

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

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SUPERIOR COURT DIVISION

COUNTY OF WAKE

17 CVS 6465

WAKE COUNTY, C.S.C.

STATE OF NORTH CAROLINA,

Upon the relation of,

ROY A. COOPER, III, individually and  
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; CHARLTON L.  
ALLEN, in his official capacity as  
CHAIR OF THE NORTH CAROLINA  
INDUSTRIAL COMMISSION; and  
YOLANDA K. STITH, in her official  
capacity as VICE-CHAIR OF THE  
NORTH CAROLINA INDUSTRIAL  
COMMISSION,

Defendants.

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT  
(COUNTS 7-12)**

This matter is before the Court on Plaintiff Governor Roy Cooper's Motion for Partial Summary Judgment as to Counts 7-12 and the Motion to Stay of Defendants Philip E. Berger and Timothy K. Moore ("Legislative Defendants"). Having reviewed and considered the motions, the pleadings and other filings in this matter, any

affidavits and other evidence submitted by the parties, and the arguments of counsel, the Court grants Plaintiff's Motion for Summary Judgment and denies Legislative Defendants' Motion to Stay:

### BACKGROUND AND JURISDICTION

1. In the Amended Complaint, Plaintiff challenges the following statutes (the "Challenged Statutes") as unconstitutional because the structures they establish violate separation of powers (N.C. CONST. art. 1, § 6):

- a. N.C. Gen. Stat. § 143B-135.240, establishing the structure for the Clean Water Management Trust Fund Board of Trustees;
- b. N.C. Gen. Stat. § 143B-168.4, establishing the structure for the Child Care Commission;
- c. N.C. Gen. Stat. § 143-135.25, establishing the structure for the State Building Commission;
- d. N.C. Gen. Stat. § 143B-135.202, establishing the structure for the North Carolina Parks and Recreation Authority;
- e. N.C. Gen. Stat. § 143B-472.128, establishing the structure for the Rural Infrastructure Authority;
- f. N.C. Gen. Stat. § 74C-4, establishing the structure for the Rural Infrastructure Authority.

2. There are no genuine issues of material fact as to Counts 7-12, and Plaintiff is entitled to summary judgment in his favor as a matter of law.

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3. A present and real controversy exists between the parties as to the constitutionality of the Challenged Statutes.

4. Plaintiff, as the head of the executive branch directly elected by the people, has standing to challenge the constitutionality of laws that infringe upon his

authority and the executive branch's authority. *See, e.g.*, N.C. CONST. art. I, §§ 6; art. III, §§ 1, 5(4); *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008); *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018) (reversing trial court order to the extent it dismissed the Governor's claims for lack of standing).

Simply put, if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim.

*Id.*

5. Plaintiff's claims are ripe for judicial determination. *See, e.g., Cooper*, 370 N.C. at 416, 809 S.E.2d 113 n.12 (“[W]e do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor's executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of Article III, Section 5(4) of the North Carolina Constitution.”).

6. This Court has jurisdiction over the parties and subject matter of this lawsuit, and venue is proper. *See News & Observer Publ'g Co. v. Easley*, 182 N.C. App. 14, 19, 641 S.E.2d 698, 702 (2007) (“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.”).

7. On the record during that hearing, the parties stipulated to the certification of this judgment for immediate appeal under Rule 54(b). For that reason and for good cause shown, the Court finds that there is no just reason for delay and that this order is a final judgment as to Counts 7-12.

### LEGAL STANDARD

8. It is a right of the citizens of North Carolina, set forth in Article I, Section 6 of the North Carolina Constitution, that the “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.

9. The analysis in this case is controlled by the Supreme Court of North Carolina’s decisions in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E. 2d 248 (2016) and *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018).

10. In *McCrory*, the Court held:

When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor’s influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of

powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself.

*McCrorry*, 368 N.C. at 647, 781 S.E.2d at 257.

11. *McCrorry*, therefore, requires courts to look at three elements in assessing whether an executive board or agency violates separation of powers: (a) does someone other than the Governor appoint a majority of the members of the board or commission; (b) is the Governor's power to remove members of the board or commission constrained; and (c) does the board or commission have the "final say on how to execute the laws" in the area of the law that it regulates.

12. *Cooper* confirmed the holding in *McCrorry*, that Article III, Section 5(4) of the North Carolina Constitution requires the Governor to have enough control over commissions or boards that are primarily administrative or executive in character in order to perform his or her constitutional duty.

13. *Cooper* explained that our Constitution guarantees sufficient control by the Governor to allow him or her to implement the policy preferences that the Governor was elected to undertake and which are authorized by the relevant substantive statutes. *Cooper*, 370 N.C. at 410, 809 S.E.2d at 109.

