

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23CV028505-910

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; THE STATE
OF NORTH CAROLINA; NORTH
CAROLINA ENVIRONMENTAL
MANAGEMENT COMMISSION; and
JOHN (JD) SOLOMON, in his official
capacity as CHAIR of the North
Carolina Environmental Management
Commission; CHRISTOPHER M.
DUGGAN, in his official capacity as
VICE-CHAIR of the North Carolina
Environmental Management
Commission; and YVONNE C.
BAILEY, TIMOTHY M.
BAUMGARTNER, CHARLES S.
CARTER, MARION DEERHAKE,
MICHAEL S. ELLISON, STEVEN P.
KEEN, H. KIM LYERLY,
JACQUELINE M. GIBSON, JOSEPH
REARDON, ROBIN SMITH, KEVIN
L. TWEEDY, ELIZABETH J. WEESE,
and BILL YARBOROUGH, in their
official capacities as
COMMISSIONERS of the North
Carolina Environmental Management
Commission,

Defendants.

ORDER
(Granting in Part and Denying in Part
Plaintiff's Motion for Summary
Judgment and Granting in Part
and Denying in Part Legislative
Defendants Motions for Summary
Judgment)

This matter came before the undersigned three-judge panel presiding at the February 16, 2024 term of Wake County Superior Court on Governor Roy A. Cooper, III's ("Plaintiff") Motion for Summary Judgment and Defendants Philip E. Berger and Timothy K. Moore's ("Legislative Defendants") Motion for Summary Judgment and Supplemental Motion for Summary Judgment. 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 three-judge panel grants in part and denies in part Plaintiff's Motion for Summary Judgment and grants in part and denies in part Legislative Defendants' Motions for Summary Judgment.

BACKGROUND AND JURISDICTION

1. In his Complaint filed on October 10, 2023 and Supplemental Complaint filed January 16, 2024, Plaintiff challenges the following statutes ("Challenged Statutes") as unconstitutional on their face because the structures they establish allegedly violate separation of powers (N.C. CONST. art. 1, § 6):

- a. Part I of Session Law 2023-136 ("Senate Bill 512") amending N.C. Gen. Stat § 143B-437.54 (Economic Investment Committee "EIC");
- b. Part II of Senate Bill 512 amending N.C. Gen. Stat § 143B-283 (Environmental Management Commission "EMC");
- c. Part III of Senate Bill 512 amending N.C. Gen. Stat § 130A-30 (Commission for Public Health "CPH");

- d. Part IV of Senate Bill 512 amending N.C. Gen. Stat § 143B-350 (Board of Transportation “BOT”);
- e. Part V of Senate Bill 512 amending N.C. Gen. Stat § 113A-104 (Coastal Resources Commission “CRC”);
- f. Part VI of Senate Bill 512 amending N.C. Gen. Stat § 143-241 (Wildlife Resources Commission “WRC”); and
- g. Sections 1.(a) and 1.(b) of Session Law 2023-108 (“House Bill 488”) enacting N.C. Gen. Stat. §§ 143-136.1 & 143-137.1 (Residential Code Council “RCC”).

2. The General Assembly passed House Bill 488, 2023 N.C. Sess. L. 108, on June 27, 2023. House Bill 488 made a number of changes to the Building Code Council, which will go into effect on January 1, 2025. Most significantly, House Bill 488 will eliminate the existing Residential Code Committee, which operates as a committee of the current Building Code Council and will establish the RCC as a separate body. *See* 2023 N.C. Sess. L. 108, § 1.(a).

3. House Bill 488 will give the RCC authority to amend and adopt the portions of the State Building Code that pertain specifically to residential construction. 2023 N.C. Sess. L. 108, § 1.(a); *accord* (Complaint, ¶ 141). The RCC will be tasked with reviewing any proposed amendment to the North Carolina Residential Code, including any other code section applicable to residential construction. 2023 N.C. Sess. L. 108, § 1.(a) (creating N.C. Gen. Stat. §§ 143-136.1 establishing the RCC and 143-136.1(d) enumerating its duties). It will also be tasked with hearing and deciding any appeal or interpretation arising under N.C.

