STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

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

Plaintiff,

vs.

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

Defendants.

MEMORANDUM OF ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER came before the undersigned duly-appointed three-judge panel during the March 7, 2017, special session of Wake County Superior Court upon cross-motions for summary judgment by Plaintiff and Defendants regarding the constitutionality of portions of Session Law 2016-125 and portions of Session Law 2016-126.

This Court heard arguments from Jim W. Phillips, Eric M. David, and Daniel F.E. Smith, of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, counsel for Plaintiff, and arguments from Noah H. Huffstetler, III, D. Martin Warf, and Candace S. Friel of Nelson Mullins Riley & Scarborough LLP, counsel for Defendants. The

cross-motions for summary judgment have been fully briefed and the motions are ripe for consideration. The Court has considered all matters of record, including the Amended Complaint, affidavits on file, the responses to the cross-motions, and the Brief of *Amici Curiae* Stella Anderson and Courtney Patterson in Support of Plaintiff's Motion for Summary Judgment.

Background

Session Law 2016-125 was signed into law by Governor Pat McCrory on December 16, 2016. Session Law 2016-126 was signed into law by Governor McCrory on December 19, 2016.

Plaintiff challenges the constitutionality of Part I of Session Law 2016-125, which reorganizes two statutorily-created bodies, the State Board of Elections (the "Board of Elections") and the State Ethics Commission (the "Ethics Commission"), into one independent, regulatory and quasi-judicial body, the Bipartisan State Board of Elections and Ethics Enforcement (the "Bipartisan Board").

Plaintiff challenges the constitutionality of two portions of Session Law 2016-126: (1) Part III, which amended N.C. Gen. Stat. § 143B-9(a) by establishing statutory authority for the North Carolina Senate to confirm the Governor's appointments for the heads of various state agencies; and (2) Portions of Sections 7, 8, and 33 of Part I, which converted the designation of exempt employees to career State employees.

Procedural History

On December 30, 2016, Plaintiff, who was, at that time, the Governor-elect, filed his Complaint alleging that the creation of the Bipartisan Board in Part I of

Session Law 2016-125 violates the State Constitution. That same day, Plaintiff moved for and was granted a temporary restraining order by the Honorable Donald W. Stephens that stayed Part I of Session Law 2016-125. Portions of Session Law 2016-125 regarding the Bipartisan Board were set to take effect January 1, 2017.

By Order of the Chief Justice of the North Carolina Supreme Court dated January 3, 2017, this three-judge panel was appointed to hear the constitutional challenge raised in Plaintiff's Complaint.

On January 5, 2017, Plaintiff, who was sworn in as Governor on January 1, 2017, moved for a preliminary injunction to stay implementation of Part I. On January 6, 2017, the three-judge panel (this "Court") entered its Order Allowing Motion for Preliminary Injunction and enjoined Parts I and VI of Session Law 2016-125 from going into effect.

On January 10, 2017, Plaintiff filed his Amended Complaint, adding a number of additional claims and legal theories related to the above-referenced portions of Session Law 2016-126. Plaintiff challenged Part V of Session Law 2016-125, but voluntarily dismissed those claims such that they are not before this Court.

On January 23, 2017, Defendants filed their Notice of Appeal and moved the Court to reconsider its Order and to stay its effect, thus allowing Parts I and VI of the Session Law to take effect pending final determination of the merits of this case. This Court denied that motion on February 2, 2017, and Defendants filed their

Petition for Writ of Supersedeas and Motion for Temporary Stay with the North Carolina Court of Appeals on February 7, 2017.[1]

On January 31, 2017, Defendants filed their Motion to Dismiss and Answer to Amended Complaint. Defendants' Motion to Dismiss, brought pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure relates to issues of standing and nonjusticiability as to the creation of the Bipartisan Board in Part I of Session Law 2016-125 and the advice and consent provision in Part III of Session Law 2016-126.

Defendants also moved to dismiss challenges to the amendments to exempt positions in Sections 7, 8, and 33 of Part I of Session Law 2016-126 to the extent Plaintiff relies on the Exclusive Privileges Clause of the North Carolina Constitution. Plaintiff has abandoned his arguments related to the Exclusive Privileges Clause.

On February 6, 2017, Plaintiff moved for a temporary restraining order enjoining Part III of Session Law 2016-126, and, following a telephonic hearing on February 7, 2017, this Court entered its Temporary Restraining Order. Thereafter,

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[1] Neither party has argued that the Notice of Appeal divested this Court of jurisdiction under the *functus officio* doctrine, and this Court finds it did retain and does have jurisdiction to enter this Order. As to the appellate procedure of the preliminary injunction, the Court of Appeals granted a temporary stay of the Order on Preliminary Injunction while it considered the Writ of Supersedeas. Plaintiff sought relief from the Court of Appeals Order in the North Carolina Supreme Court, and a stay of the Court of Appeals Order was granted. On February 28, 2017, the Court of Appeals entered a Writ of Supersedeas as to the portion of this Court's January 6, 2017, Order "requiring Chapters 163, 138A, and 120C of the General Statutes to remain in effect as they were prior to the passage of Senate Bill 4" and to the portion of the Order "enjoining Part VI of Senate Bill 4 insofar as it prevents the unchallenged or severable portions of Senate Bill 4 from being enforced." The Writ of Supersedeas was denied as to all other parts of the January 6, 2017 Order.

Plaintiff sought a preliminary injunction of Part III, which motion was heard by the Court on February 10, 2017. On February 13, 2017, this Court denied that motion. On February 14, 2017, Plaintiff and Defendants filed their motions for summary judgment. On February 24, 2017, Plaintiff filed a Motion for Protective Order and Motion to Enforce the Court's February 13, 2017 Order.

