STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTIC
SUPERIOR COURT DIVISION
23CV029308-910

JOSHUA H. STEIN, 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; DESTIN C. HALL, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA,

Defendants.

LEGISLATIVE DEFENDANTS' RESPONSE IN OPPOSITION TO GOVERNOR'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Destin C. Hall, in his official capacity as Speaker of the North Carolina House (together, "Legislative Defendants") submit this brief in opposition to Governor Stein's Motion for Preliminary Injunction.

INTRODUCTION

The Governor seeks a temporary restraining order and preliminary injunction against sections 3A.3.(b), (c), (d), (f), (g), and (h) of Senate Bill 382. To claim such extraordinary relief the Governor makes an even more extraordinary claim: Despite its text, structure, and history, our Constitution actually establishes a unitary executive, rather than the plural executive model that has been a feature of this State's government since its founding. Accordingly, the Governor claims that all executive power must vest in him, and that no duties (at least not duties he wants for himself) can be assigned to any other executive officer. He therefore says he will suffer irreparable harm without an injunction and that the balance of equities commands the relief he seeks. None of that is true. His motion should be denied.

Like all other acts of the General Assembly, Senate Bill 382 (which was passed over the Governor's veto) is presumptively constitutional. The North Carolina Supreme Court has made this clear, time and again. And yet the Governor seeks to push that presumption aside in order to urge the Court to enjoin Senate Bill 382 merely because he disagrees with it. But his disagreement is not enough. It is not enough to invalidate the law, nor is it enough to enjoin it.

Our Constitution expressly describes the duties, responsibilities, and powers of the Governor, as do the General Statutes. And the gubernatorial powers the law and Constitution enumerate are also his limits. The General Assembly, however, is different. It exercises all power not otherwise limited by express terms of the Constitution. Thus, unlike the Governor, the General Assembly "need not identify the constitutional source of its power when it enacts statutes" and instead may "rely on its general power to legislate, which it retains as an arm of the people." *Cooper v. Berger*, 371 N.C. 799, 815-16, 822 S.E.2d 286, 299 (2018) ("*Cooper Confirmation*") (citation omitted). The General Assembly also has the express authority to organize government and assign duties to the members of the executive branch. N.C. CONST. art. III, § 5(10). Accordingly, updating the Board of Elections' structure is "committed to the sole discretion of the General Assembly." *Cooper v. Berger* ("*Cooper I*"), 370 N.C. 392, 409, 809 S.E.2d 98, 108 (2018). And importantly here, it has express power to assign duties (i.e., executive functions) to the other elective officers that comprise the executive branch. *See* N.C. Const. Art. III, § 7(2).

Our Constitution also does not vest executive power in the Governor alone. Unlike the federal Constitution, North Carolina's Constitution does not establish a unitary executive. Rather, our government is deliberately structured with a multi-member executive branch. For this reason, the Governor's analogies to federal law fail. Although they use similar language as their federal counterparts, the Vesting

Clause[1] and Take Care Clause[2] of our Constitution apply to a government with a very different history and structure. Indeed, our Constitution expressly anticipates that the General Assembly will have the power to assign duties and functions to other members of the executive branch in Article III. § 7(2). This case begins and ends there. Although the Governor cites *McCrory, Cooper I, and Cooper Confirmation*, none of those decisions addressed laws that allocate power within the executive branch. Thus, the Governor is left with an astounding ask of this Court: Enjoin a law enacted in accordance with an express constitutional provision, based on a legal claim that has never been adopted by any of our appellate courts.

Nor is there any immediate harm that commands such extraordinary relief. At its core, the purpose of a temporary restraining order and preliminary injunction is to meet an emergency. It is clear no emergency exists here. The Panel already stated in its recent Scheduling Order that a decision on the merits of the Governor's challenge to Senate Bill 382 will come before it goes into effect—that is, before the bill has any impact on the Governor.