Gen. Stat. § 143-141 pertaining to the Residential Code. *Id.* Both the Building Code Council and the RCC may prepare and adopt the State Building Code. 2023 N.C. Sess. L. 108, § 1.(a) (amending N.C. Gen. Stat. § 143-138). Appointments to the RCC by the General Assembly are subject to passage of an appointments bill under N.C. Gen. Stat. § 120-121, and appointments by the Governor are subject to Senate confirmation. *See* 2023 N.C. Sess. L. 108, § 1.(a).

4. Under House Bill 488, the RCC will have thirteen members. The Governor will appoint seven members to the RCC, while the General Assembly will appoint the remaining six members. *See* N.C. Gen. Stat. § 143-136.1(a), Each of the thirteen appointees to the Council must satisfy professional qualifications set forth in the statute to ensure that the members possess the expertise needed to oversee building regulations. *See id.*; *see also* N.C. Sess. Law 2023-137, § 51.(a) (clarifying certain statutory qualifications). The Governor appoints the RCC chair. The statute is silent as to removal authority (which is the same with respect to appointees to the current Building Code Council). A quorum of nine affirmative votes is required for the RCC to act. *See* N.C. Gen. Stat. § 143-137.1(e).

5. On August 16, 2023, the General Assembly passed Senate Bill 512, which restructured six boards and commissions at issue here. Under Senate Bill 512:

a. The EMC has fifteen members. The Governor appoints seven members, another elected member of the Council of State (the Commissioner

of Agriculture) appoints two members, and the General Assembly appoints a minority of six members. *See* 2023 N.C. Sess. L. 136, § 2.1(a) (amending N.C. Gen. Stat. § 143B-283(a1)). EMC members elect the chair, and each appointing authority can remove its appointees for cause. *See* 2023 N.C. Sess. L. 136, § 2.1(a) (amending §§ 143B-284 and 143B-283(b1)).

b. The CRC has thirteen members. The Governor has six appointments, another elected member of the Council of State (the Commissioner of Insurance) appoints one member, and the General Assembly appoints a minority of six members. CRC members elect the Chair, and each appointing authority can remove its appointees, if cause exists for removal. *See* 2023 N.C. Sess. L. 136, § 2.1(a) (amending §§ 113A-104(i) and 143-241).

c. The WRC has twenty-one members. The Governor appoints a majority of eleven (with nine drawn from wildlife districts across the State, plus two at-large seats), and the General Assembly has a minority of ten appointments. *See* 2023 N.C. Sess. L. 136, § 6.1(a) (amending N.C. Gen. Stat. § 143-241). Beginning on June 30, 2025, the power to fill one of the Governor's at-large appointments will go to another member of the Council of State: the Commissioner of Agriculture. *See* 2023 N.C. Sess. L. 136, § 6.1(b) (amending N.C. Gen. Stat. § 143-241); *see also id.* § 6.1(d) (providing that the amendments granting an appointment to the Commissioner of Agriculture will take effect on June 30, 2025). Thus, at that time the executive branch

will continue to have a majority of the 21 appointments (11), and the General Assembly will continue to have a minority (10). Appointees serve at the pleasure of the authority that appointed them. The Governor thus may remove his own appointees to the WRC at any time and for any reason. *Id.*

d. The CPH consists of thirteen members, four of whom are elected by the North Carolina Medical Society. N.C. Gen. Stat. § 130A-30(a). Of the remaining nine members, the Governor appoints five and the Senate and House each appoint two. *See* 2023 N.C. Sess. L. 136, § 3.1(a). The Governor also appoints the CPH chair. *See* N.C. Gen. Stat. § 130A-31. Each appointing authority retains the power to remove its appointees for “misfeasance, malfeasance, or nonfeasance.” *See* N.C. Gen. Stat. § 130A-30(c).

e. The EIC consists of seven members: the Secretary of Commerce; the Secretary of Revenue; the State Budget Director; one Senate appointee; one House appointee; the President *Pro Tempore* of the Senate or his designee; and the Speaker of the House of Representatives or his designee. *See* 2023 N.C. Sess. L. 136, § 1.1(a).

f. The BOT has twenty members. Fourteen of the BOT’s members are appointed by the General Assembly from geographic regions across the state, with the remaining six at-large members appointed by the Governor. *See* 2023 N.C. Sess. L. 136, § 2.1(a) (amending N.C. Gen. Stat. § 143B-283(a)). The BOT also selects its own chair and vice-chair.

