violate separation of powers by preventing the Governor from performing his core function under the North Carolina Constitution to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4).

24. By seeking declaratory and injunctive relief enjoining the operation of Session Law 2017-6, this lawsuit seeks to preserve the constitutional balance of power carefully crafted by our founders—and most recently re-adopted by the people of North Carolina in the Constitution of 1971—and to reaffirm that the executive branch is co-equal to the legislative branch, no matter which political party holds the office.

Non-Delegation

25. Legislative power is vested in the General Assembly by Article II, Section 1 of the North Carolina Constitution.

26. The General Assembly may not abdicate or delegate its core legislative power. *See* N.C. CONST. art. I, § 6, art. II, § 1.

27. Delegation of some legislative power is only permissible if it is "accompanied by adequate guiding standards," which include procedural safeguards to cabin the exercise of delegated legislative power. *See, e.g., Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-98, 249 S.E.2d 402, 410-11 (1978).

CHALLENGES TO SESSION LAW 2017-6

28. Under the leadership and direction of the General Assembly, Senate Bill 68 was reported as a favorable committee substitute (replacing a bill regarding the student page program)

on April 4, 2017. Senate Bill 68 then passed both chambers of the General Assembly on April 11, 2017, following reconciliation by a conference committee. Next, Senate Bill 68 was presented to the Governor on April 11, 2017. On April 21, 2017, the Governor vetoed Senate Bill 68. Despite that veto, Senate Bill 68 was enacted by the General Assembly on April 25, 2017, becoming Session Law 2017-6.

29. Session Law 2017-6 destroys the existing executive agencies that enforce election and ethics laws. In their place, the Session Law creates a new agency with a structure designed to create deadlock, thus interfering with the Governor's ability to fulfill his duty to ensure faithful execution of the laws.

30. As set forth in the current N.C. Gen. Stat. § 163-19 (before Session Law 2017-6), the State Board of Elections (the "SBOE") consists of five members, no more than three of whom may be from the same political party. Those five members are all appointed by the Governor from a list of five nominees submitted by the state party chairman of each of the two largest political parties in the State. A five-member SBOE ensures that, barring a recusal or absence, the SBOE will not be deadlocked and unable to act when it needs to execute the laws.

31. Under the current structure, the SBOE may take action on a vote of a simple majority of its members, meaning that three appointees are sufficient to execute the laws.

32. Effective May 1, 2017, the SBOE and the State Ethics Commission will be abolished. Session Law 2017-6, §§ 5(a) to 5(d); 7(a), 7(c) to 7(g).

33. All current proceedings and investigations previously undertaken by the SBOE and the Ethics Commission will be transferred to the New State Board. *See id.* §§ 11, 12. In addition, records, personnel, property, funds, and duties previously undertaken by the SBOE and State Ethics Commission will be transferred to the New State Board. *See id.* §§ 16, 18, 19.

34. The substantive laws governing ethics, elections, lobbying, and campaign finance will not change, but the executive agency charged with their enforcement will be completely restructured in a manner that interferes with the Governor's faithful execution of those laws. Specifically:

a. A new eight-member Bipartisan State Board of Elections and Ethics Enforcement will be created to execute elections and ethics laws, with its membership split between four members of each of the two largest political parties. Session Law 2017-6, § 4(c) (enacting §§ 163A-1, 163A-2).

b. The Governor will be required to appoint as members of the New State Board four individuals from a list of six submitted by the State party chair of the party with the highest number of registered affiliates, currently the Democratic Party. *Id.* (enacting § 163A-2(a)).

c. The Governor will be required to appoint as members of the New State Board four individuals from a list of six submitted by the chair of the party with the second highest number of registered affiliates, currently the Republican Party. *Id.* (enacting § 163A-2(a)).

d. Unaffiliated (i.e., independent) voters will have no voice in who is selected to serve on the New State Board. *See id.*

e. Five members of the New State Board will be required to take most actions, meaning that any vote split on political party lines will deadlock the board and prevent action. *See id.* (enacting §§ 163A-3(c), 163A-4(d)).

f. The General Assembly will appoint Kim Strach as Executive Director of the New State Board. *Id.* § 17. Under both existing law and Session Law 2017-6, the Executive Director is the "chief State elections official" who is "responsible for staffing, administration, and execution of the State Board's decisions and orders." *Id.* (enacting §§ 163A-6(c) and (d)); N.C. Gen. Stat. § 163-27.1. Ms. Strach was initially hired by the SBOE on a 3-2 partisan vote following Governor McCrory's election and appointment of a majority Republican Board. If the New State Board deadlocks on political party lines, Ms. Strach will serve indefinitely.

g. The Governor is empowered to appoint the first chair of the New State Board. *See* Session Law 2017-6, § 10. But, following that first appointment, the New State Board selects its chair and must select a chair of a set political affiliation—if current registration statistics hold, the chair will be a Republican for every year that Presidential, gubernatorial, and Council of State elections are held. *Id.* (enacting § 163A-2(f)).

h. Vacancies in any of the New State Board positions will remain vacant for up to thirty days to allow a State party chair to provide a list of two names to the Governor to select one new appointee. *Id.* (enacting § 163A-2(d)).

i. Five members of the New State Board will be required to issue subpoenas, Session Law 2017-6, § 4(c) (enacting § 163A-3(c), 163A-4(a),(d)). Under the existing statutes, just the chair or any two of the remaining four members of SBOE may issue a subpoena. *See* N.C. Gen. Stat. § 163-23.

j. Members of the New State Board will only be removable for misfeasance, nonfeasance, or malfeasance. Session Law 2017-6 (enacting § 163(a)(2)(c)).