On February 27, 2017, Defendants filed a Response, and, by agreement of the parties, the matter was heard without argument. Also on February 27, 2017, this Court entered an Order noting that it was reserving its ruling on Plaintiff's Motion for Protective Order and Motion to Enforce the Court's February 13, 2017 Order and continuing to take the matter under advisement.

On February 28, 2017, Plaintiff and Defendants filed their responsive papers to the cross-motions for summary judgment. On March 10, 2017, this Court entered an Order declaring the issues that were raised in the February 24th Motion for Protective Order moot.

Summary of Session Laws at Issue

Part I of Session Law 2016-125 reorganizes, effective January 1, 2017, the Board of Elections and the Ethics Commission into the Bipartisan Board. It also establishes the following elements of governance and structure of the Board:

- Four members of the eight person Bipartisan Board would be appointed by the Governor, two from the Republican Party and two from the Democratic Party. The Governor's appointees would be chosen from lists of three nominees submitted by the party chairs;

- Four members of the eight person Bipartisan Board would be appointed by the General Assembly, two from the Republican Party and two from the Democratic Party. Two of the four appointees

would be appointed upon recommendation of the Speaker of the House of Representatives, who would recommend one Democrat and one Republican chosen from lists of three nominees prepared by the majority and minority leaders of the House. The remaining two appointees would be appointed upon recommendation of the President Pro Tempore of the Senate, who would recommend one Democrat and one Republican chosen from lists of three nominees prepared by the majority and minority leaders of the Senate;

- The members of the Ethics Commission serving on December 31, 2016, would constitute and serve as the Bipartisan Board until June 30, 2017;

- The chair and vice-chair of the Ethics Commission serving on December 31, 2016, would serve as the chair and vice-chair of the Bipartisan Board until June 30, 2017;

- All members would take an oath of office;

- Members could be removed by their appointing authority only for misfeasance, malfeasance, or nonfeasance;

- Vacancies would be filled by the appointing authority for the vacating member;

- Six members of the Bipartisan Board would constitute a quorum, and, except where required to act unanimously, a majority vote of the Bipartisan Board would require six members;

- Chair would rotate annually with a Democrat serving in odd years and a Republican serving in even years; and

- Subpoenas can be signed and issued by the Chair upon a vote of six members.

Part III of Session Law 2016-126 amended N.C. Gen. Stat. § 143B-9(a) by establishing statutory authority for the North Carolina Senate to confirm the Governor's appointments for the heads of various state agencies. Section 143B-9(a) creates two processes by which the Senate advises and consents to the appointment of the Governor, depending on whether the appointment occurs when the General

Assembly is out of session or whether a nomination is made while the General Assembly is in session and can act upon it.

Sections 7 and 8 of Part I of Session Law 2016-126 (the "Exempt Positions Amendments") amended the number of state government positions that the Governor could deem "exempt" from the North Carolina Human Resources Act, and provides that employees in any positions the Governor converts from exempt to "non-exempt" would be deemed career State employees pursuant to Chapter 126 of the North Carolina General Statutes (the "North Carolina Human Resources Act").

Section 33 of Part I of Session Law 2016-126 sets the effective date for the enactment of the Exempt Positions Amendments.

North Carolina Constitutional Provisions at Issue

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other. Art. I, Sec. 6.

The executive power of the State shall be vested in the Governor. Art. III, Sec. 1.

The Governor shall take care that the laws be faithfully executed. Art. III, Sec. 5(4).

The Governor shall nominate and, by and with the advice and consent of a majority of the Senators, appoint all officers whose appointments are not otherwise provided for. Art. III, Sec. 5(8).

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. Art. III, Sec. 5(10).

Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department. Art. III, Sec. 11.

Jurisdiction and Venue

A present and real controversy exists between the parties as to the constitutionality of the challenged Session Laws. 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."). This three judge panel was properly designated by the Chief Justice to consider these constitutional challenges pursuant to N.C. Gen. Stat. 1-267.1.

Standard of Review

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).

This Court must apply "every reasonable presumption that the legislature as the lawmaking agent of the people has not violated the people's Constitution[.]" *State ex rel. Martin v. Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478 (1989).

"[T]he burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Rowlette v. State*, 188 N.C. App. 712, 715, 656 S.E.2d 619, 621 (2008) (citations omitted).

McCrory v. Berger, 368 N.C. 633, 781 S.E.2d 248 (2016), where the trial court also ruled on cross-motions for judgment on the pleadings, makes clear that, when confronted with a separation of powers challenge to a legislative enactment, the reviewing 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. 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 645-47, 633 S.E.2d at 256-57.

McCrory further held 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. *Id.* at 647, 781 S.E.2d at 257; *cf. Carr v. Coke*, 116 N.C. 223, 234-35, 22 S.E. 16, 17 (1895) ("It is the province and duty of the Court to construe and interpret legislative acts, and see if they disregard or violate any provision of the Constitution, and if so found, to declare them invalid, and this is done upon the face of the act itself.").

The Court will now address the specific constitutional challenges.

THE BOARD OF ELECTIONS AMENDMENTS

(Counts 1 and 5)

Findings of Fact

1. Prior to being preliminarily enjoined, the Board of Elections Amendments were set to take effect as early as January 1, 2017. *See* 2016 N.C. SESS. LAWS 125, §§ 19, 26.

2. As set forth in the current N.C. Gen. Stat. § 163-19 (before the Board of Elections Amendments), the State Board of Elections consists of five members, no more than three of whom may be from the same political party. Those five members were 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.

3. Under the current law, the State Board of Elections may generally take action on a vote of a simple majority of its members.

4. The Board of Elections Amendments would have, as of January 1, 2017, eliminated the State Board of Elections and the State Ethics Commission and replaced them with a single board tasked with administering all of the State's elections and ethics laws (the "New State Board").