Finally, the equities favor denying the Governor's motion. There is no harm to the Governor—beyond his own dissatisfaction—in having to faithfully execute a presumptively constitutional law. But the harm from the inversion of this presumption necessarily restricts the General Assembly's constitutional freedom to legislate. Enjoining Senate Bill 382—whose structure has never been deemed

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1 N.C. CONST. art. III, § 1.

2 N.C. CONST. art. III, § 5(4).

unconstitutional—only to later have the Supreme Court confirm the law's presumed constitutionality is time that cannot be recovered.

A law is only invalid if it is unconstitutional beyond a reasonable doubt—that is, there are no set of circumstances under which it may be constitutional. The Governor cannot meet this high bar, and to enjoin the effectiveness of Senate Bill 382 necessarily restricts the General Assembly's constitutional authority to reorganize the Board it created. An injunction does not avoid inequity, it creates it. The Governor's Motion should be denied.

STANDARD OF REVIEW

I. Preliminary Injunctive Relief Is An Extraordinary Remedy.

"'The primary purpose of a temporary restraining order is usually to meet an emergency when it appears that any delay would materially affect the rights of a plaintiff.'" *Hutchins v. Stanton*, 23 N.C. App. 467, 469, 209 S.E.2d 348, 349 (1974) (quoting *Register v. Griffin*, 6 N.C. App. 572, 575, 170 S.E.2d 520, 523 (1969)). A temporary restraining order "is only an ancillary remedy for the purpose of preserving the status quo or restoring a status wrongfully disturbed pending the final determination of the action." *Hutchins*, 23 N.C. App. at 469, 209 S.E.2d at 349.

Similarly, a preliminary injunction is an extraordinary measure taken to preserve the *status quo* during litigation. *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856 (1990) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Because of its extraordinary nature, a preliminary injunction will not issue unless a movant can show a "likelihood of success on the merits of his case," and that he is "likely to sustain irreparable loss unless the

injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of [the] plaintiff's rights during the course of litigation." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754 (1983); *see also* N.C. R. Civ. P. 65(b). A court must also weigh the potential harm a movant will suffer if no injunction is entered against the potential harm to a defendant if the injunction is entered. *See Williams v. Greene*, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978); *see also State v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980) (stating that adjudication of a motion for injunctive relief requires "a careful balancing of the equities").

II. A Facial Challenge Is "The Most Difficult Challenge To Mount Successfully."

This Court must presume that laws passed by the General Assembly are constitutional. *McKinney v. Goins*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *11 (Jan. 31, 2025) (Newby, C.J.); *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."). And the party challenging a law's constitutionality—here, the Governor—bears the burden of overcoming this presumption of validity. *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212, 886 S.E.2d 16, 32 (2023). The burden to overcome that presumption is high. The judiciary cannot declare an act invalid unless the plaintiff can show an *"express provision"* of the Constitution *"explicitly"* prohibits that act, *"beyond a reasonable doubt."* *Harper v. Hall*, 384 N.C. 292, 298, 886 S.E.2d 393, 399 (2023) (emphasis added); *Ivarsson v. Off. of Indigent Def. Servs.*,

156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003) (quoting *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991)).

The Governor's claim involves a facial challenge, which represents 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.*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)). 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." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (citation omitted). 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 I*, 370 N.C. at 413, 809 S.E.2d at 111; *see also McKinney*, No. 109PA22-2, 2025 N.C. LEXIS 65, at *17.

The Governor has not met, and cannot meet, this burden. Senate Bill 382 is a valid exercise of the General Assembly's power to organize and regulate administrative agencies. And thus the Governor's motion for a preliminary injunction must fail.

ARGUMENT

To begin with, the Panel stated in its March 26, 2025, Scheduling Order that the Governor's pending motion for TRO and preliminary injunction, as well as the pending cross-motions for summary judgment, will be heard on April 14, 2025. The Panel further stated that "[t]he Court intends to issue its ruling by May 1, 2025[,]" the effective date of Senate Bill 382. In other words, the full merits of the Governor's claims will be heard and decided before the challenged portions of Senate Bill 382 go into effect, which impending date is the impetus for the Governor's motion. *See* Pl.'s Mot. for TRO, ¶¶ 9(a)-(b). Consequently, there is no emergency requiring temporary or preliminary injunctive relief, and the permanent injunction he seeks will be decided before the effective date of the legislation he challenges.