35. County boards of elections will also be restructured by Session Law 2017-6.

36. Under the existing law found at N.C. Gen. Stat. § 163-30 (before Session Law 2017-6), county boards of elections consist of three members, no more than two of whom may be of the same political party. Two members constitute a quorum and aside from situations where the chair can act alone, a simple majority of two of three votes is required to take action. *See* N.C. Gen. Stat. § 163-31 (before Session Law 2017-6)

37. If Session Law 2017-6 is allowed to take effect, county boards of election will consist of four members, two of the political party with the highest number of registered affiliates and two of the political party with the second highest number of registered affiliates, with a vote of three members required to take action. *Id.* §§ 7(h) (amending § 163-30), 7(i) (amending 163-31). The Republican Party holds the chairmanship in even-numbered years, when the vast majority of statewide and federal elections (presidential, Congressional, gubernatorial, Council of State, General Assembly, and judicial) take place. *See id.*

A. SECTIONS 3 TO 22 OF SESSION LAW 2017-6 VIOLATE SEPARATION OF POWERS AND THE FAITHFUL EXECUTION CLAUSE.

(1) The SBOE is an executive agency under the current election laws.

38. Under existing law, the SBOE is the principal executive agency charged with executing the State's election laws.

39. Current law designates the SBOE as an "independent regulatory and quasi-judicial agency" with "all powers and duties conferred upon the heads of principal departments under G.S. 143B-10." N.C. Gen. Stat. § 163-28. This means that the SBOE has all the powers and duties of a principal department (like the Department of Environmental Quality). As a result, the SBOE must prepare and submit, *inter alia*, the following items to the Governor: (1) an "annual plan of work"; (2) "an annual report covering programs and activities for each fiscal year; (3) a budget; (4) "legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of [the] department." *See* N.C. Gen. Stat. § 143B-10(g),(h),(i).

40. Many of the powers granted to the SBOE under the current law are plainly executive in nature. For example, and without limitation:

a. SBOE has "general supervision over the primaries and elections in the State." N.C. Gen. Stat. § 163-22(a);

b. SBOE provides county boards with copies of all election laws and SBOE rules and regulations. *See id.* § 163-22(b);

c. SBOE distributes to the public materials explaining primary and election laws and procedures. *Id.*;

d. SBOE appoints county board members and advises them as to the "proper methods of conducting primaries and elections." *Id.* § 163-22(c);

e. SBOE may "remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause." *Id.*;

f. SBOE determines "the form and content of ballots, instruction sheets, pollbooks, tally sheets, abstract and return forms, certificates of election, and other forms to be used in primaries and elections." *Id.* § 163-22(e);

g. SBOE prepares, prints, and distributes ballots to county boards. *See id.* § 163-22(f);

h. SBOE certifies to "county boards of elections the names of candidates for district offices who have filed notice of candidacy with the Board and whose names are required to be printed on county ballots." *Id.* § 163-22(g);

i. SBOE "tabulate[s] the primary and election returns," "declare[s] the results," and "prepare[s] abstracts of the votes cast in each county." *Id.* § 163-22(h);

j. SBOE provides training and screening for poll workers and test voting machines. *See id.* § 163-22(o);

k. SBOE may assist county boards in litigation. *See id.* § 163-25;

l. The executive director of the SBOE "may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted." *Id.* § 163-27.1;

m. SBOE makes available registration forms for organized voter registration drives. *See id.* § 163-82.5;

n. SBOE maintains "a statewide computerized voter registration system to facilitate voter registration and to provide a central database containing voter registration information for each county." *Id.* § 163-82.11;

o. SBOE creates guidelines "to administer the statewide voter registration system established by this Article." *Id.* § 163-82.12;

p. SBOE approves county voter registration plans. *See id.* § 163-82.22(b);

q. SBOE may "modify the general election law time schedule with regard to ascertaining, declaring, and reporting results." *Id.* § 163-104;

r. SBOE certifies to the Secretary of State candidates for office. *See id.* § 163-108(a);

s. SBOE approves county plans addressing elderly or disabled voters. *See id.* § 163-130;

t. SBOE "shall certify the official ballots and voter instructions to be used in every election that is subject to this Article." *Id.* § 163-165.3(a);

u. SBOE "shall ensure that official ballots throughout the State" have the required characteristics. *Id.* § 163-165.4;

v. SBOE may extend voting hours. *See id.* § 163-166.01;

w. SBOE certifies election results. *See id.* § 163-182.15; and

x. SBOE has significant duties with respect to campaign finance regulations. *See id.* § 263-278.22.