14. Twice in the *Cooper* opinion, the Court made it clear that the Governor must be able to control the policy preferences of a *majority* of the members of an executive branch board. *See id.* at 416, 809 S.E.2 at 112; and *id.* at 418, 809 S.E.2d at 114.

## STRUCTURE OF THE CHALLENGED BOARDS AND COMMISSIONS

15. With respect to appointment authority, the Challenged Statutes all allow the General Assembly to appoint a majority of the members of the board or commission. In this respect, the Challenged Statutes are identical to the commissions invalidated in *McCrorry*, which allowed the Governor “only two or three appointees per commission.” *McCrorry*, 368 N.C. at 646, 781 S.E.2d at 256.

16. With respect to removal authority, just like the commissions at issue in *McCrorry*, the Challenged Statutes all “sharply constrain[] the Governor’s power to remove members of any of the [boards or commissions], allowing him to do so only for cause.” *Id.* at 646, 781 S.E.2d at 257. Indeed, in the case of the Private Protective Services Board, the Governor has no ability to remove a member he did not appoint, even for cause.

17. Finally, with respect to whether the challenged board or commission has the “final say on how to execute the laws” in the area of the law that it regulates, the statutes are clear and the record is undisputed that each of the boards and commissions challenged in this case are executive in nature and have the requisite “final say on how to execute the laws.”

18. As in *McCrorry*, each of the boards or commissions in this case is housed within a principal department headed by one of the Governor’s cabinet secretaries.

19. In *McCrorry*, the Court noted that the commissions at issue in that case were authorized to make rules, issue orders, make permit decisions, and review and approve plans. 368 N.C. at 637-39, 781 S.E.2d at 250-52.

20. In this case, the challenged boards and commissions have similar “final say” in the areas they regulate.

21. The Clean Water Management Trust Fund Board of Trustees is responsible for:

- a. Allocating grants for projects and activities that fulfill the criteria of the Clean Water Management Trust Fund, which is “administered by the Department of Natural and Cultural Resources” pursuant to direction received from the Clean Water Board. *Id.* §§ 143B-135.242(a), 143B-135.234(a).
- b. Establishing criteria, guidelines, and matching requirements for grant awards. *See id.* §§ 143B-135.242(b)-(c), 143B-135.238(c).
- c. Acquiring land “by purchase, negotiation, gift, or devise” after review and approval by the Council of State. *Id.* § 143B-135.242(d).
- d. Designating managers for the lands that the Board acquires. *Id.* § 143B-135.242(f).
- e. Adopting administrative rules to implement its powers. *Id.* § 143B-135.242(g).
- f. Administering the Solid Waste Management Loan Program and Local Government Special Obligation Bonds and exercising “all of the powers necessary or convenient” to do so, including: the execution of contracts, including loan agreements with units of local government; establishment of reserve funds; employment of an administrator, consultants, attorneys, and other agents (with salaries fixed by the Board); suing and being sued; establishing minimum financial standards for local government eligibility; and to deposit, disburse, and invest the funds under its control. *Id.* §§ 159I-2, 159I-3, 159I-5, 159I-6, 159I-10. Applications for loans are not filed with the Board, but instead are filed with the Department of Environmental Quality’s (“DEQ”) Division of Waste Management. *Id.* § 159I-9.
- g. Negotiating a memorandum of agreement with the Secretary of DEQ regarding competitive bid procedures and related matters for contracts made by DEQ’s Division of Waste Management for solid

waste research using funds from the Solid Waste Management Loan Fund. *Id.* § 159I-7.

- h. Exercising “sole and absolute discretion” with respect to requests to amend conservation easements under the board’s purview. *See* Clean Water Management Trust Fund Policy Manual, Conservation Agreement Amendment Policy (March 9, 2015), available at [https://files.nc.gov/cwmtf/documents/files/cwmtf\\_policy\\_manual\\_apr2017\\_bookmarked.pdf](https://files.nc.gov/cwmtf/documents/files/cwmtf_policy_manual_apr2017_bookmarked.pdf).