5. Under the Board of Elections Amendments, among other changes that would have occurred (absent the injunction of the Court):

a. The State Board of Elections would have been dissolved and the eight members of the Ethics Commission serving as of December 31, 2016, would have been appointed by legislative enactment to the eight seats on the New State Board, where they would have served until June 30, 2017. 2016 N.C. Sess. Laws 125, § 2.(c).

b. Effective July 1, 2017, the Governor would be authorized to make four appointments to the New State Board—two each from lists of three nominees submitted by the two State party chairs. The remaining four members would be appointed by the General Assembly upon the recommendations of the House Speaker and Senate President Pro Tem (two each from lists of three nominees submitted by the House and Senate majority and minority leaders, respectively). *Id.*

c. A member of the New State Board would only be removable by his "appointing authority" for "misfeasance, malfeasance, or nonfeasance." Similarly, vacancies would be filled by the same appointing authority. *Id.*

d. The New State Board would elect its own chair and vice-chair, with chairmanship rotating on even and odd years between "a member of the political party with the second highest number of registered affiliates" and the party with the highest, respectively. With registered Democrats currently outnumbering registered Republicans, this provision means that a Republican member would, for the foreseeable future, hold the chairmanship in years with state- and nation-wide elections. *Id.*

e. The quorum of the eight-member New State Board would be six and "a majority vote for action" would be defined as a super-majority of six members. Thus, six or more votes would be required for the board to exercise its duties and powers regarding its investigative and regulatory functions, as well as all other "vote[s] for action." *Id.*

f. Issuance of a subpoena would require a supermajority vote *plus* a petition to the Wake County Superior Court. *Id.*

g. The State's 100 county boards of election would change from three-to four-member boards (two Republican and two Democratic), with a vote of three of four members required to take action. *See* 2016 N.C. Sess. Laws 125, § 5.(h).

h. The New 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." 2016 N.C. Sess. Laws 125, § 2.

6. Defendants submitted the Affidavit of Kimberly Westbrook Strach, executive director of the State Board of Elections, in which she confirmed that in the 2016 fall elections, the State Board of Elections was required to vote to approve 33 county one-stop, early voting plans. Of those 33 votes, the board divided along strictly partisan lines eight times. (Strach Aff. ¶ 10.)

7. In her deposition, Strach testified that, in her experience, early voting plans are a hotly contested policy issue. Strach noted that under the Board of Elections Amendments, if the State Board of Elections had been evenly divided by political party and had deadlocked, the county early voting plan would default to the statutory minimum—one site per county, during business hours only (except for the last Saturday before the election). (Strach Dep. 46-52.)

8. Strach also confirmed that on May 1, 2013, the first day that Governor McCrory was able to appoint all five members of the State Board of Elections, the new board was seated with a 3-2 Republican majority. That new board immediately fired the previous executive director (who was a Democrat and had served under the prior three Democratic governors), and hired Strach. The vote on hiring Strach was 3-2, along partisan lines. Strach further admitted that, under N.C. Gen. Stat. § 163-27, if the board had deadlocked on the hiring of a new executive director, the prior director would have continued to serve indefinitely. (Strach Dep. 43-46.)

Conclusions of Law

9. This Court concludes that, like the commissions at issue in *McCrory*, the State Board of Elections and the New State Board are "housed in the executive

branch of government. . . ." 368 N.C. at 636, 781 S.E.2d at 250; 2016 N.C. Sess. Laws 125, Part I, § 2.(c).

10. The Court further concludes that the State Board of Elections—and the New State Board under the Board of Elections Amendments—is *primarily* administrative or executive in character. *See, e.g.*, N.C. Gen. Stat. §§ 163-22 (a) and (c) (supervision of county election boards and appointment and removal of county board members); *Id.* § 163-82.12 (administer statewide voter registration system); *Id.* § 163-166.01 (extend voting hours); *Id.* § 163-22(h) (declare and certify results of elections).

11. The Court finds this conclusion to be compelled by *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982), in which the powers and duties of the Environmental Management Commission, that were held to be executive in nature, closely mirror the powers and duties of the State Board of Elections. *See also Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E.2d 143, 147 (1964) (noting the election laws grant "broad supervisory powers to the State Board of Elections"); *States' Rights Democratic Party v. State Bd. of Elections*, 229 N.C. 179, 186, 49 S.E.2d 379, 384 (1948) (noting State Board of Elections was "created to administer" the election laws).

12. The fact that the Board of Elections Amendments describe the New State Board as "an independent regulatory and quasi-judicial agency" does not change the actual nature of the State Board. The Court notes that the Coal Ash Management Commission at issue in *McCrory* was also nominally independent, but that did not alter the Court's separation of powers analysis.

13. Moreover, the Board of Elections Amendments note that:

> The [New] State Board shall exercises 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.* 2016 N.C. Sess. Laws 125, § 2 (emphasis added).

14. The "powers and duties" detailed under N.C. Gen. Stat. § 143B-10 include eight express references to required approval by, or reporting to, the Governor.

15. Under *McCrory*, because the New State Board is primarily executive in nature, the Governor "must have enough control over [the appointees] to perform his constitutional duty," to faithfully execute the laws. 368 N.C. at 646, 781 S.E.2d at 256.

16. Because the powers of the State Board are contained within the executive branch, a constitutional violation of the Separation of Powers clause occurs if the Board of Elections Amendments "prevent" the Governor "from performing [his] constitutional duties." *Id.* at 645, 781 S.E.2d at 256.

17. As *McCrory* makes clear, "the degree of control that the Governor has over [executive branch appointees] depends on his ability to [1] *appoint* the [members], [2] to *supervise* their day-to-day activities, and [3] to *remove* them from office." *Id.* at 646, 781 S.E.2d at 256 (emphases added).

18. The Court concludes that under the Board of Elections Amendments, the Governor will have inadequate control over the New State Board.