41. Under current law, the State's 100 county boards of elections—all appointed by the SBOE—also undertake executive functions, including the primary duty of administering elections on the county level. County boards "perform all the duties imposed upon them by law. . . ." N.C. Gen. Stat. § 163-33. Among other duties, county boards are required:

a. "To advertise and contract for the printing of ballots and other supplies used in registration and elections; and to provide for the delivery of ballots, pollbooks, and other required papers and materials to the voting places." N.C. Gen. Stat. § 163-33(6);

b. "To provide for the purchase, preservation, and maintenance of voting booths, ballot boxes, registration and pollbooks . . . , and equipment used in registration, nominations, and elections; and to cause the voting places to be suitably provided with voting booths and other supplies required by law." *Id.* § 163-33(7);

c. "To provide for the issuance of all notices, advertisements, and publications concerning elections required by law." *Id.* § 163-33(8);

d. "To receive the returns of primaries and elections, canvass the returns . . . , and to issue certificates of election to county officers and members of the General Assembly except those elected in districts composed of more than one county." *Id.* § 163-33(9);

e. "To appoint and remove the board's clerk, assistant clerks, and other employees." *Id.* § 163-33(10);

f. "To prepare and submit to the proper appropriating officers a budget estimating the cost of elections for the ensuing fiscal year." *Id.* § 163-33(11); and

g. "To perform such other duties as may be prescribed by this Chapter, by directives promulgated pursuant to G.S. 163-132.4, or by the rules, orders, and directives of the State Board of Elections." N.C. Gen. Stat. § 163-33(12).

42. Under Sections 3 through 22 of Session Law 2017-6, the New State Board would exercise executive authority, just as the SBOE currently does. Session Law 2017-6 assigns to the New State Board *all* of the executive duties detailed above—and set forth at length in Chapter 163 of the General Statutes—that are presently the responsibility of the SBOE.

(2) Sections 3 through 22 of Session Law 2017-6 prevent the Governor from exercising his executive function of ensuring that North Carolina's election laws are faithfully executed.

43. While leaving in place the executive duties of the current SBOE, Session Law 2017-6 substantially changes the entity charged with administering those laws, how the members of the new entity are appointed and removed, and how that entity carries out those duties, all in ways that conflict directly with our state Constitution.

44. Session Law 2017-6 creates the New State Board and charges it with the execution and administration of all the laws that the SBOE is currently responsible for executing and administering.

45. As of May 1, 2017, the SBOE and State Ethics Commission will be destroyed and replaced with the New State Board.

46. Taken as a whole, the structures enacted by Session Law 2017-6 serve to make it more difficult for the New State Board (as compared to the existing SBOE) and county boards of election (as compared to county boards under existing law) to execute the election laws.

47. Our Supreme Court in *McCrory* held that the Governor's ability to control executive agencies like the New State Board "depends on his ability to appoint the [Board members], to supervise their day-to-day activities, and to remove them from office." *McCrory v. Berger*, 368 N.C. at 646, 781 S.E.2d at 256.

(a) Appointment.

48. Specifically, as detailed above, the New State Board would consist of eight members, with four members from a political party not affiliated with the Governor. The Governor's power of appointment is sharply constrained in that: (a) four members must be appointed from each of the two major political parties; (b) for each political party, those four members must be selected from a list of six members submitted by the State party chair.

49. By requiring the Governor to appoint four members from a list of six that he has no role in compiling, Session Law 2017-6 sharply constrains the Governor's power of appointment and removes his discretion in ensuring that the members of the New State Board share his policy views and priorities. Session Law 2017-6 seeks to reduce the Governor's role in appointing the members of the New State Board to that of a ministerial functionary signing off on lists compiled by the political parties.

50. While the Governor may have input and perhaps control over the six people recommended by the chair of the party with which he is affiliated, he will certainly have no control or input into the six candidates provided by the chair of the other party. Indeed, even before the Governor vetoed then-Senate Bill 68, the Republican Party chair had already announced his six nominations. If allowed to appoint the people he believes would support his policy views and priorities, the Governor would not appoint any of Republican Party's six nominees, and he certainly would not choose to appoint them to make up half of the New State Board.

51. To be clear, however, this structural constraint imposed on the Governor's powers remains no matter which political party holds the Governor's office.

52. If the Governor believes that the people on the lists provided do not share his policy views and priorities, Session Law 2017-6 has no mechanism to allow him to require new lists that

include such individuals. To the contrary, if a political party—either political party—wants to undermine the Governor's ability to execute the laws in accordance with his policy views and priorities by submitting a list with six people who actively oppose the Governor, Session Law 2017-6 provides no way for the Governor to stop it.

53. The Governor's appointment to fill a vacancy must now wait up to 30 days to allow a political party to provide a list of names. *See id.* (enacting § 163A-2(d)).

54. In short, Session Law 2017-6 allows one political party official—unelected and unaccountable—to hijack the agenda of one of the State's most important executive branch agencies, and it leaves the Governor with no statutory mechanism to stop it.

