

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

Plaintiff,

v.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

17 CVS

FILED
2017 APR 26 P 2:23
C.S.C.

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

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

INTRODUCTION

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

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

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

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

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

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

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

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

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

PARTIES AND JURISDICTION

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

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

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

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

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

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

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

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

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

CONSTITUTIONAL PRINCIPLES

Separation of Powers

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

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

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

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

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

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

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

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

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

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

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

Non-Delegation

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

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

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

CHALLENGES TO SESSION LAW 2017-6

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

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

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

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

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

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

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

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

Specifically:

- a. A new eight-member Bipartisan State Board of Elections and Ethics Enforcement will be created to execute elections and ethics laws, with its membership split between four members of each of the two largest political parties. Session Law 2017-6, § 4(c) (enacting §§ 163A-1, 163A-2).
- b. The Governor will be required to appoint as members of the New State Board four individuals from a list of six submitted by the State party chair of the party with the highest number of registered affiliates, currently the Democratic Party. *Id.* (enacting § 163A-2(a)).
- c. The Governor will be required to appoint as members of the New State Board four individuals from a list of six submitted by the chair of the party with the second highest number of registered affiliates, currently the Republican Party. *Id.* (enacting § 163A-2(a)).
- d. Unaffiliated (i.e., independent) voters will have no voice in who is selected to serve on the New State Board. *See id.*
- e. Five members of the New State Board will be required to take most actions, meaning that any vote split on political party lines will deadlock the board and prevent action. *See id.* (enacting §§ 163A-3(c), 163A-4(d)).
- f. The General Assembly will appoint Kim Strach as Executive Director of the New State Board. *Id.* § 17. Under both existing law and Session Law 2017-6, the Executive Director is the "chief State elections official" who is "responsible for staffing, administration, and execution of the State Board's decisions and orders." *Id.* (enacting §§ 163A-6(c) and (d)); N.C. Gen. Stat. § 163-27.1. Ms. Strach was initially hired by the SBOE on a 3-2 partisan vote following Governor McCrory's election and appointment of a majority Republican Board. If the New State Board deadlocks on political party lines, Ms. Strach will serve indefinitely.
- g. The Governor is empowered to appoint the first chair of the New State Board. *See* Session Law 2017-6, § 10. But, following that first appointment, the New State Board selects its chair and must select a chair of a set political affiliation—if current registration statistics hold, the chair will be a Republican for every year that Presidential, gubernatorial, and Council of State elections are held. *Id.* (enacting § 163A-2(f)).

- h. Vacancies in any of the New State Board positions will remain vacant for up to thirty days to allow a State party chair to provide a list of two names to the Governor to select one new appointee. *Id.* (enacting § 163A-2(d)).
- i. Five members of the New State Board will be required to issue subpoenas, Session Law 2017-6, § 4(c) (enacting § 163A-3(c), 163A-4(a),(d)). Under the existing statutes, just the chair or any two of the remaining four members of SBOE may issue a subpoena. *See* N.C. Gen. Stat. § 163-23.
- j. Members of the New State Board will only be removable for misfeasance, nonfeasance, or malfeasance. Session Law 2017-6 (enacting § 163(a)(2)(c)).

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

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

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

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

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

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

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

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

- a. SBOE has "general supervision over the primaries and elections in the State." N.C. Gen. Stat. § 163-22(a);
- b. SBOE provides county boards with copies of all election laws and SBOE rules and regulations. *See id.* § 163-22(b);
- c. SBOE distributes to the public materials explaining primary and election laws and procedures. *Id.*;
- d. SBOE appoints county board members and advises them as to the "proper methods of conducting primaries and elections." *Id.* § 163-22(c);
- e. SBOE may "remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause." *Id.*;