19. Under the Board of Elections Amendments, all appointees to the New State Board will be appointed by the General Assembly and will serve until June 30,

2017. See 2016 N.C. Sess. Laws 125, § 13. Only the General Assembly—and not the Governor—will be permitted to remove such members, and only for "misfeasance, malfeasance, or nonfeasance." *Id.* § 2.(c).

20. Even with the July 1, 2017 appointments, the Court concludes that the Governor is prevented from controlling the New State Board, as required by the separation of powers clause, Art. I, § 6, the executive powers clause, Art. III, § 3, and faithful execution clause, Art. III, § 5(4) of North Carolina Constitution.

21. Specifically, the Governor only appoints four of eight members of the New State Board, while six of eight members are required to take any action. The Governor does not have the power to remove all eight members (or even six), but instead may only remove the four members that he appoints. Any three members of the New State Board may block any board action or investigation—meaning only three of the four legislative members can vote to prevent the board from acting.

22. The Court finds that the New State Board is, as constituted under the new session laws, substantially similar to the commissions that *McCrory* held unconstitutional as violating separation of powers. The Governor's inability to appoint a controlling number of members of the New State Board means that the legislature retains control over that board and can prevent the Governor from taking action.

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

With regard to the Findings of Facts and Conclusions of Law involving the Board of Elections issues, the Three-Judge panel is UNANIMOUS in its decision.

Severability

Plaintiff has challenged the following specific provisions of the Session Laws (collectively, the "Challenged Provisions"):

a. Session Law 2016-125, Part I, §§ 1-19.

b. Session Law 2016-126, Part III, §§ 38-39.

c. Those portions of Session Law 2016-126, Part I, §§ 7-8, codified at N.C. Gen. Stat. § 126-5(d)(2c).

The Session Laws each contain severability clauses. Such clauses are typically enforceable, unless doing so would "caus[e] the statute to enact what the Legislature did not intend." *See Parker v. Stewart*, 29 N.C. App. 747, 749, 225 S.E.2d 632, 633-34 (1976) (quoting *Commissioners v. Boring*, 175 N.C. 105, 95 S.E. 43 (1918)).

In this case, because of the intertwined nature of the Challenged Provisions, the Court concludes that any attempt to rewrite those provisions to ensure their compliance with the Constitution would require "the judicial branch of government" to act "as part of the legislative branch of government." *See City of Roanoke Rapids v. Peedin*, 124 N.C. App. 578, 591, 478 S.E.2d 528, 535 (1996) (citations and internal quotation marks omitted). This Court has no desire to "hang up its robes" to assume a legislative role, and thus respectfully declines to assume that role.

THE ADVICE AND CONSENT AMENDMENT

Findings of Fact

1. Advice and consent is an exclusive function of the legislative branch.
2. The executive appointees at question in the instant case (i.e. cabinet secretaries), are the most important appointments a Governor makes, as they are appointed to lead the State's principal departments, said departments having been created by act of the legislative branch. The powers and duties of these principal department heads are set forth in N.C. Gen. Stat. 143B-10.
3. As amended by the Advice and Consent Amendment, N.C. Gen. Stat. § 143-9(a) now reads, in pertinent part, as follows (with amendments underlined):

§ 143B 9. Appointment of officers and employees.

a) The head of each principal State department, except those departments headed by popularly elected officers, shall be appointed by the Governor and serve at his the Governor's pleasure. The salary of the head of each of the principal State departments shall be set by the Governor, and the salary of elected officials shall be as provided by law.

For each head of each principal State department covered by this subsection, the Governor shall notify the President of the Senate of the name of each person to be appointed, and the appointment shall be subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North Carolina Constitution unless (i) the senatorial advice and consent is expressly waived by an enactment of the General Assembly or (ii) a vacancy occurs when the General Assembly is not in regular session. Any person appointed to fill a vacancy when the General Assembly is not in regular session may serve without senatorial advice and consent for no longer than the earlier of the following:

(1) The date on which the Senate adopts a simple resolution that specifically disapproves the person appointed.

(2) The date on which the General Assembly shall adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the person appointed.

2016 N.C. SESS. LAWS 126, § 38.

4. N.C. Gen. Stat. § 147-12(a)(3d) governs the time of the Senate confirmation process for any officials appointed by the Governor who are required by statute to be confirmed by the Senate, including those covered by the Advice and Consent Amendment. That statute provides:

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

N.C. Gen. Stat. § 147-12(a)(3d).

5. As of the date of this order, the Governor has not yet submitted the names of any of his principal department heads to the President of the Senate, yet the Governor has appointed eight department heads that have been sworn in to office, are performing the duties of those offices, and are receiving the salary and benefits commensurate with the occupation of those offices.

6. A Legislature that has the authority to create executive agencies also has the authority to require legislative advice and consent to fill the leadership roles in those agencies, absent constitutional limitations to the contrary.

7. No applicable constitutional limitation on such appointment power exists in our constitution.

8. "The will of the people "is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it*

conflicts with the Constitution." *Pope v. Easley*, 354 N.C. at 546, 556 S.E.2d at 267 (emphasis in original).

9. A statute "must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *Rowlette v. State*, 188 N.C. App. 712, 715, 656 S.E.2d 619, 621 (2008) (citations omitted).

10. The Plaintiff has made no evidentiary showing that the Advice and Consent provision will result in a violation of the separation of powers provision of the North Carolina Constitution.

Conclusions of Law

1. This Court has subject matter jurisdiction over the question of whether advice and consent in N.C. Gen. Stat. § 143B-9(a) is constitutional. The Governor has standing to raise the arguments and there is not a clear textual acknowledgment of authority to one branch or the other regarding the exercise of advice and consent over gubernatorial appointments to statutory office. While the exercise of the right of advice and consent, if constitutional, likely would be beyond judicial review, this Court is capable of entering an effective judgment on the constitutionality of the right itself. Defendants' motion to dismiss on this point is DENIED.