(b) Supervision.

55. Because five members of the New State Board are required to take action, *see* Session Law 2017-6, § 4(c) (enacting § 163A-4), the structure of the New State Board empowers four members—including those appointed by only one of the political parties—to block any action by the New State Board.

56. The recent experience of the Federal Elections Commission ("FEC"), which is split 3-3 along party lines, is instructive. In the past 10 years, the FEC has become bitterly partisan and deadlocked. The number of enforcement actions has dropped and, with votes along partisan lines, many enforcement actions are ultimately dismissed. The FEC's ability to promulgate rules has also been affected, with no new rules promulgated following the U.S. Supreme Court's landmark 2010 opinion in *Citizens United v. Federal Elections Commission*, 558 U.S. 310. *See generally* "Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp," Office of FEC Commissioner Ann M. Ravel, February 2017, *available at* http://www.fec.gov/members/ravel/ravelreport_feb2017.pdf.

57. The issues with the New State Board extend beyond the 4-4 partisan split. Instead of allowing the chair alone—or any two members of the SBOE—to issue a subpoena, as is authorized by current law, N.C. Gen. Stat. § 163-23, the concurrence of five members is required for the New State Board to request the Superior Court of Wake County to issue a subpoena. *See* Session Law 2017-6, § 4(c) (enacting § 163A-4(d)). As a result, a minority of the New State Board (whatever their political affiliations) may not bring an issue to the attention of the full board by pursuing an investigation.

58. The General Assembly has legislatively appointed the current Executive Director of the SBOE as the Executive Director of the New State Board through May 2019. Ms. Strach was initially appointed to her position as Executive Director in a partisan 3-2 vote made by Governor McCrory's appointees to the SBOE. Beginning in May 2019, the Executive Director will be appointed by the New State Board to serve a two-year, rather than four-year, term. *See id.* § 4(c) (enacting § 163A-6); § 17. But if the New State Board deadlocks on a new appointee, Ms. Strach will continue to serve indefinitely.

59. The Executive Director of the New State Board is the "chief State elections official," which is akin to a cabinet secretary of a principal department. The Executive Director is "responsible for staffing, administration, and execution of the State Board's decisions and orders. . . ." *See id.* (enacting § 163A-6(c)). This type of official—with this level of discretion and the power to exercise final executive authority—anywhere else in the executive branch would be an exempt policymaking employee subject to removal at the Governor's sole discretion.

60. Session Law 2017-6 provides no mechanism for the Governor to appoint the chair of the New State Board or of the county boards of elections. Instead, Session Law 2017-6 mandates that for every year that Presidential, gubernatorial, and Council of State elections are

held, a member of the Republican Party must be appointed chair of the New State Board of Elections and, likewise, a Republican must be appointed chair of each county board of elections.

(c) Removal

61. The new law sharply constrains the Governor's authority to remove members of the New State Board, allowing removal only for "misfeasance, malfeasance, or nonfeasance." *Id.* (enacting § 163A-2(c)).

62. Similarly, the Governor may not remove the Executive Director of the New State Board, except for cause. Session Law 2017-6 (enacting § 163A-6(b)).

63. In sum, the structures created by Session Law 2017-6 for the New State Board and county boards of elections represent a substantial diminution to the power of the Governor and appear designed to encourage deadlock at both the State and county level.

(3) Session Law 2017-6 violates the Separation of Powers.

64. Though they claim to have created a "bipartisan" state board and "bipartisan" county boards, Defendants have in fact created a New State Board and county boards that are designed to neuter the State's elections oversight capabilities and prevent the Governor and the executive branch from faithfully executing the State's elections laws.

65. Session Law 2017-6 strips the Governor of his ability to control the New State Board, even as that board continues to exercise core executive functions. It does so by limiting the Governor's powers of appointment, supervision, and removal and by empowering four members of the New State Board to block any action, prevent the issuance of a subpoena, and otherwise obstruct the enforcement of elections laws.

66. The Governor cannot appoint a majority of members to the New State Board that reflect his policy views and priorities, since his eight appointments are made from political party lists, including a political party different from his own.

67. The Governor's power to supervise is limited because he has no power over the selection of the Executive Director, who is initially appointed by the General Assembly and may well retain her directorship if the New State Board deadlocks along political lines. In the election years when the most citizens vote, when the functioning of the electoral process is most complicated and critical, when the SBOE usually meets on a weekly (rather than monthly) basis, and when the election results fill the greatest number of positions in state and federal government—when the President, Governor, members of the Council of State, members of Congress, and members of the General Assembly are elected—the Governor has no power to designate a chair of the New State Board or the county boards; instead the chair must be a member of the Republican Party.

68. The Governor's power to remove members of the New State Board is sharply constrained and limited to removal for misfeasance, malfeasance, or nonfeasance. Similarly, the Executive Director of the New State Board may only be removed for cause.

69. Just as the New State Board is likely to be consistently deadlocked and unable to act under Session Law 2017-6, so too will the county boards be deadlocked and unable to carry out their duties under N.C. Gen. Stat. § 163-33.