Still, even if an emergency did exist sufficient to justify the Governor's motion, he is not entitled to preliminary relief. First, he cannot show irreparable harm from complying, even for a short period, with a presumptively constitutional law. Second, the public interest favors such compliance, not avoiding it. Third, he is not likely to succeed on the merits of the Supplemental Complaint.

I. The Governor Is Not Likely To Succeed On The Merits Of His Claim.[3]

The Governor's motion for preliminary injunction fails because he cannot establish a likelihood of success on the merits of his claims. As stated above, to have a law declared invalid, a plaintiff must establish that it is unconstitutional "*beyond a*

[3] In the interests of judicial economy, Legislative Defendants will not repeat verbatim the merits argument raised in their motion for summary judgment, and instead simply incorporate those arguments as if fully stated here.

reasonable doubt." *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015) (emphasis added) (citing *Baker*, 330 N.C. at 334, 410 S.E.2d at 889). This requires the Governor to show that "*no set of circumstances exist*" under which Senate Bill 382 would be constitutional. *Bryant*, 359 N.C. at 564, 614 S.E.2d at 485 (emphasis added). The Governor cannot show a likelihood of success under such a standard for three reasons.

First, the General Assembly's enactment of Senate Bill 382 rests on both its inherent and express authority to structure State agencies and to assign duties to the "other elective officers" who serve on the Council of State. Our Constitution does "not enumerate the powers of the General Assembly." *Cooper Confirmation*, 371 N.C. at 815, 822, S.E.2d at 299 (2018). As a result, "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.'" *Id.* 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)). The General Assembly thus "need not identify the constitutional source of its power when it enacts statutes" but may "rely on its general power to legislate, which it retains as an arm of the people." *Id.* What is more, the General Assembly also has the express authority to organize government and assign duties to the members of the executive branch. *See* N.C. CONST. art. III, § 5(10). As a result, any decision about the Board of Election's structure is "committed to the *sole*

discretion of the General Assembly." *Cooper I*, 370 N.C. at 409, 809 S.E.2d at 108 (emphasis added).

Second, Senate Bill 382 does not violate the Separation of Powers Clause. As matter of plain text, the General Assembly's decisions to transfer the Board of Elections to the Department of the Auditor and to give the Auditor the power to appoint the Board's members (as well as the fifth member of the county boards) do not implicate the Separation of Powers Clause. The Governor and the Auditor are both executive officers. The Governor's current challenge thus involves an *intramural* dispute over the allocation of power *within the executive branch*. The Separation of Powers Clause, however, only speaks to the separation of *powers* between *branches*, not within them. N.C. CONST. art. I, 6 ("The *legislative, executive, and supreme judicial powers* of the State government shall be forever separate and distinct from each other." (emphasis added)); *accord Harper* 384 N.C. at 298, 886 S.E.2d at 399 (explaining the clause is intended to protect the people by "keeping *each branch* within its described sphere[]" and merely provides that the "*powers of the branches* are 'separate and distinct'" (emphasis added)).

To avoid this, the Governor repeatedly cites *McCrory*, *Cooper I*, and *Cooper Confirmation*. But these cases are inapposite. None dealt with boards or commissions within departments headed by other Council of State members. Indeed, the Court stressed each time that, "[a]s in *McCrory*, 'our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State.'" *Cooper Confirmation*, 371

N.C. at 805 n.4, 822 S.E.2d at 292 n.4 (quoting *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5) (emphasis added); *Cooper I*, 370 N.C. at 407 n.5, 809 S.E.2d at 107 n.5 (same). The Governor's reliance on those cases is therefore misplaced.