22. The Child Care Commission is responsible for:

- a. Adopting rules for child care facilities throughout the state. *Id.* §§ 143B-168.3(a1)(2), 110-88(5), 110-91. Such rules “shall be enforced by the Department of Health and Human Services.” *Id.* §§ 143B-168.3(b); 110-90(9); 110-104.
- b. Developing policies and procedures for issuing and revoking licenses to child care facilities. *Id.* §§ 143B-168.3(a1)(1); 110-88(1),(5), (8), (10)-(14); 110-102.2. The Child Care Commission’s licensing program is also administered by DHHS. *Id.* §§ 110-90(1),(5),(11); 110-93.
- c. Adopting rules for administrative enforcement actions after an inspection by DHHS “substantiate[s] that child abuse or neglect did occur in the facility.” *Id.* §§ 110-88(6a); 110-105.3; 110-105.5.
- d. Requiring inspections and reporting by “local or State health agencies, fire and building inspection agencies, and from representatives” of DHHS prior to initial licensing and requiring similar inspections and reports annually thereafter. *Id.* §§ 110-88(2),(2a); 110-92; 110-105.
- e. Adopting rules “for the investigation of reports of child abuse or neglect and for administrative action when child abuse or neglect is substantiated. . . .” *Id.* § 143B-168.5.
- f. Reviewing and approving (or rejecting) learning curricula for child care and prekindergarten programs. *See* North Carolina Child Care Commission, Meeting Minutes at 5-6 (November 17, 2015), available at [https://www.ncchildcare.nc.gov/PDF\\_forms/child\\_care\\_commission\\_minutes\\_november\\_2015-1.pdf](https://www.ncchildcare.nc.gov/PDF_forms/child_care_commission_minutes_november_2015-1.pdf).



23. The State Building Commission is responsible for:
- a. Adopting rules establishing standard procedures and criteria for the selection of designer, consultant, and construction manager for State building projects. *Id.* §§ 143-135.26(1), 143-132(c).
  - b. Selecting the designer, consultant, and construction manager for State building projects unless “the General Assembly or the University of North Carolina is the funded agency.” *Id.*
  - c. Adopting rules for the “plan review, approval, and permit process,” evaluation of completed work, and post-occupancy evaluation, inspection, and preventative maintenance for State building projects. *Id.* § 143-135.26(2), (3), (4), (10).
  - d. If deemed necessary by the Commission, appointing an advisory board to assist it in its work. *Id.* § 143-135.26(7).
  - e. Authorizing a State agency, local government unit, or other regulated entity to use alternative contracting methods or, when the project cost does not exceed \$500,000, to use open-end design agreements. *Id.* §§ 143-135.26(9), (12); 143-64.34; 116-31.11.
  - f. Reporting annually to the Governor and the Joint Legislative Commission on Governmental Operations. *Id.* § 143-135.26(13).
  - g. Exempting “major facility construction or renovation” projects from statutorily prescribed energy-efficiency and water use standards when they are “not practicable.” *Id.* § 143-135.38.
  - h. Receiving annual reports from the State Board of Community Colleges providing details regarding construction contracts awarded by the State Board of Community Colleges. *Id.* § 115D-9(g).
24. The Parks and Recreation Authority is responsible for:
- a. Within broad limitations, exercising discretion to allocate funds for land acquisition, repairs, renovations, improvements, construction, and other capital projects. *See id.* § 143B-135.200(2),(3). According to its 2017 Annual Report, the Parks Authority reviewed 67 funding applications from local governments and allocated nearly \$14 million during the 2015-16 fiscal year. *See* North Carolina Division of Parks

and Recreation, North Carolina State Parks Annual Report 2017 at 7, 11. (2017), available at [https://files.nc.gov/ncparks/481/2017 DPR ANNUAL REPORT.pdf](https://files.nc.gov/ncparks/481/2017_DPR_ANNUAL_REPORT.pdf).

- b. Receiving public and private donations into the Parks and Recreation Trust Fund. *Id.* § 143B-135.200(1).
  - c. Soliciting funds from public and private sources. *Id.* § 143B-135.200(4).
  - d. Developing public and private support for programs and operations within parks and recreation areas. *Id.* § 143B-135.200(5).
25. The Rural Infrastructure Authority is responsible for:
- a. “[F]ormulat[ing] policies and priorities for grant and loan making” so long as such policies include four application cycles annually, timely distribution of funds, and use a federal funds first (where available). *Id.* § 143B-472.128(j)(3).
  - b. Receiving and reviewing grant applications from local governments. *Id.* § 143B-472.128(j)(1).
  - c. Awarding grants to local governments for water, wastewater, and other infrastructure needs. *Id.* §§ 143B-472.127(a)(1); 143B-472.128(j)(2); 143B-437.01.
  - d. Providing grants or loans for reuse or demolition of buildings, or construction and expansion of rural health care facilities. *Id.* § 143B-472.127(a)(2).
  - e. Establishing a “threshold amount for emergency grants and loans that may be awarded by the Assistant Secretary without the prior approval of the authority.” *Id.* § 143B-472.128(j)(4).
  - f. Analyzing opportunities to share information and aid local governments in seeking grants, and periodically reviewing the grant program overall. *Id.* § 143B-472.128(j)(5)-(7).
26. The Private Protective Services Board is responsible for:
- a. “[A]dminister[ing] the licensing and set[ting] educational and training requirements for persons, firms, associations, and