- f. SBOE determines “the form and content of ballots, instruction sheets, pollbooks, tally sheets, abstract and return forms, certificates of election, and other forms to be used in primaries and elections.” *Id.* § 163-22(e);
- g. SBOE prepares, prints, and distributes ballots to county boards. *See id.* § 163-22(f);
- h. SBOE certifies to “county boards of elections the names of candidates for district offices who have filed notice of candidacy with the Board and whose names are required to be printed on county ballots.” *Id.* § 163-22(g);
- i. SBOE “tabulate[s] the primary and election returns,” “declare[s] the results,” and “prepare[s] abstracts of the votes cast in each county.” *Id.* § 163-22(h);
- j. SBOE provides training and screening for poll workers and test voting machines. *See id.* § 163-22(o);
- k. SBOE may assist county boards in litigation. *See id.* § 163-25;
- l. The executive director of the SBOE “may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted.” *Id.* § 163-27.1;
- m. SBOE makes available registration forms for organized voter registration drives. *See id.* § 163-82.5;
- n. SBOE maintains “a statewide computerized voter registration system to facilitate voter registration and to provide a central database containing voter registration information for each county.” *Id.* § 163-82.11;
- o. SBOE creates guidelines “to administer the statewide voter registration system established by this Article.” *Id.* § 163-82.12;
- p. SBOE approves county voter registration plans. *See id.* § 163-82.22(b);
- q. SBOE may “modify the general election law time schedule with regard to ascertaining, declaring, and reporting results.” *Id.* § 163-104;
- r. SBOE certifies to the Secretary of State candidates for office. *See id.* § 163-108(a);
- s. SBOE approves county plans addressing elderly or disabled voters. *See id.* § 163-130;
- t. SBOE “shall certify the official ballots and voter instructions to be used in every election that is subject to this Article.” *Id.* § 163-165.3(a);

- u. SBOE “shall ensure that official ballots throughout the State” have the required characteristics. *Id.* § 163-165.4;
- v. SBOE may extend voting hours. *See id.* § 163-166.01;
- w. SBOE certifies election results. *See id.* § 163-182.15; and
- x. SBOE has significant duties with respect to campaign finance regulations. *See id.* § 263-278.22.

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

- a. “To advertise and contract for the printing of ballots and other supplies used in registration and elections; and to provide for the delivery of ballots, pollbooks, and other required papers and materials to the voting places.” N.C. Gen. Stat. § 163-33(6);
- b. “To provide for the purchase, preservation, and maintenance of voting booths, ballot boxes, registration and pollbooks . . . , and equipment used in registration, nominations, and elections; and to cause the voting places to be suitably provided with voting booths and other supplies required by law.” *Id.* § 163-33(7);
- c. “To provide for the issuance of all notices, advertisements, and publications concerning elections required by law.” *Id.* § 163-33(8);
- d. “To receive the returns of primaries and elections, canvass the returns . . . , and to issue certificates of election to county officers and members of the General Assembly except those elected in districts composed of more than one county.” *Id.* § 163-33(9);
- e. “To appoint and remove the board’s clerk, assistant clerks, and other employees.” *Id.* § 163-33(10);
- f. “To prepare and submit to the proper appropriating officers a budget estimating the cost of elections for the ensuing fiscal year.” *Id.* § 163-33(11); and
- g. “To perform such other duties as may be prescribed by this Chapter, by directives promulgated pursuant to G.S. 163-132.4, or by the rules, orders, and directives of the State Board of Elections.” N.C. Gen. Stat. § 163-33(12).

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

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

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

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

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

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

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

(a) Appointment.

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

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

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

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

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

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

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

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

(b) Supervision.

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

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

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

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

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

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

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

(c) Removal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- a. Violates the constitutional guarantee of separation of powers, N.C. CONST. art. I, § 6;
- b. Interferes with the Governor’s constitutional duty to ensure the laws are faithfully executed, *id.* art. I, § 6; art. III, §§ 1, 5(4); and
- c. Unconstitutionally delegates legislative power to the Revisor of Statutes without adequate guiding standards, *id.* art. I, § 6; art. II, § 1.

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

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

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

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

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

95. That is just one reason why, under North Carolina law, a threatened constitutional violation is *per se* irreparable harm sufficient to support a preliminary injunction. *See, e.g., High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) (“[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable.”); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (citing *Pleasants*); *S. S. Kresge Co. v. Tomlinson*, 275 N.C. 1, 8, 165 S.E.2d 236, 240 (1969) (same).

COUNT 1: DECLARATORY JUDGMENT

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

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

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

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

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

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

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

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

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

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

COUNT 2: DECLARATORY JUDGMENT

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

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

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

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

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

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

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

COUNT 3: INJUNCTIVE RELIEF

THE GOVERNOR IS ENTITLED TO PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

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

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

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

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

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

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

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

MOTION FOR TEMPORARY RESTRAINING ORDER
AND MOTION FOR PRELIMINARY INJUNCTION

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

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

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

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

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

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

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

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

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows:

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

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

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

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

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



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