70. Under Session Law 2017-6, county boards of elections change to four member boards, with a vote of three of four members required to take action. *See* Session Law 2017-6, § 7(h),(i) (amending §§ 163-30, 163-31).

71. The impact of the new law on both the Governor's ability to ensure that the laws are faithfully executed and on his ability to ensure that those he appoints and employs reflect his policy views and priorities can be seen in connection with the laws governing the establishing of early voting times and sites for elections—in short, how easy or hard it is for citizens to vote.

72. Under the version of N.C. Gen. Stat. § 163-227.2 in the statute books, the General Assembly established that unless expanded by county boards of elections and approved by the SBOE, early voting is limited to ten (10) days and may only take place at the local board of elections office. *See id.* §§ 163-227.2(b), (f), (g). However, a federal court ruling in the case challenging a new voter ID law restored a prior law providing for seventeen (17) days of early voting. Whichever version of the law applies, the time and place(s) for early voting are set by statute, with statutory authorization for county boards of elections and the SBOE to decide to expand the time and place(s) for early voting.

73. In recent years, many counties have substantially expanded both the number of days (including weekends) on which early voting is allowed, as well as the number of sites for early voting. The end result has been that it has been easier for citizens to vote.

74. Under the new law, because the Governor does not control a majority of the appointments to the New State Board or the county boards of election, and because a majority is required to change the default, *limited* early voting set forth in the statute, it is highly likely that it will be harder to vote going forward. The result of a 4-4 vote by the New State Board will be to default to the minimum early-voting times and single early-voting site set forth in the statute.

75. If recent events are any indication, political differences will continue to drive early voting decisions. Following the federal court ruling overturning the voter ID law, the Executive Director of the State Republican Party—the chair of which will effectively appoint half the New

State Board and the county boards—reminded Republican appointees to county boards of election of "their duty to consider republican [sic] points of view" and suggested that reductions to voting days were appropriate.

76. In short, Session Law 2017-6 ensures that the New State Board and county boards will be unable to execute the State's election law, and it strips from the Governor any ability to change that circumstance. Accordingly, it prevents him from fulfilling his constitutional duty to see that the laws are "faithfully executed."

B. SECTION 3 OF SESSION LAW 2017-6 UNCONSTITUTIONALLY DELEGATES LEGISLATIVE POWER TO THE REVISOR OF STATUTES.

77. As elaborated above, delegation of legislative power is only permissible if it is accompanied by adequate guiding standards, including procedural safeguards checking the exercise of delegated legislative power. *See, e.g., Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-98, 249 S.E.2d 402, 410-11 (1978). And delegation of the core legislative power to make laws is absolutely prohibited. *See id.*

78. Here, the General Assembly—in its haste to create the New State Board by May 1, 2017 (when the Governor would appoint a majority of members) and after its first attempt was held unconstitutional—delegated its core legislative power to a single individual because it simply lacked the time to properly amend the voluminous statutes governing elections, ethics, lobbying, and campaign finance.

79. Historically, changes that restructure government to such a large extent have been the result of a study commission or committee that has had adequate time to thoughtfully consider all issues, hear from interested parties, and propose changes to government structure that provide sufficient time for all effected agencies to plan for and implement the new structures.

80. But here, Section 3 of Session Law 2017-6 delegates to a single person—the Revisor of Statutes, *see* N.C. Gen. Stat. § 120-36.22—the power and duty to consolidate and recodify three entire chapters of the General Statutes: Chapter 120C (spanning 30 pages in the official statute book) Chapter 138A (spanning 49 pages in the official statute book); and Chapter 163 (spanning 491 pages in the official statute book).

81. The Revisor of Statutes is also empowered to move "other existing statutory laws *relating to* elections and ethics enforcement that are located elsewhere in the General Statutes as the Revisor deems appropriate." *See* Session Law 2017-6, § 3 (emphasis added). Similarly, the Revisor "when necessary to organize relevant law into its proper place in the . . . structure [outline by the Session Law] may rearrange sentences that currently appear within subsections." *Id.* The Revisor may also "correct terms" and "adjust subject and verb agreement and the placement of conjunctions." In other words, the Revisor has complete discretion to change the existing law governing elections and ethics enforcement.

82. Application of well-accepted canons of statutory construction—including, among others, the doctrines of *in pari materia* and *ejusdem generis*—shows that the powers granted to the Revisor by Session Law 2017-6 allow the Revisor to change substantive law in his sole discretion.

83. In its preamble, Session Law 2017-6 sets forth various goals, none of which provide practicable guiding standards for the Revisor's work.

84. Moreover, even assuming that the delegation of core legislative power were permissible, there are no real procedural safeguards over the delegation of authority to the Revisor. There is no statutory mechanism to correct mistakes made by the Revisor of Statutes. *See* N.C. Gen. Stat. §§ 120-36.21 to 1230-36.22. With respect to Session Law 2017-6, the only apparent procedural safeguard is that the Revisor is to "consult with" three boards and one commission as

he does the recodification. That consultation requirement does not require the Revisor to follow the recommendations of those boards and commission.