2. Article III, Section 5(8) regarding the exclusive right of the Governor to make appointments applies only to constitutional officers.

3. Article III, Section 5(8) does not prohibit the General Assembly from appointing statutory officers.

4. Because the Constitution is a restriction of powers..."those powers not surrendered are reserved to the people to be exercised by their representatives in the General Assembly, so long as an act is not forbidden[.]" *Guilford Cty. Bd. Of Educ. V. Guildford Cty. Bd. Of Elections*, 110 N.C. App. 506, 510, 430 S.E.2d 681, 684 (1993).

5. Although the State Constitution is silent as to the advice and consent on Statutory officers, we conclude that Article III, Section 5(8) does not prohibit the General Assembly from appointing statutory officers. Moreover, Article III, Section 5(8) is not a prohibition; it does not, beyond a reasonable doubt, restrict the General Assembly's advice and consent power as to statutory appointees. *See Crump v. Snead,* 134 N.C. App. 353, 355, 517, S.E.2d 384 (1999) (citations omitted). The Appointments Clause stands for the principle that the people of North Carolina gave the Governor the exclusive right to appoint constitutional officers, subject to the advice and consent of the Senate, "whose appointments are not otherwise provided for."

6. Article III, Section 5(8) permits advice and consent at the highest levels of constitutional office but is not a limitation of advice and consent.

7. Article III, Section 5(8) does not limit the General Assembly to advice and consent on *only* constitutional officers.

8. Our State Constitution does not prohibit a law establishing senatorial advice and consent over the appointments of the Governor to the heads of principal state departments.

9. Advice and consent as set out in N.C. Gen. Stat. § 143B-9 does not violate the separation of powers clause.

10. Plaintiff has failed to meet its burden of showing the unconstitutionality of the challenged portions of Part III of Session Law 2016-126 violate Article III, Section 1, Article III, Section 5(4); Article III, Section 5(8); or Article I, Section 6 of the North Carolina Constitution (the Advice and Consent provisions) beyond a reasonable doubt.

11. N.C. Gen. Stat. § 143B-9, as provided for in Session Law 2016-126, is constitutional.

Judges Caldwell and Foster concur in this holding. Judge Burke dissents from this holding.

THE EXEMPT POSITIONS AMENDMENTS

(Counts 4 and 6)

Findings of Fact

1. In 2013, after Governor McCrory took office, the General Assembly increased the number of exempt positions in the principal state departments to 1,500. *See* 2013 N.C. SESS. LAWS 382. That change meant that Governor McCrory was able to employ over a thousand more persons than his predecessor in positions that were exempt from the NC HR Act.

2. Then, after Plaintiff was elected, the General Assembly reduced the total number of positions the Governor may designate as exempt in the departments enumerated in N.C. Gen. Stat. § 126-5(d)(1) from 1,500 to 425. Plaintiff has not challenged the reduction in the number of exempt positions from 1,500 to 425, but it provides factual context to the Exempt Positions Amendment.

3. The Exempt Positions Amendments added the following subsection to Chapter 126 of the North Carolina Human Resources Act (the "NC HR Act"):

> Changes in Cabinet Department Exempt Position Designation. – If the status of a position designated exempt pursuant to subsection (d)(1) of this section is changed and the position is made subject to the provisions of this Chapter, an employee occupying the position who has been continuously employed in a permanent position for the immediate 12 preceding months, shall be deemed a career State employee as defined by G.S. 126-1.1(a) upon the effective date of the change in designation.

2016 N.C. SESS. LAWS 126, § 7, codified at N.C. Gen. Stat. § 126-5(d)(2c).

4. Under N.C. Gen. Stat. § 126-1.1(a), a "career State employee" is one who: (a) "[i]s in a permanent position with a permanent appointment," and (b) "[h]as been continuously employed by the State . . . in a position subject to the North Carolina Human Resources Act for the immediate 12 preceding months." Non-exempt, "career" State employees are entitled to protections under the NC HR Act, including that they can generally only be terminated for cause and after some due process.

5. By contrast, exempt positions are "at will," meaning that the Governor has more flexibility to terminate or re-assign an exempt employee. Exempt positions in state government are generally positions for policymaking or managerial employees. Exempt employees are tasked with decision-making authority, and they

are expected to share and promote the Governor's vision and goals for the State. (Cobb Aff. ¶ 5.)

6. For those exempt positions designated as policymaking positions, which are generally at or near the top of the hierarchy of an executive branch agency, the Governor is free to select his hires without posting the positions publicly or otherwise vetting candidates through a competitive hiring process. As a result, exempt policymaking positions, in particular, are typically filled at the discretion of the Governor rather than through merits-based selection. (Cobb Aff. ¶¶ 8-9.)

7. Exempt positions designated as "managerial exempt" positions must be posted publicly, but those positions are likewise typically filled with individuals who share the Governor's policymaking goals. Employees in exempt managerial positions are generally directors, deputy directors, supervisors, or bureau chiefs who manage the day-to-day operations of the agency. (Cobb Aff. ¶ 9.)

8. Exempt positions are crucial for a Governor because the Governor must have the confidence that his or her decision-making employees can be trusted to support, and work to implement, the Governor's agenda. An important part of that is that exempt positions provide the Governor with the flexibility to terminate or re-assign exempt employees as may be necessary. (Cobb Aff. ¶ 6.)

9. When an administration changes, the new Governor's staff will collaborate with Office of State Human Resources staff to review the personnel histories of exempt employees and, in many cases, inform them they are terminated. The new Governor will then name his cabinet secretaries and top-level policymaking

exempt employees in each department. Those employees, in most cases, will work to fill managerial exempt positions throughout the executive branch. (Cobb Aff. ¶ 12.)