Finally, Senate Bill 382 does not violate the Vesting Clause or the Take Care Clause. While our Constitution provides—as a general matter—that "the executive power of the State shall be vested in the Governor" in Article III, Section 1, and charges the Governor with the duty to "take care that the laws be faithfully" executed in Article III, Section 5(4), it does not stop there. The Constitution also establishes nine "other elective officers" who are also members of the executive branch, and states that "their respective duties shall be prescribed by law." N.C. Const. Art. III, §(2) (Lieutenant Governor); § 7 ("Other elective officers").

To avoid this, the Governor claims the Vesting Clause and the Take Care Clause should be read in the same manner as their federal counterparts. But the structure of our State Constitution is different.[4] When inserted into our Constitution, those clauses must be read in *pari materia* with the rest of our State Constitution, and, in particular, the provisions expressly establishing other executive officers and charging the General Assembly with responsibility for assigning their duties.

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[4] In comparing the appointments clauses of the State and federal Constitutions, the Court in *McCrory* made a similar observation, noting that "[o]ur interpretation of the appointments clause in the state constitution differs from the United States Supreme Court's interpretation of the federal constitution's appointments clause" because North Carolina's appointments clause "differs in both text and history." *State v. Berger*, 368 N.C. 633, 640 n.3, 781 S.E.2d 248, 252 n.3 (2016).

Thus, while the Vesting Clause creates a general rule that means duties vest in the Governor as a matter of default, it is subject to the later, more specific provisions that permit the General Assembly to assign duties to other Council of State members. *Cooper Confirmation*, 371 N.C. at 800, 822 S.E.2d at 290 (explaining that the Governor has a duty of faithful execution, but "the Governor is not alone in this task," and "[t]o assist the executive branch in fulfilling its purpose, our constitution requires the General Assembly to 'prescribe the functions, powers, and duties of the administrative departments and agencies of the State" under Article III, § 5(10)).

Indeed, the Constitution expressly directs the General Assembly to prescribe those executive officers' duties, N.C. Const. art. III, §§ 6, 7(2), whose "power and authority" "emanate from the General Assembly and are limited by legislative prescription." *State ex rel. Comm'nr of Ins. v. N.C. Auto Rate Admin. Office*, 287 N.C. 192, 214 S.E.2d 98 (1975). For this reason, the only court to have ever addressed a claim similar to the one the Governor now asserts, held that laws granting appointments to other Council of State members were constitutional so long as they allocated a majority to the executive branch. *See Cooper v. Berger*, 23CV282505-910 (Wake) (Feb. 28, 2024 Order on Motions for Summary Judgment, ¶¶ 50-54) (attached as Exhibit A).

Similarly, although the Governor believes that it grants him a broad power to enact executive policy, the Take Care Clause is not a conferral of power, it is a *limit*. The clause subordinates the Governor's power to legislative direction by commanding that he act within, and not exceed, the bounds of the laws passed by the General

Assembly. *See* N.C. CONST. art. III, § 5(4) ("Execution of laws. The Governor shall take care that the laws be faithfully executed."). Thus, according to its plain language, the clause requires the Governor to "take care" that laws are executed in a manner "faithful," not to *his* prerogatives, but to those of the legislature. As the Court explained in Cooper *I*, the clause at most grants the Governor the corresponding power to make those policy decisions he has been "allowed through delegation from the General Assembly." *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112. Nothing in that clause, however, prohibits the General Assembly from assigning duties to other constitutional officers within the executive branch.

In short, the Governor cannot meet the high bar necessary to mount his challenge to Senate Bill 382. There has been no transfer of power away from the executive branch. Nor has the Governor been prevented from carrying out any law or duty that has been assigned to him. As a result, he cannot show that Senate Bill 382's changes to the Board of Elections, and the concomitant changes to the county boards, violate the Constitution.