6. On October 11, 2023, Plaintiff's Complaint was transferred to a three-judge panel ("Court") by Paul C. Ridgeway, Senior Resident Superior Court Judge, under N.C. Gen. Stat. § 1-267.1 and North Carolina Rule of Civil Procedure 42(b)(4) (N.C. Gen. Stat. § 1A-1, Rule 42(b)(4)).

7. Two days later, on October 13, 2023, Paul M. Newby, Chief Justice of the North Carolina Supreme Court issued an order assigning the undersigned to hear constitutional challenges raised in this case. The Chief Justice subsequently issued a second order, dated February 7, 2024, confirming that the undersigned are assigned to hear all constitutional challenges raised in this action, including those asserted in Plaintiff's Supplemental Complaint.

8. On November 1, 2023, the Court heard Plaintiff's motion for preliminary injunction. On November 10, 2023, the Court issued its order on Plaintiff's motion for preliminary injunction, granting it in part and denying it in part.

9. On November 17, 2023, the Legislative Defendants and State of North Carolina answered Plaintiff's Complaint.

10. On December 8, 2023, pursuant to the Court's November 20 Case Management Order, Plaintiff and the Legislative Defendants moved for summary judgment.

11. On January 11, 2024, one day before the parties' responses to the cross-motions for summary judgment were due, Plaintiff moved for a second temporary restraining order, preliminary injunction, and for leave to file a

Supplemental Complaint alleging what Plaintiff characterized as an “as-applied” challenge to Senate Bill 512’s restructuring of the EMC. Plaintiff’s supplemental allegations related to the Commission’s decision to voluntarily terminate a lawsuit against the Rules Review Commission.

12. That same afternoon, Plaintiff’s motion for a temporary restraining order was heard by Judge Rebecca Holt, sitting as a single Superior Court Judge. Judge Holt granted Plaintiff’s motion for a temporary restraining order.

13. Also on January 11, the Legislative Defendants submitted a consent motion to modify the November 20 Case Management Order to account for Plaintiff’s Supplemental Complaint, if necessary, in the parties’ response briefs.

14. On January 16, 2024, the Legislative Defendants moved to transfer the Supplemental Complaint to a three-judge panel under Rule 42 of the North Carolina Rules of Civil Procedure and General Statute 1-267.1, asserting that Plaintiff’s “as-applied” challenge was, in effect, the same as his original facial challenge to Part II of Senate Bill 512 pertaining to the restructuring of the Environmental Management Commission.

15. On January 18, 2024, the Chief Justice assigned the Honorable Judge John M. Dunlow, under Rule 2.1 of the Rules of Practice and Procedure, to hear the pending motion to transfer to a three-judge panel and Plaintiff’s second motion for preliminary injunction. On January 25, 2024, Judge Dunlow heard the motion to transfer and Plaintiff’s second motion for preliminary injunction.

16. On January 29, 2024, Judge Dunlow granted the motion to transfer, and ruled that as a single judge he lacked jurisdiction to rule on the motion for a preliminary injunction, upon holding that the Supplemental Complaint in fact raised a facial challenge to Part II of Senate Bill 512, and therefore the supplemental claim must be heard by a three-judge panel.

17. On January 31, 2024, Legislative Defendants answered the Supplemental Complaint and likewise moved for summary judgment as to the claims asserted in the Supplemental Complaint.

18. On February 16, 2024, the undersigned panel heard Plaintiff's and the Legislative Defendants' cross-motions for summary judgment, including Legislative Defendants' motion for summary judgment as to the claims asserted in the Supplemental Complaint.

19. Following the February 16, 2024, hearing, the panel denied the Governor's second motion for a preliminary injunction with respect to the EMC, and granted the EMC's motion to dissolve the TRO entered by Judge Holt on January 11, 2024.

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

21. Plaintiff, as the head of the executive branch directly elected by the people, has standing to challenge the constitutionality of laws that infringe upon the authority of his office and that of the executive branch. *See, e.g.*, N.C. CONST. art. I, § 6; art. III, §§ 1, 5(4); *Cooper v. Berger* ("*Cooper I*"), 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).

22. 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.")

23. Rule 56 of the North Carolina Rules of Civil Procedure provides that the Court should enter summary judgment where "the pleadings, depositions, and answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c).

24. Both Plaintiff and Legislative Defendants agree there are no genuine issues of material fact, and therefore the case is ripe for summary judgment as to all claims.