10. Exempt employees are the employees who, along with the Governor, set the policy within a particular department or agency in accordance with the Governor's policy goals and priorities. Exempt employees ensure that the Governor's policy is carried out, make key decisions about how to apply the law within that department or agency, and provide direction to rank-and-file employees. If these decision-making employees do not share the Governor's policy views and priorities, they can very easily undermine the Governor's work on critical issues. (Cobb Aff. ¶ 13.)

11. Before the Exempt Positions Amendments, exempt employees could not attain "career" status until they had worked in a permanent, non-exempt, position for at least a year. During that first year, the employee was "probationary" and could be terminated at will. In that respect, employees who shifted from exempt to non-exempt status as part of the transition between administrations stood in the same position as persons newly hired into permanent, non-exempt positions by the new Governor. (Cobb Aff. ¶ 11.)

12. Before the Exempt Positions Amendments, each new Governor would have an opportunity to assess those employees' performances and willingness to implement the Governor's policies and priorities for up to a year, keep those who merited "career" status, and terminate those who did not. (Cobb Aff. ¶ 11.)

13. In 2013 and 2014, Governor McCrory created approximately 465 exempt positions within the state Department of Health and Human Services ("DHHS"), either by converting permanent positions to exempt or by creating new exempt positions. As a result, by the end of 2014, DHHS had more exempt positions than the administration of Governor Perdue had in all its executive branch departments combined. (Cobb Aff. ¶ 17.)

14. In the two weeks after House Bill 17 was passed, the McCrory administration tried to convert more than 900 exempt positions to permanent, non-exempt positions. Included in these more than 900 positions were approximately 465 positions in DHHS. (Cobb Aff. ¶ 19.)

15. The number of exempt positions in the Department of Environmental Quality went from approximately 20 to more than 140 between 2013 and 2014. Then, following the enactment of House Bill 17, Governor McCrory converted approximately 78 exempt positions back to permanent, non-exempt positions. (Cobb Aff. ¶ 20.)

Conclusions of Law

1. Under the NC HR Act, the Governor holds the power to appoint personnel to "exempt" positions within the executive branch. "Exempt" positions are policymaking and managerial positions that are exempt from—and therefore not subject to—the NC HR Act. *See Carrington v. Brown*, 136 N.C. App. 554, 559, 525 S.E.2d 230, 235 (2000).

2. "The rationale for creating exempt positions, positions exempt from the protection afforded by the civil service statute, was to allow the governor to employ top level state employees on an at-will basis, and to reposition these employees as he felt necessary in order to further the agenda of the administration." *Id.* at 560, 525 S.E.2d at 234 (quoting *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990)).

3. As the North Carolina Supreme Court held in 2016:

> To ensure the execution of policies on which the winning candidate campaigned, the [United States Supreme] Court held that employees in policymaking positions legally can be dismissed on grounds relating to political loyalty "to the end that representative government not be undercut by tactics obstructing the implementation of policies of [a] new administration, policies presumably sanctioned by the electorate.

Young, 368 N.C. at 670-71, 781 S.E.2d at 281 (quoting *Elrod v. Burns*, 427 U.S. 347, 367 (1976)). *See also Branti v. Finkel*, 445 U.S. 507, 518 (1980) ("[I]t is equally clear that the Governor of a State may appropriately believe that the official duties of various assistants who help him write speeches, explain his views to the press, or communicate with the legislature cannot be performed effectively unless those persons share his political beliefs and party commitments.").

4. In *Stott*, the Fourth Circuit applied *Elrod* and *Branti* to Chapter 126 and held that "patronage dismissals of government officials holding policymaking positions were justified 'to ensure that policies which the electorate has sanctioned are effectively upheld.'" 916 F.2d at 140 (quoting *Elrod*, 427 U.S. at 372).

5. As the Court noted in *McCrory*, "the degree of control that the Governor has over [executive branch appointees] depends on his 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.

6. Applying the *McCrory* analysis, the Court concludes that the General Assembly has effectively appointed hundreds of employees in the heart of the executive branch.

7. Moreover, the Exempt Positions Amendments, by affording "career" status to those employees who were exempt in the prior administration, has also substantially limited the Governor's ability to remove them. The *McCrory* Court noted that the provisions of the challenged laws that only allowed the Governor to remove commission members "for cause" "sharply constrain[ed] the Governor's power to remove members." Id. at 646, 781 S.E.2d at 257. The Exempt Positions Amendments have the very same effect here.

8. The Court concludes that under *McCrory*, the Exempt Positions Amendments violate the North Carolina Constitution because they leave the Governor "with little control over the views and priorities of the officers" holding key decision-making positions in the executive branch. 368 N.C. at 647, 781 S.E.2d at 257.

9. Because the Exempt Positions Amendments prevent the Governor from taking care that the laws are faithfully executed, the Court concludes that they violate the separation of powers, and that this provision is found to be unconstitutional.

Judges Caldwell and Burke concur in this holding. Judge Foster dissents from this holding.

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. First Issue: The Board of Elections Amendments

As to the First Issue, the Board of Elections Amendments, the three judge panel unanimously GRANTS the Plaintiff's Motion for Summary Judgment, and DENIES the Defendant's Motion for Summary Judgment

2. Second Issue: The Advice and Consent Amendment

As to the Second Issue, the Advice and Consent Amendment, a majority of the three judge panel (Judge Burke dissenting) DENIES the Plaintiff's Motion for Summary Judgment, and GRANTS the Defendants' Motion for Summary Judgment

3. Third Issue: Exempt Positions Amendments

As to the third issue, the Exempt Positions Amendments, a majority of the three-judge panel (Judge Foster dissenting) GRANTS the Plaintiff's Motion for Summary Judgment, and DENIES the Defendants' Motion for Summary Judgment.