II. <u>There Is No Immediate Harm Necessitating Preliminary Relief.</u>

Emergency injunctive relief would be improper because the Governor cannot show he will suffer "irreparable" harm. "A prohibitory preliminary injunction [should be] granted only when irreparable injury is real and *immediate*." *United Tel. Co. v. Universal Plastics*, Inc., 287 N.C. 232, 235, 214 S.E.2d 49, 51 (1975) (emphasis added). The harm the Governor seeks to prevent is the effectiveness of the challenged portions of Senate Bill 382 beginning May 1, but the Panel already indicated it will decide the constitutionality and effectiveness those portions prior to May 1. "The

purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (citation omitted). But the current law, which allows the Governor to make all appointments that Senate Bill 382 transfers to the Auditor, will be in effect through the date of the Panel's decision, but at the latest May 1. Thus, the current *status quo* is the very relief the Governor seeks in his Supplemental Complaint. Consequently, he has no basis to seek a preliminary injunction.

What is more, irreparable harm must be more than just avoiding compliance with a statute alleged (but not proven) to be unconstitutional. This is because the law is presumed constitutional until a plaintiff can establish otherwise beyond a reasonable doubt. *See Fayetteville St. Christian Sch.*, 299 N.C. at 358, 261 S.E.2d at 913. ("Their contention that further compliance with the Act's requirements violates their constitutionally guaranteed religious freedoms goes to the heart of their legal challenge to the application of the Act itself and must await resolution at the final hearing when all the facts upon which such resolution must rest can be fully developed."). Indeed,

> the mere fact that a statute is alleged to be unconstitutional or invalid will not entitle a party to have its enforcement enjoined. Further circumstances must appear bringing the case under some recognized head of equity jurisdiction and presenting some actual or threatened and irreparable injury to complainant's rights for which there is no adequate legal remedy.

Fox v. Bd. of Comm'rs of Durham Cty., 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956); *see also Elmore v. Lanier*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967) (Plaintiff "is not entitled to injunctive relief in the absence of allegations and proof that he will

suffer direct injury, such as a deprivation of a constitutionally guaranteed personal right or an invasion of his property rights. In the absence of such allegation and proof the Court will not pass on the constitutionality of the statute.").

The Governor cannot show a meaningful threat of irreparable harm. Instead, the primary basis of his alleged harm is a misapplication of two North Carolina Supreme Court decisions, *McCrory* and *Cooper I*—opinions that expressly took "no position on how the separation of powers clause applies to those executive departments that are headed by independently elected members of the Council of State." *McCrory*, 368 N.C. at 646, n.5, 781 S.E.2d at 256 n. 5)); *Cooper I*, 370 N.C. at 407 n.5, 809 S.E.2d at 107 n.5 (same); *see* (Supp. Compl., ¶¶ 102, 103, 105, 109).

Moreover, and as discussed more fully above and in Legislative Defendants' brief in support of their motion for summary judgment, the General Assembly created, and thus would be fully within its power to eliminate, the Board of Elections. Therefore, the mere fact that Senate Bill 382 changes its membership cannot, in-and-of-itself, be an "irreparable" harm. The same is true for the transfer of the Board of Elections to the Department of the Auditor.

Simply put, the Governor offers no evidence to establish a threat of irreparable harm that might require the issuance of a preliminary injunction.

III. A Preliminary Injunction Will Harm The Public Interest.

The balance of the equities favors denying the Governor's motion. Since the State's inception, our Constitution has vested the General Assembly with significantly more power than the Governor. The General Assembly is the "stronger"

of the two branches. *See Cunningham v. Sprinkle*, 124 N.C. 638, 642-43, 33 S.E. 138, 139 (1899). The General Assembly acts as an arm of the People and exercises the People's power. *Pope*, 354 N.C. at 546, 556 S.E.2d at 267 (citation omitted). In essence, every North Carolina voter is present in the "General Assembly" through the voter's representative. That is why an act of the people's elected representatives is presumptively valid. *Id.* And "so long as an act is not forbidden, its wisdom and expediency are for legislative, not judicial, decision." *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (quoting *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92).

As discussed above, acts of the General Assembly are presumed constitutional unless proved otherwise beyond a reasonable doubt. This is for good reason: "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," *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959), and "it is the role of the legislature, rather than [the courts], to balance disparate interests and find a workable compromise among them." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citation omitted).