corporations engaged in a private protective services profession within” North Carolina. *Id.* §§ 74C-4(a); 74C-5(2),(5),(6); 74C-8; 74C-13. Licensing by the Protective Board includes issuing “firearm registration permit[s]” allowing licensees to carry a firearm in the performance of private protective services. *Id.* § 74C-13.

- b. Adopting administrative rules to carry out its duties. *Id.* §§ 74C-5(1),(9).
- c. Along with the Secretary of Public Safety, investigating violations of the law by licensees or applicants. *Id.* §§ 74C-5(3), 74C-7. The Board alone evaluates the results of investigations to determine whether a license should be denied, suspended, or revoked. *Id.* §§ 74C-5(2),(6), 74C-12.
- d. Approving “training schools, instructors, and course materials” for entities wishing to provide training. *Id.* § 74C-5(11).
- e. Using the funds in the Private Protective Services Education Fund for “education of licensees and registrants as deemed appropriate by the Board.” *Id.* § 74C-30.
- f. Creating and periodically modifying the State’s comprehensive criminal history search and review process, which is applicable to all registrations, certifications, and renewal applications. *See* North Carolina Department of Public Safety, Private Protective Services Board, *Memorandum* (December 1, 2017), available at [https://files.nc.gov/ncdps/documents/files/December.2017.PPSB\\_Memorandum.pdf](https://files.nc.gov/ncdps/documents/files/December.2017.PPSB_Memorandum.pdf).

27. Accordingly, because (a) the General Assembly appoints a majority of members of each of the challenged boards and commissions; (b) the Governor’s authority to remove those members is constrained; and (c) the boards and commissions “have the final say on how to execute the laws” in the areas they regulate, the Challenged Statutes violate separation of powers beyond any reasonable doubt.

## DEFENDANTS' MOTION TO STAY

28. Defendants seek to stay any ruling of this Court pending the submission of constitutional amendments to the voters on November 6, 2018 (Session Law 2018-117). Defendants contend the proposed amendments “would have an obvious impact” on these claims.

29. In light of this Court’s decision that the Challenged Statutes infringe on the Governor’s constitutional authority and violate separation of powers, and because the outcome of the vote in November is uncertain, this Court, in its discretion, denies Defendants’ Motion to Stay.

30. Defendants have had more than two years since the Supreme Court issued its decision in *McCrorry* and more than a year since this action was filed. They have had ample opportunity to address the constitutional problems with the Challenged Statutes.

31. Any *de minimis* harm Defendants may suffer as a result of their stay request being denied is outweighed by the constitutional harm a stay would impose on the Governor.

## CONCLUSION

**It is therefore ORDERED, ADJUDGED, AND DECREED that:**

1. Defendant’s Motion to Stay is denied.
2. Plaintiff’s Motion for Partial Summary Judgment is granted.

3. Pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and North Carolina Rules of Civil Procedure 57 and 65, the Court hereby enters final judgment declaring that the following are unconstitutional and are therefore void and permanently enjoined:

- a. N.C. Gen. Stat. § 143B-135.240;
- b. N.C. Gen. Stat. § 143B-168.4;
- c. N.C. Gen. Stat. § 143-135.25;
- d. N.C. Gen. Stat. § 143B-135.202;
- e. N.C. Gen. Stat. § 143B-472.128; and
- f. N.C. Gen. Stat. § 74C-4.

4. This Judgment is certified for immediate review pursuant to Rule 54(b).

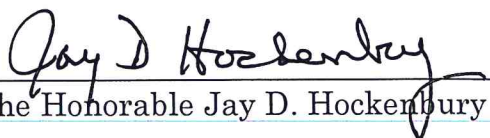
5. The parties shall bear their own costs.

**SO ORDERED, ADJUDGED, AND DECREED.**

SO ORDERED, this the 22<sup>nd</sup> day of August, 2018.

  
The Honorable Henry W. Hight, Jr.

SO ORDERED, this the 14<sup>th</sup> day of August, 2018.

  
The Honorable Jay D. Hockenbury

SO ORDERED, this the 20<sup>th</sup> day of August, 2018.

  
The Honorable Nathaniel J. Poovey

**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 31<sup>st</sup> day of August, 2018.



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