LEGAL STANDARDS

25. Facial challenges to acts of the General Assembly are the "most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005). Facial challenges are "seldom" upheld "because it is the role of the legislature, rather than [a] Court, to balance disparate interests and find a

workable compromise among them.” *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 292 (2018) (“*Cooper Confirmation*”) (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm’rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)).

26. The Court must presume that laws passed by the General Assembly are constitutional. See *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001); see also *State v. Strudwick*, 379 N.C. 94, 105, 864 S.E.2d 231, 240 (2021) (“[W]e presume that laws enacted by the General Assembly are constitutional.”) Consequently, every presumption favors the validity of the challenged statutes. See *Ivarsson v. Off. of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003).

27. The burden to overcome the presumption of constitutionality is high. The judiciary cannot declare a law invalid unless its “unconstitutionality be determined beyond reasonable doubt.” *Id.* (quoting *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (emphasis added)). Ultimately, “[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid.” *Bryant*, 359 N.C. at 564, 614 S.E.2d at 486 (emphasis added). In other words, the constitutional violation must be “plain and clear.” *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) (citation omitted).

28. To determine whether a violation is “plain and clear,” courts look to the “text of the constitution, the historical context in which the people of North

Carolina adopted the applicable constitutional provision, and our precedents.” *Cooper v. Berger* (“*Cooper I*”), 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018).

29. All power not expressly limited by the people in the constitution remains with the people and “is exercised through the General Assembly, which functions as the arm of the electorate.” *Cooper Confirmation*, 371 N.C. at 815–16, 822 S.E.2d at 299 (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (*per curiam*)). Accordingly, “the General Assembly need not identify the constitutional source of its power when it enacts statutes” but instead may “rely on its general power to legislate, which it retains as an arm of the people.” *Id.*

30. In addition to the General Assembly’s inherent power, the Constitution provides that “[t]he 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, § 5(10). Consequently, whether to create, eliminate, or move a given board or commission to another department is “a decision committed to the sole discretion of the General Assembly.” *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108; *see also McCrory*, 368 N.C. at 664, 781 S.E.2d at 268 (noting “the General Assembly’s significant express constitutional authority to assign executive duties to the constitutional officers and organize executive departments.”)

31. The General Assembly has the power to appoint statutory officers to the boards and commissions it creates. *McCrory*, 368 N.C. at 642-44, 781 S.E.2d at 254-55. Among other things, “appointing statutory officers is not an exclusively

executive prerogative,” and therefore does not involve the exercise of executive power. *See Cooper Confirmation*, 371 N.C. at 805, 822 S.E.2d at 292 (quoting *McCrory*, 368 N.C. at 648, 781 S.E.2d at 258).

32. “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.

33. “The Governor is our state’s chief executive. He or she bears the ultimate responsibility of ensuring that our laws are properly enforced. Indeed the Constitution of North Carolina enshrines this executive duty: ‘The Governor shall take care that the laws be faithfully executed.’ But the Governor is not alone in this task. Our constitution establishes nine other offices in the executive branch . . . these ten offices are known as the Council of State.” *Cooper Confirmation*, 371 N.C. at 799, 822 S.E.2d at 289-290 (citations omitted).

34. There is no bright-line rule for determining whether the Governor has “enough control” over a board or commission to comply with his or her duty to take care that laws are faithfully executed. Instead, the test “is functional, rather than formulaic, in nature.” *Cooper I*, 370 N.C. at 417, 809 S.E.2d 98 at 113; *see also McCrory*, 368 N.C. at 648 n.7. Thus, because “each statutory scheme is different,” the court must engage in “a case-by-case analysis” that requires it to “resolve each challenge by carefully examining its specific factual and legal context.” *Cooper I*, 370 N.C. at 414, 809 S.E.2d at 111 (quoting *McCrory*, 368 N.C. at 646–47, 781 S.E.2d at 257)).

35. The degree of control that the Governor has over a committee, commission, board, or council that is “primarily administrative or executive in character,” is determined by the Governor’s “ability to appoint the commissioners, to supervise their day-to-day activities, and to remove them from office.” *See McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *Cooper Confirmation*, 371 N.C. at 806, 822 S.E.2d at 293. *But see McCrory*, 368 N.C. at 663, 781 S.E.2d at 267 (Newby, J., concurring in part and dissenting in part)(“Our current constitution and a variety of statutes continue to recognize that the authority to appoint an official does not result in control of the appointee.”)