But the People have no redress when a trial court enjoins a valid law, potentially for years, until a final ruling on the merits by the North Carolina Supreme Court. *See, e.g., Town of Boone v. State*, 369 N.C. 126, 794 S.E.2d 710 (2016) (reversing grant of injunction against the General Assembly, holding that challenged

law was constitutional and within the General Assembly's plenary power, after injunction in place for two years). Indeed, "a restriction on the General Assembly is in fact a restriction on the people." *McCrory*, 368 N.C. 633, 651, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part).

Thus, an injunction enjoining the Board of Elections to protect the Governor's right to faithfully *execute* the laws itself arrests the legislature's right to *make* laws, at least until they pass constitutional muster. In balancing the equities, this is an inequitable result for the People. There is no cognizable harm to the Governor if a presumptively constitutional law is not enjoined pending a decision on his allegations of unconstitutionality. And the executive branch—here, the Governor—may be made whole by invalidating a law and permitting him to appoint board membership as he sees fit. The People, however, are restricted from lawmaking—and exercising their governance in the manner they wish via the laws they delegate their elected representatives to pass—until a presumptively constitutional law is confirmed constitutional. This inverts the standard, and in the context of the separation of powers, is antithetical to protecting the branches' separate powers.

After years of litigation by the Governor and his predecessor seeking to block reforms to the Board of Elections, the General Assembly availed itself of an option expressly granted to it under our Constitution and transferred the Board of Elections to the State Auditor and gave the Auditor power to appoint the Board's members. Enjoining Senate Bill 382 would deny the People their ability to change the Board's structure, effectively placing it beyond democratic control. On balance, this creates

inequity, while the alternative does not. The Court should deny the Governor's motion.

IV. This Case Presents A Political Question Outside The Scope Of Judicial Review.

Legislative Defendants acknowledge that binding precedent may limit this Court from concluding that the Governor's claims present a nonjusticiable political question. That said, in anticipation of this matter proceeding to the North Carolina Supreme Court (and if a court may hold that the issue is not one of subject matter jurisdiction), they wish to preserve the issue for presentation in that forum.[5]

CONCLUSION

For each of the foregoing reasons, the Court should deny the Governor's motion for Temporary Restraining Order and Preliminary Injunction.

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[5] Notably, the Governor posits that the role and function of the Auditor does not relate to elections. *See, e.g.*, (Gov.'s Br. in Supp. Mot. for Summ. Judgt., at 19-20). He ignores that his role and function does not either. All the same, what the Governor deems as the "appropriate" role for the Auditor, or any other executive officer, is not determinative. Rather, this is quintessentially a policy issue—and "[t]he legislative branch is without question 'the policy-making agency of our government' . . . ." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169–70, 594 S.E.2d 1, 8–9 (2004). And because it is a policy issue, it is a nonjusticiable political question. Indeed, as the Auditor correctly points out in his brief in opposition to the Governor's motion for summary judgment, the Constitution provides a political solution to the Governor's concerns about the General Assembly's reorganization of the Board of Elections. If the Governor disapproves of the General Assembly's statutory assignment of duties among executive officers, he can change those assignments through an executive order within the first 60 days of the applicable session. N.C. CONST. art. III, § 5(10). His changes become law unless overturned by a majority vote of either chamber. *Id.* This is a process designed to resolve inter-branch disputes exactly like this one—to wit, a political solution.

This the 10th day of April, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2025, I caused a copy of the foregoing document to be served upon all parties via email as follows:

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EXHIBIT A

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

40. As in *McCrory*, 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 *McCrory*, 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. Appling 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. Appling 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.

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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.

John M. Dunlow

HON. JOHN M. DUNLOW
Superior Court Judge

Dawn M Layton

HON. DAWN M. LAYTON
Superior Court Judge

Paul A. Holcombe III

HON. PAUL A. HOLCOMBE III
Superior Court Judge