85. In any event, the Revisor *cannot* consult with the State Board of Elections and the State Ethics Commission, both of which are abolished by the Session Law. Consequently, if the Revisor makes a mistake in his work, that mistake becomes the law of the land.

86. Accordingly, the foregoing delegation of legislative authority to the Revisor fails to provide adequate guiding standards and procedural safeguards, and thus violates the non-delegation doctrine.

87. The violation of the non-delegation doctrine by Session Law 2017-6 is not a mere technical failing. Instead, it is part and parcel of Defendants' outright attack on the constitutional guarantee of popular sovereignty and representative government. *See* N.C. Const. art. I, §§ 2, 3. Rather than fully debating the amendments to the General Statutes caused by consolidating the functions, powers, and duties of three established executive agencies and departments (i.e. the State Board of Elections, the Secretary of State, the State Ethics Commission), Defendants have simply destroyed the existing structures and executive bodies, avoided legislative debate on substantive changes to law, and delegated the job of cleaning up their mess to the Revisor of Statutes. Indeed, the fact that Defendants have instructed the Revisor to consult with two abolished boards shows the absurdity of this delegation.

88. In sum, Session Law 2017-6 abandons the well-established and orderly democratic process to enact law, violating the substantive guarantee of representative government through the unconstitutional delegation of legislative power to a single individual. *See* N.C. CONST. art. I, § 6; art. II, § 1.

C. SECTIONS 3 THROUGH 22 OF SESSION LAW 2017-6 CREATE IMMEDIATE, IRREPARABLE HARM.

89. Unless Session Law 2017-6 is enjoined, on May 1, 2017, the State Board of Elections ("SBOE") and the State Ethics Commission will both be abolished. Session Law 2017-6, §§ 5(a) to 5(d); 7(a), 7(c) to 7(g).

90. The New State Board that replaces the SBOE and Ethics Commission will be appointed pursuant to an unconstitutional statutory scheme that:

a. Violates the constitutional guarantee of separation of powers, N.C. CONST. art. I, § 6;

b. Interferes with the Governor's constitutional duty to ensure the laws are faithfully executed, *id.* art. I, § 6; art. III, §§ 1, 5(4); and

c. Unconstitutionally delegates legislative power to the Revisor of Statutes without adequate guiding standards, *id.* art. I, § 6; art. II, § 1.

91. All current proceedings and investigations previously undertaken by the SBOE and the Ethics Commission will be transferred to the New State Board. *See id.* §§ 11, 12. In addition, records, personnel, property, funds, and duties previously undertaken by the SBOE and State Ethics Commission will be transferred to the New State Board. *See id.* §§ 16, 18, 19.

92. Effective May 1, 2017, the existing governmental structures that execute election, ethics, lobbying, and campaign finance laws will be destroyed and replaced with the unconstitutional New State Board. *See* Session Law 2017-6, § 22.

93. The General Assembly will legislatively appoint the Executive Director of the New State Board, who serves as the "chief State elections official," and who will continue to serve indefinitely in the event the New State Board deadlocks along partisan lines regarding her replacement. *See* Session Law 2017-6, § 4(c) (enacting § 163A-6); *id.* § 17. Serving as the "chief

State elections official," the Executive Director has the sole power to make decisions regarding staffing and administration for the New State Board. *Id.* § 4(c) (enacting § 163A-6).

94. Accordingly, much of the constitutional harm to the Office of the Governor will occur immediately if Session Law 2017-6 is allowed to take effect. Moreover, if not enjoined during the pendency of this litigation, the unconstitutional New State Board and newly restructured county boards will be charged with enforcing the State's election and ethics laws during the 2017 local elections, and, possibly, the 2018 national and statewide elections.

95. That is just one reason why, under North Carolina law, a threatened constitutional violation is *per se* irreparable harm sufficient to support a preliminary injunction. *See, e.g.*, *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable."); *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).

COUNT 1: DECLARATORY JUDGMENT

SECTIONS 3 THROUGH 22 OF SESSION LAW 2017-6 VIOLATE SEPARATION OF POWERS GUARANTEED BY THE NORTH CAROLINA CONSTITUTION.

96. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

97. A present and real controversy exists between the parties as to the constitutionality of Sections 3 through 22 of Session Law 2017-6.

98. Sections 3 through 22 of Session Law 2017-6 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully

executed. *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250 ("[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.").

99. Accordingly, Sections 3 through 22 of Session Law 2017-6 violate the Separation of Powers Clause (Article I, Section 6) and the Executive Power Clauses (Article III, Sections 1 and 5(4)) of the North Carolina Constitution and are therefore void and of no effect.

100. Given the pervasive nature of the unconstitutional provisions in Sections 3 through 22 of Session Law 2017-6, it would be impossible for the Court to identify and excise particular provisions while leaving the remainder of the legislation intact. Any attempt to judicially rewrite Sections 3 through 22 of Session Law 2017-6 to ensure their compliance with the Constitution would require the Court to re-write the law in a manner not intended by the General Assembly, and would encroach on the General Assembly's legislative function.