36. Whether a violation exists under the three-factor test “is a question of degree.” *Cooper Confirmation*, 371 N.C. at 806, 822 S.E.2d at 293 (quoting *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256). “When the challenge involves the Governor’s constitutional authority,” the question turns on “whether the actions of a coordinate branch “unreasonably disrupt a core power of the executive.” *Id.*

37. “The legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.” *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608 (1982); *Accord Greer v. Georgia*, 233 Ga. 667, 212 S.E.2d 836 (1975).

BOARDS AND COMMISSIONS AT ISSUE

38. Each of the boards and commissions challenged in this case appear to be “primarily administrative or executive in character.”

39. In *McCrary*, 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. *See McCrary*, 368 N.C. at 637–39, 781 S.E.2d at 251-252.

40. As in *McCrary*, the challenged boards and commissions have the “final say” in executing the laws in the areas they regulate. The challenged boards and commissions make rules, set standards and objectives, make final decisions about permits and grants, and review and approve plans. *See, e.g.*, N.C. Gen. Stat. §§ 143B-282, 143B-282.1 (Environmental Management Commission); N.C. Gen. Stat. §§ 113A-106.1, 113A-107, 113A-107.1, 113A-113, 113A-118, 113A-134.2 (Coastal Resources Commission); N.C. Gen. Stat. §§ 143-239, 143-240, 113-306, 113-333 (Wildlife Resources Commission); N.C. Gen. Stat. §§ 143B-437.52, 143B-437.526, 143B-437.57, 143B-437.60 (Economic Investment Committee); N.C. Gen. Stat. § 143B-350 (Board of Transportation); N.C. Gen. Stat. §§ 130A-9, 130A-22, 130A-29 (Commission for Public Health); N.C. Gen. Stat. §143-136 (Building Code Council).

41. Also as in *McCrary*, the Environmental Management Commission, Coastal Resources Commission, Wildlife Resources Commission, Economic Investment Committee, Board of Transportation, and Commission for Public Health, are each housed within a principal department headed by one of the Governor’s cabinet secretaries. N.C. Gen. Stat. § 143B-282(1) (Environmental

Management Commission); N.C. Gen. Stat. §§ 113A-104 (Coastal Resources Commission); N.C. Gen. Stat. § 143-240 (Wildlife Resources Commission); N.C. Gen. Stat. § 143B-437.54 (Economic Investment Committee); N.C. Gen. Stat. § 143B-350 (Board of Transportation); N.C. Gen. Stat. § 130A-29 (Commission for Public Health). The Residential Code Council, however, will be housed within the Department of Insurance which is headed by a separate member of the Council of State. *See* N.C. Sess. Law 2023-108 § 1(a) (creating N.C. Gen. Stat. §143-136.1).

42. In analyzing the individual boards and commissions at issue, it is important to note that all the boards and commissions challenged in this litigation are statutory creations of the General Assembly, and none administers subject matter that the Constitution explicitly assigns to the Governor.

43. Four of the challenged bodies—the EMC, CRC, WRC, and RCC—allocate a majority of appointments to the executive branch, as well as the power to remove them, with the General Assembly holding only a minority of the appointments.

44. For one of the challenged commissions—the CPH—Senate Bill 512 allocates a majority of political appointments to the Governor, with the General Assembly having only a minority, and the remaining appointments being allocated to an outside body of independent healthcare professionals, the North Carolina Medical Society.

45. Although, the Governor contends that all the challenged statutes violate the separation of powers, the Governor has not explicitly identified the

specific ways in which either Senate Bill 512 or House Bill 488 is incompatible with faithful execution of the laws.

A. Residential Code Council

46. As explained above, once established the RCC will have thirteen members. The Governor will appoint a majority of seven, while the General Assembly will appoint a minority of six. *See* N.C. Sess. Law 2023-108, § 1(a) (creating N.C. Gen. Stat. § 143-136.1(a)). The Governor will appoint the chair. The statute is silent on removal of members.