4. Pursuant to N.C. Gen Stat. §§ 1-253—1-267 and North Carolina Rules of Civil Procedure 57 and 65:

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

Amendments") are Unconstitutional and are therefore permanently enjoined.

5. Plaintiff's Challenge to the constitutionality of Sections 38 and 39 of Session Law 2016-126 ("the Advice and Consent Amendment") is Dismissed.

6. The parties shall bear their own costs.

SO ORDERED, this the 17th day of March, 2017

The Honorable Jesse B. Caldwell

SO ORDERED, this the 17th day of March, 2017

The Honorable L. Todd Burke

(Concurring in the Orders regarding the Board of Elections Amendments and Exempt Positions Amendments, and dissenting as to the Order regarding the Advice and Consent Amendment)

SO ORDERED, this the 17th day of March, 2017

The Honorable Jeffery B. Foster

(Concurring in the Orders regarding the Board of Elections Amendments and Advice and Consent Amendment, and dissenting as to the Order regarding Exempt Positions Amendments)

Judge L. Todd Burke, Dissenting from the decision of the panel on Part III of House Bill 17 requiring Senate confirmation of Gubernatorial Cabinet appointees.

Advice and Consent

N.C. Gen. Stat. 143B-9 as provided for in Session Law 2016-126 requiring Senate confirmation of Gubernatorial Cabinet appointees is unconstitutional.

It is with regret that I must dissent from my beloved robed brethren. Prior to the enactment of N.C. Gen. Stat. 143B-9 as provided for in Session Law 2016-126, the Governor of North Carolina enjoyed untethered authority as it concerns the appointment of department heads of principal departments. In Federalist No. 1 Alexander Hamilton is quoted as saying: "It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force."

The federal government is defined in the United States Constitution. Ours is a tripartite government designed for the three branches to be separate and distinct. James Madison stated in Federalists No. 47, "[T]he preservation of liberty requires that the three great departments of power should be separate and distinct." James Madison wrote this in response to the people that the United States constitution did not include a "separation of powers" clause instead, that the doctrine was imbedded in the government the Constitution creates. Moreover, North Carolina Constitution Article I Sec. 6 is more forceful with the pronouncement of the "separation of powers" clause, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

Clearly this clause is in direct response to the people who were liberating themselves from a monarchy and the aggregation of all government in the hand of one or a few, the very

definition of tyranny. This doctrine was announced in the first North Carolina Constitution in 1776 and has been restated in each of the three times the constitution has been amended since.

The executive power of the State shall be vested in the Governor. Art. III, Sec. I. The Governor shall take care that the laws be faithfully executed. Art. III, Sec. 5(4). The Legislature enacting N.C. Gen. Stat. 143-B9 has overreached its authority. All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole. Art. I Sec. 2. Art. III, Sec. 5(8) regarding the exclusive right of the Governor to make appointments applies only to constitutional officers.

Unlike the United States Constitution, the North Carolina Constitution is construed to be a limit on authority rather than a grant of authority. Art. III, Sec. 5(8) is silent on advice and consent of statutory officers, specifically executive cabinet heads. This limit dictates that Senate confirmation of gubernatorial department heads pursuant to N.C. Gen. Stat. 143B-9 is unconstitutional.

"Where the construction of a constitutional provision is at issue, . . . [i]nquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." Sneed v. Greensboro Bd. of Educ. 299 N. C. 609, 613, 264 S.E.2d 106, 110 (1980). To reiterate, prior to N.C. Gen. Stat. 143B-9 the Governor had no encroachment on his authority to appoint department heads in his cabinet by the advice and consent of the North Carolina Senate. Whenever there has been a shift in power by the documents outlining the North Carolina government, it has been accomplished by constitutional convention or putting a referendum to the people. Whether it has been to select the Governor by popular election or allow the

Governor Veto power. This infringement upon the executive branch by the legislative branch can be resolved simply by a return to basics and examining the North Carolina Constitution. Simply put, the legislature has violated the "Separation of Powers" clause in Art. I, Sec. 6 and Art. III, Sec. 5(4) by obstructing the Governor from taking care the laws be faithfully executed.

The North Carolina Supreme Court has pronounced that it cannot adopt a categorical rule that would resolve every separation of powers challenge . . .State ex rel. McCrory v. Berger, 368 N. C. 633, 781 S.E.2d 248 (2016). Thus an examination of the law as it concerns the issues presented by the matter at bar must be resolved in a case by case analysis. The timing of this legislation, the conditions that existed prior to its enactment and the purposes sought to be accomplished by its promulgation demonstrate an abuse of power by the legislative branch and an unconstitutional violation of the separation of powers clause. The legislature has endeavored to go beyond the conventions of checks and balances.

As a caveat and in the alternative, the question begs to be asked that although not presented by plaintiff whether the legislative branch has violated the equal protection rights of the Governor and the people by undermining the election with its seize of power that usurps that of the Governor and the electorate? An analogy can be drawn with the adoption of the intent standard in Washington V. Davis, 426 U.S. 229 (1976) and its progeny where the Court gave constitutional protection to entrenched legislative practices and resulting practices and resulting actions that systematically disadvantaged a particular class. [T]hough the law may be fair on its face and impartial in appearance, . . . If it is applied and administered by public authority with an evil eye and unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal rights is still within the prohibition of the Constitution. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Perhaps N.C. Gen. 143-B9 requires an intent standard versus the effects standard. Intent is frequently difficult to assess but a law that significantly encroaches on one branch of government by another that cuts at the heart of the foundations to the government as outlined by the Framers deserves this examination. This dialogue shall be continued.

Judge Jeffery B. Foster, Dissenting from the decision of the panel on portions of Sections 7 and 8 of Session Law 2016-126 codified at N.C. Gen. Stat. § 126-5(d)(2c) ("the Exempt Positions Amendments").