101. Session Law 2017-6 does not include a severability provision.

102. Accordingly, Sections 3 through 22 of Session Law 2017-6 are void in their entirety.

103. Pursuant to N.C. Gen. Stat. §§ 1-253–1-267 and North Carolina Rule of Civil Procedure 57, the Governor is entitled to a judgment declaring that Sections 3 through 22 of Session Law 2017-6 are unconstitutional, and are therefore void and of no effect.

COUNT 2: DECLARATORY JUDGMENT

SESSION LAW 2017-6 VIOLATES THE NON-DELEGATION DOCTRINE.

104. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

105. A present and real controversy exists between the parties as to the constitutionality of Section 3 of Session Law 2017-6.

106. Section 3 unconstitutionally delegates core legislative power to the Revisor of Statutes. *See, e.g., Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-98, 249 S.E.2d 402, 410-11 (1978).

107. Section 3 also unconstitutionally delegates quasi-legislative power to the Revisor of Statutes, because Section 3 and the remainder of Session Law 2017-6 fail to provide adequate guiding standards or procedural safeguards. *See id.*

108. Session Law 2017-6 does not include a severability provision.

109. Pursuant to N.C. Gen. Stat. §§ 1-253–1-267 and North Carolina Rule of Civil Procedure 57, the Governor entitled to a judgment declaring that Sections 3 through 22 of Session Law 2017-6 are unconstitutional, and are therefore void and of no effect.

COUNT 3: INJUNCTIVE RELIEF

THE GOVERNOR IS ENTITLED TO PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

110. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

111. The Governor is entitled to a preliminary and permanent injunction pursuant to North Carolina Rule of Civil Procedure 65 barring Sections 3 through 22 of Session Law 2017-6 from taking effect.

112. Without such relief, the unconstitutional statute will remain in effect during the pendency of this litigation, preventing the Governor from performing his core executive function of ensuring that the laws are faithfully executed.

113. Sections 3 through 22 of Session Law 2017-6 threaten immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people of North Carolina whom he was elected to serve.

114. As set forth above, the Governor is likely to succeed on the merits of his claims.

115. Providing the Governor the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

116. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by the Governor.

MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

117. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

118. As described above, Sections 3 through 22 of Session Law 2017-6 violate numerous provisions of the North Carolina Constitution, with each such violation constituting irreparable harm as a matter of law. Thus no further showing of irreparable harm is required.

119. Even if the Court required a further showing, as a matter of law, the facts alleged above, and the other facts of record establish irreparable harm to Office of the Governor if Sections 3 through 22 of Session Law 2017-6 are allowed to take effect on May 1, 2017.

120. As set forth above, the Governor is likely to succeed on the merits of his claims.

121. Providing the Governor the injunctive relief sought herein is necessary to protect the Governor's rights during the course of this litigation.

122. The temporary and preliminary injunctive relief sought by the Governor will preserve the status quo under which the elections of 2016 were conducted while the Court adjudicates the constitutionality of Sections 3 through 22 of Session Law 2017-6.

123. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by the Governor.

124. Accordingly, the Governor moves for a temporary restraining order and preliminary injunction barring Sections 3 through 22 of Session Law 2017-6 from taking effect.

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows:

1. That the Court issue a temporary restraining order and preliminary injunction pursuant to North Carolina Rule of Civil Procedure 65 barring Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6) from taking effect during the pendency of this litigation;

2. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that Sections 3 through 22 of Session Law 2017-6 are unconstitutional and therefore void and of no effect;

3. That the Court award to Plaintiff his costs and expenses, pursuant to applicable statutory and common law, including N.C. Gen. Stat. §§ 6-20, and 1-263; and

4. That the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 26th day of April, 2017.

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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS _____

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; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

VERIFICATION

I, Kristi Jones, being first duly sworn, depose and say:

I am chief of staff to the Governor of the State of North Carolina, Roy A. Cooper, III, and I have the authority to execute this verification on behalf of the Governor, acting in his official capacity.

I have read the COMPLAINT filed in this matter on behalf of Governor Cooper, acting in his official capacity, and can verify based on personal knowledge to the factual contents thereof, and that the same is true to the best of my knowledge or are believed by me to be true based upon reasonable inquiry.

[SIGNATURE ON FOLLOWING PAGE]

Kristi Jones

KRISTI JONES
Chief of Staff
Office of the Governor
of the State of North Carolina

Wake County, North Carolina

I certify that the following person personally appeared before me this day, acknowledging to me that she signed the foregoing document: **Kristi Jones**

Date: 4/26/17

Patricia G. Douglas
[Official Signature of Notary]

[Official Seal]

Patricia G. Douglas, Notary Public
[Notary's printed or typed name]

My Commission Expires: 5/2/19

PATRICIA G DOUGLAS
Notary Public
Wake County, NC
My Commission Expires May 2, 2019

SESSION LAW 2017-6, WHICH WAS EXHIBIT A TO THE VERIFIED COMPLAINT, IS LOCATED AT PAGE 1 OF THIS APPENDIX

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 5084

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; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