47. Once established, the RCC will be tasked with two primary functions. First, the RCC will be responsible for reviewing any proposed revision or amendment to the North Carolina Residential Code. 2023 N.C. Sess. L. 108, § 1.(a) (creating N.C. Gen. Stat. § 143-136.1 establishing the RCC and § 143-136.1(d) enumerating its duties). Second, it will be tasked with considering “any appeal or interpretation arising under G.S. 143-141 pertaining to the North Carolina Residential Code and mak[ing] disposition of the appeal or issue an interpretation.” *See* 2023 N.C. Sess. L. 108, § 1.(d) (amending N.C. Gen. Stat. § 143-141).

48. Applying the three-factor test from *McCrory*, against the backdrop of the RCC being housed in the Department of Insurance, the Governor maintains enough control over the RCC to comply with his duty to take care that the laws are faithfully executed.

49. For these reasons, the Governor has not established beyond a reasonable doubt that House Bill 488's creation and structuring of the RCC violates the separation of powers.

B. Environmental Management Commission, Coastal Resources Commission, and Wildlife Resources Commission

50. The EMC, CRC, and WRC all share similar structural characteristics under Senate Bill 512. Given their similar structures under Senate Bill 512, we analyze these commissions together. In each of these structures, a majority of appointments are allocated to the executive branch. However, one or two of the executive branch's appointments are allocated to either the Commissioner of Agriculture (in the case of the EMC and the WRC) or the Commissioner of Insurance (in the case of the CRC).

51. Our Constitution does not create a unitary executive. Rather, Article III establishes a multi-member executive branch, which consists of multiple constitutional officers who are elected on a statewide basis. *See* N.C. CONST. art. II, § 2 (providing for election of the Lieutenant Governor); § 7(1) (entitled "Other Elective Offices" and establishing the offices of Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance).

52. While the Governor is the chief executive, other elected officers who are members of the Council of State are also vested with executive power by Article III. The Constitution also expressly directs the General Assembly to prescribe their duties. *See* N.C. CONST. art. III, § 6 (providing that, in addition to serving as President of the Senate, the Lieutenant Governor “shall perform such additional duties as the General Assembly or Governor may assign him”); §7(2) (providing that the elected members of the Council of State’s “respective duties shall be prescribed by law”); *State ex rel. Comm’nr of Ins. v. N.C. Auto Rate Admin Office*, 287 N.C. 192, 214 S.E.2d 98 (1975) (providing “the power and authority” of Council of State members “emanate from the General Assembly and are limited by legislative prescription.”)

53. The General Assembly’s power to organize and reorganize the executive branch and to prescribe the functions, powers, and duties of executive officials, including for members of the Council of State, encompasses authority to divide between the Governor and other constitutional executive officers the power to appoint members of statutory boards and commissions.

54. In this situation the General Assembly has allocated to the executive branch the power to appoint and remove a majority of the members of these three commissions, with the Governor holding most of those appointments. Accordingly, the Governor has not proven beyond a reasonable doubt that Senate Bill 512’s changes to the structure of the EMC, CRC, and WRC, violate the separation of powers.

C. Commission for Public Health

55. The CPH is situated within the North Carolina Department of Health and Human Services. The CPH's primary duties are to adopt rules to protect and promote the public health as well as rules necessary to implement the public health programs administered by the North Carolina Department of Health and Human Services. *See* N.C. Gen. Stat. § 130A-29.

56. Under Senate Bill 512, the CPH has thirteen members, four of whom are elected by the North Carolina Medical Society. N.C. Gen. Stat. § 130A-30(a). Of the remaining nine members—all of them political appointments—the Governor has the majority of five, while the Senate and House each appoint two. *See* 2023 N.C. Sess. L. 136, § 3.1(a). The Governor appoints the chair, *see* N.C. Gen. Stat. § 130A-31, and each appointing authority retains the power to remove its appointees for cause. *See* N.C. Gen. Stat. § 130A-30(c)

57. According to a witness for the Governor, “CPH’s composition,” which even before Senate Bill 512 required appointees to meet certain qualifications, “is intended to ensure the necessary expertise to allow for the adoption of rules and to take other actions authorized by law.” (Affidavit of Dr. Ronald May, ¶ 7).