I must respectfully dissent from the decision of my learned colleagues with regard to their holding that Section 7 and 8 of Session Law 2016-126, codified at N.C. Gen. Stat. § 126-5(d)(2c), commonly referred to in this litigation as the "Exempt Positions Amendments" is unconstitutional. I would find that the law as passed is Constitutional.

The fact that the Legislature saw fit to provide more exempt positions to the previous Governor than the Plaintiff is not, in and of itself, enough to show that there is a violation of the separation of powers. Prior administrations have fully carried out their executive functions with exempt positions in numbers that align with those available to this Governor. Such numerical considerations are political in nature and not appropriate for review by this Court. "As to whether an act is good or bad law, wise or unwise, is a question for the Legislature and not for the courts--it is a political question." Libertarian Party of N.C. v. State, 200 N.C. App. 323 (2009)

"The (political question). . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions . . . ." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178, 106 S. Ct. 2860 (1986). "It is well established that the . . . courts will not adjudicate political questions." *Powell*, 395 U.S. at 518, 23 L. Ed. 2d at 515"

Bacon v. Lee, 353 N.C. 696 (2001).

It should be the position of this Court that the issues raised in challenging the Exempt Position Amendment are non-justiciable because they are uniquely

political. However, if the choice is made to review the statute, then such review still demonstrates that the legislation is constitutional.

Our Constitution states that:

"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....." N.C. Const. Art. III, Sec. 5(10).

It is clearly established in our case law that the legislature is most closely representative of the will of the people, and as such, its legislation and intent is to be given great deference by our Courts.

"All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution.") State ex rel. Martin v. Preston, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989).

There has been much said during the pendency of this case about separation of powers and the concomitant authorities and powers of the individual branches of our state government. However, *"Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature."* John V. Orth, The North Carolina State Constitution, 42 (1995).

It is an unpopular notion that perhaps one branch of three in a government should have more "power" than the other branches. While most instances of constitutional debate involve our Federal Constitution, where the Executive, Legislative and Judicial branches are "co-equal", that is not

the case in North Carolina. Unlike the Federal Constitution, which is a grant of power:

> Our State Constitution is in no matter a grant of power, and as such, all power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it.
>
> *Town of Boone v. State*, ___ N.C. ___, 794 S.E.2d 710 (2016).

> The Constitution of North Carolina is not a grant of power; rather, the power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid unless it conflicts with the Constitution.
>
> *Pope v. Easley*, 354 N.C. 544, 546 (2001).

Because of this distinction, the acts of the Legislature are to be given great deference by the Courts of our State.

> In reviewing legislation, the North Carolina Supreme Court "reviews acts of the state legislature with great deference; a statute cannot be declared unconstitutional under the State Constitution unless that Constitution clearly prohibits the statute"... "[A] statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground."
>
> *Crump v. Snead*, 134 N.C.App. 353, 355 (1999).

Thus the Courts must look to the Constitution to determine the limitations on the Legislature's authority, not to determine its authority per se.

With the power of the Legislature established, and after clarifying the constitutional scheme of North Carolina as one of a limitation of power and not a granting of power, the Court must then determine whether the challenge of the Governor has established, beyond a reasonable doubt, that the legislation is unconstitutional due to the Legislature exceeding its authority and invading the

exclusive providence of the Executive Branch. The Governor has fallen well short of meeting that burden.

First, the Governor has failed to produce any evidence, whether by affidavit or otherwise, that the legislation would affect his ability to discharge the duty of his office to see that the "laws be faithfully executed" N.C.Const.Art. III Sec. 5(4).

To successfully challenge the constitutionality of the provision, the Governor must forecast evidence that his ability to see that the laws are faithfully executed would somehow be impaired by the grant of career status to employees of the prior administration. No such evidence was provided.

Further, even assuming the Governor had produced such evidence, he would have to show that state personnel laws would prevent him from making necessary changes to the status of employees allegedly affecting his ability to control his administration. The fact that it may be more onerous or difficult to remove or transfer employees he deems inappropriate for their roles is not a sufficient justification to challenge the facial constitutionality of the legislation under a separation of powers theory.

The Governor has also failed to show that the Exempt Positions Amendment cannot be constitutional under any circumstance. "[A] statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Crump v. Snead*, 134 N.C.App. 353, 355 (1999). That is a heavy burden of proof which the Governor has fallen well short of in this instance.

Finally, the reliance of the majority on *McCrory v. Berger*, 368 N.C. 633 (2016) to find this legislation unconstitutional is misplaced. In *McCrory*, the positions affected by the Legislature's overreach in that instance included members of Commissions which were at the highest level of the executive branch, and were charged with making quasi-judicial decisions affecting several departments of state government.

In the instant case, positions ranging from architects, nurses, maintenance managers and others[2] are alleged to be so important as to justify allowing the unfettered right to terminate them at will, absent any showing that they would have even basic policy input into the administration of Governor Cooper, or that the retained individuals had any policy input into the administration of Governor McCrory. Such speculative "evidence" is woefully insufficient to challenge the constitutionality of the Exempt Positon Amendment.

For these reasons, I dissent from the decision of the panel with regard to the Exempt Positions Amendment.

[2] The News and Observer published a comprehensive list of all 908 jobs that were converted to protected personnel status by Gov. McCrory prior to leaving office. The list included the employee's name, department, and position. Positions included: Engineering/Architectural supervisors and managers, IT managers, Child Day Care Assistant Director, Attorneys, and Institutional Social Work Coordinators. The entire list is available at: www.newsobserver.com/news/politics-government/state-politics/article134706044.html. The article was provided to the panel by counsel for the Defendants in materials presented at the March 7, 2017 hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing a copy thereof to each of said parties, addressed, postage prepaid, as follows:

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