TEMPORARY RESTRAINING ORDER

THIS MATTER came on for telephonic hearing on April 28, 2017, before the undersigned three-judge panel upon the Plaintiff's Motion for Temporary Restraining Order regarding Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6). Upon consideration of all matters of record, including the Verified Complaint, affidavits on file, arguments by counsel for Plaintiff and counsel for Defendants, the Court finds and concludes as follows:

1. This Court has personal and subject matter jurisdiction over this cause.

2. This cause is properly referred to the undersigned three-judge panel.

3. The Plaintiff, in his motion for temporary restraining order, seeks to restrain the operation of the Sections 3 through 22 of Senate Bill 68 (Session Law

2017-6), which was enacted by the North Carolina General Assembly on April 25, 2017, and would destroy the existing State Board of Elections, destroy the existing State Ethics Commission, and create the new Bipartisan State Board of Elections and Ethics Enforcement.

4. Plaintiff's Verified Complaint challenges Sections 3 through 22 of Senate Bill 68 on the grounds that they violate Article I, Section 6; Article II, section 1; and Article III, Sections 1 and 5(4) of the North Carolina Constitution. In his Verified Complaint, Plaintiff seeks declaratory relief, a preliminary injunction, and a permanent injunction. Plaintiff has filed motions seeking a temporary restraining order and preliminary injunction.

5. The Court finds and concludes that:

a. The Plaintiff, Governor Roy A. Cooper, III, has shown a likelihood of success on the merits of his challenge.

b. The Plaintiff is likely to sustain irreparable harm unless a temporary restraining order is issued and, in the opinion of the Court, the issuance of a temporary restraining order is necessary for the protection of the Plaintiff's rights during the course of this litigation. Violations of the North Carolina Constitution constitute irreparable harm as a matter of law. The destruction of the State Board of Elections and State Ethics Commission and their replacement with the new, unconstitutional Bipartisan

State Board of Elections and Ethics Enforcement also constitute irreparable harm.

c. The balance of equities favors granting a temporary restraining order. The immediate and irreparable harm caused by the challenged legislation outweighs any possible harm in preserving the status quo prior to the challenged legislation being implemented.

d. It is not possible, at this early time, for the Court to identify and excise particular provisions of Sections 3 through 22 of Senate Bill 68 likely to be unconstitutional while allowing other portions of the challenged legislation to take effect.

THEREFORE, the Court concludes that the Plaintiff's Motion for a Temporary Restraining Order should be ALLOWED and that the Defendants are enjoined during the pendency of this litigation and until further order of the Court as follows:

a. Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6) are preliminarily enjoined and therefore are of no effect pending expiration of this Order or further Order of this Court;

b. Plaintiff Governor Cooper does not have any duty to take any action to implement or enforce Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6);

c. Defendants are restrained and enjoined from taking any action to implement or enforce Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6); and

d. Defendants' "officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice in any manner of [this] order by personal service or otherwise" are likewise enjoined from taking any action to implement or enforce Sections 3 through 22 of Senate Bill 68 (Session Law 2017-6).

e. In accordance with N.C. Rule Civ. P. 65(c), no security is required of the Plaintiff.

Judges Caldwell and Burke concur in the decision to grant the temporary restraining order. Judge Foster voted to deny the temporary restraining order.

Unless Defendants consent to an extension of this temporary restraining order, Governor Cooper's motion for preliminary injunction shall be heard before the undersigned three judge panel on Wednesday, May 10, 2017, at a time and in a location to be determined by the panel and communicated to counsel through the trial court administrator.

SO ORDERED, this the 28th day of April at 4:50 p.m.

SO ORDERED, this the 18 day of April, 2017.

The Honorable Jesse B. Caldwell, III

CERTIFIED TRUE COPY FROM ORIGINAL
Clerk of Superior Court, Wake County

By: _____
Assistant Deputy Clerk of Superior Court

Date: 6-6-17

SO ORDERED, this the 28th day of April, 2017.

The Honorable L. Todd Burke

Judge Foster voted to deny the temporary restraining order.

SO ORDERED, this the 28th day of April, 2017.

The Honorable Jeffery B. Foster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on all parties by serving counsel as indicated below via electronic mail and by U.S. Mail, postage prepaid, addressed as follows:

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This the 28th day of April 2017.

Kellie Z. Myers
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STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 5084

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

Defendants.

ORDER

THIS MATTER came before the undersigned duly-appointed three-judge panel during the June 1, 2017, special session of Wake County Superior Court upon Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment and Motion to Dismiss.

Upon consideration of all matters of record, including affidavits on file, and arguments by counsel for Plaintiff and counsel for Defendants, the Court unanimously GRANTS the Defendants' Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court GRANTS the Defendants' Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1).
2. The parties shall each bear their own costs.

SO ORDERED, this the 1st day of June, 2017.

The Honorable Jesse B. Caldwell, III

The Honorable L. Todd Burke

The Honorable Jeffery B. Foster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on all parties by serving counsel as indicated below by U.S. Mail, postage prepaid, addressed as follows, with a courtesy copy sent via email:

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