58. In *Cooper I* the Court explained “the General Assembly clearly has the authority to establish qualifications for commission membership, to make certain persons ex officio members of the commission, *and to mandate that differing policy preferences be reflected in the commission’s membership.*” *Cooper I*, 370 N.C. at

417, 809 S.E.2d at 113 (emphasis added). The Court also held that “the General Assembly has the authority to provide [a] commission with a reasonable degree of independence from short-term political interference.” *Id.* at 439 n.9, 809 S.E.2d at 127 n.9; *see also id.* at 417 n.14. 809 S.E.2d at 113 n.14 (“Needless to say, we did not hold in *McCrory*, and do not hold now, that the entire concept of an “independent” agency is totally foreign to North Carolina constitutional law.”)

59. Allocating CPH appointments to the North Carolina Medical Society furthers the purpose of the CPH by ensuring that its decisions reflect the guidance and input of independent medical professionals. This reflects a legitimate exercise of the General Assembly’s authority to “mandate that differing policy preferences be reflected in the commission’s membership” and to provide the CPH “a reasonable degree of independence from short-term political influence.” *Id.* at 417, 809 S.E.2d at 113.

60. Applying the three-factor test from *McCrory*, and in light of the unique role and purpose of the CPH to our citizens and state, the Governor maintains enough control over the CPH to comply with his duty to take care that the laws are faithfully executed.

61. For these reasons, the Governor has not proved beyond a reasonable doubt that Senate Bill 512’s structuring of the CPH violates the separation of powers.

D. Economic Investment Committee

62. Previously, the EIC consisted of five members: the Secretary of Commerce, the Secretary of Revenue, the State Budget Director, one Senate appointee, and one House appointee. Senate Bill 512 adds the President *Pro Tempore* of the Senate and the Speaker of the House of Representatives, or their designees, to the EIC as *ex officio* members. 2023 N.C. Sess. L. 136, § 1.1(a).

63. The primary function of the EIC concerns economic development grants awarded through three programs: the Job Development Investment Grant Program (“JDIG”); the Job Maintenance and Capital Development Fund (“JMAC”); and the Site Infrastructure Development Fund (“SIDF”). Of these, the parties agree that the JDIG program represents the bulk of the Committee’s work.

64. The addition of two sitting legislators or their designees to the EIC violates the *per se* rule of *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608 (1982). For this reason, Plaintiff has proven beyond a reasonable doubt that Senate Bill 512’s structuring of the EIC interferes with a core power of the executive and violates separation of powers. *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257; N.C. CONST. art. I, § 6.

E. Board of Transportation

65. Under Senate Bill 512, fourteen of the BOT's total of twenty members will be appointed by the General Assembly from geographic regions across the state, with the remaining six at-large members appointed by the Governor. *See* 2023 N.C. Sess. L. 136, § 4.1(a) (amending N.C. Gen. Stat. § 143B-350(b)). The chair and vice-chair are chosen from among the BOT's membership, *see* 2023 N.C. Sess. L. 136, § 4.1(a) (amending N.C. Gen. Stat. § 143B-350(e)), and removal is only by the appointing authority.

66. Applying the three-factor test from *McCrory*, the Governor does not maintain enough control over the BOT to comply with his duty to take care that the laws are faithfully executed. For this reason, Plaintiff has proven beyond a reasonable doubt that Senate Bill 512's structuring of the BOT interferes with a core power of the executive and violates separation of powers. *McCrory*, 368 N.C. at 647; N.C. CONST. art. I, § 6.

CONCLUSION

It is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's Motion for Summary Judgment is granted in part and denied in part.

2. Defendants' Motion for Summary Judgment and Supplemental Motion for Summary Judgment are granted in part and denied in part.

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, and only the following, are unconstitutional and are therefore void and permanently enjoined:

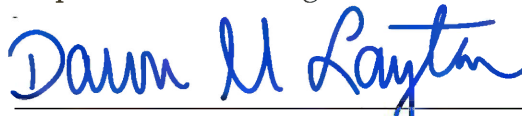
- a. Part I of Session Law 2023-136 ("Senate Bill 512") amending N.C. Gen. Stat § 143B-437.54 (EIC) and
 - b. Part IV of Senate Bill 512 amending N.C. Gen. Stat § 143B-350 (BOT).
4. The parties shall bear their own costs.

SO ORDERED, ADJUDGED, AND DECREED.

This the 28th day of February, 2024.



HON. JOHN M. DUNLOW
Superior Court Judge



HON. DAWN M. LAYTON
Superior Court Judge



HON. PAUL A. HOLCOMBE III
Superior Court Judge