

NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 23CV029308-910

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; and THE
STATE OF NORTH CAROLINA,

Defendants.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS' MOTION TO
DISMISS AND MOTION FOR
JUDGMENT ON THE PLEADINGS**

THIS MATTER came on to be heard and was heard before the undersigned Three Judge Panel upon Governor Roy A. Cooper, III's (herein "Plaintiff" or "Governor") Motion for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, filed on February 9, 2024, and on Legislative Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, filed on February 9, 2024. After considering the cross motions, briefs, and arguments and authorities cited by the parties therein, the Panel hereby determines as follows:

Summary of Undisputed Facts

1. On September 22, 2023, the General Assembly ratified Session Law 2023-139 ("Session Law").

2. Governor Roy A. Cooper, III vetoed the Session Law on September 28, 2023.
3. The General Assembly voted to override the Governor's veto on October 10, 2023, and the Session Law became law.
4. The Governor filed this lawsuit on October 17, 2023, alleging that Parts II, IV, and VIII of the Session Law are facially unconstitutional. The Governor's Complaint sought a declaratory judgment pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure and a permanent injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure.
5. On November 8, 2023, this matter was transferred to the undersigned Three Judge Panel for a determination as to the facial validity of Parts II, IV, and VIII of the Session Law.
6. Part II of the Session Law modifies the structure of the State Board of Elections ("State Board"). Under Part II, the total number of State Board members is increased from five to eight. The Governor has no appointment powers under the Session Law. The members of the State Board are all appointed by the General Assembly—two members by the President Pro Tempore, two members appointed by the Speaker of the House of Representatives, two members appointed by the minority leader in the Senate, and two members appointed by the minority leader in the House of Representatives. The General Assembly is responsible for filling all vacancies upon recommendation from the initial appointing authority. In the event of deadlock, the majority party appoints the Chair of the State Board and the Executive Director of the State Board—both of whom must be selected by the State Board by January 10, 2024 or within thirty days of their vacancy.
7. Prior to the Session Law, the Governor appointed all members of the five-member State Board from a list of eight nominees, with four nominees submitted by each of the two majority political parties. No more than three members of the five-member board could be from the same party. Any vacancy on the State Board was appointed by the Governor from a list of three nominees selected by the party of the member vacating their seat.
8. Part IV of the Session Law modifies the structure of the 100 County Boards of Elections (collectively, "County Boards"). The Session Law modifies the County Boards to only have four members, all appointed by members of the General Assembly: one member by the President Pro Tempore, one member by the Speaker of the House of Representatives, one member appointed by the minority leader in the Senate, and one member appointed by the minority leader in the House of Representatives. The General Assembly is to appoint members to the County Boards for two-year terms beginning on the last Tuesday in June, with the County Boards conducting their first meeting in July. The board members are to select a chair

amongst themselves; if they cannot do so within fifteen days of their first meeting in July, then the majority party of the General Assembly is responsible for the selection of a chair. Any vacancy is filled by either the President Pro Tempore or by the Speaker of the House.

9. Prior to the Session Law, each County Board consisted of five members. Four members were appointed by the State Board, with two members each from the two major political parties in the state. The Governor appointed the fifth member. In the event of a vacancy, the State Board filled the vacant seat.

10. Part VIII of the Session Law provides for the effective dates of the Session Law.

11. The State Board “has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, [and therefore,] clearly performs primarily executive, rather than legislative or judicial, functions.” *Cooper v. Berger*, 370 N.C. 392, 415, 809 S.E.2d 98, 112 (2018) (herein, “*Cooper I*”).

12. County Boards are engaged in preparing ballots, hiring employees, and administering elections at the county level throughout North Carolina.

13. The Governor contends that Parts II, IV, and VIII violate the North Carolina Constitution. Specifically, the Governor alleges the Session Law invades his vested power as the executive under N.C. Const. Art. III, § 5(4) and that the Session Law violates the Separation of Powers Clause under N.C. Const. Art. I, § 6.

Based on the foregoing undisputed material facts, the Panel enters the following:

Conclusions of Law

1. The Panel has the requisite jurisdiction over the parties and the subject matter of this action.

2. Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2024).

3. The Panel presumes that laws of the General Assembly are constitutional. *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 291 (2018) (herein, “*Cooper Confirmation*”). This presumption, however, is not absolute. *See id.* at 817-18, 822 S.E.2d at 300-01.

4. Our Supreme Court set out the functional test for violations of the Separation of Powers Clause in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016). “The clearest violation of the separation of powers clause occurs when one

branch exercises power that the constitution vests exclusively in another branch. Other violations are more nuanced, such as when the actions of one branch prevent another branch from performing its constitutional duties.” *Id.* at 645, 781 S.E.2d at 256 (citations omitted). “When [the Court] assess[es] a separation of powers challenge that implicates the Governor’s constitutional authority, [the Court] must determine whether the actions of a coordinate branch ‘unreasonably disrupt a core power of the executive.’” *Id.* (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)).

5. As an initial matter, the Panel must evaluate Defendants’ contention that this case is a nonjusticiable political question. Defendants argue that *Cooper I*’s political question analysis was “flawed” and is not binding on this Panel. Defendants further argue that *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) modified the political question doctrine and is, therefore, the appropriate and controlling test. Both arguments fail for the following reasons.

6. In *Cooper I*, the Court summarized the justiciability issue as whether:

the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly or whether the Governor is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle, such as that embodied in N.C. Const. art. III, § 5(4).

Cooper I, 370 N.C. at 409, 809 S.E.2d at 108.

7. The Court concluded that it was the latter, holding that it was error to dismiss the Governor’s complaint as a nonjusticiable political question because “the authority granted to the General Assembly pursuant to Article III, Section 5(10) is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4).” *Id.* at 411, 809 S.E.2d at 109. In other words,

the Governor is not challenging the General Assembly’s decision to “prescribe the functions, powers, and duties of the administrative departments and agencies of the State” by merging the State Board of Elections and the Ethics Commission into the Bipartisan State Board and prescribing what the Bipartisan State Board is required or permitted to do; instead, he is challenging the extent, if any, to which the statutory provisions governing the manner in which the Bipartisan State Board is constituted and required to operate pursuant to Session Law 2017-6 impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed.

Id. at 409-10, 809 S.E.2d at 108 (quoting N.C. Const. Art. III, section 5(10)).

8. Here, like in *Cooper I*, the Governor's Complaint challenges the manner in which the State Board and County Boards are constituted and required to operate pursuant to the Session Law and seeks a determination as to the extent of his power in N.C. Const. Art. III, Section 5(4) contradistinguished from the power of Defendants in N.C. Const. Art. III, Section 5(10).

9. Defendants are correct that *Harper v. Hall* is our Supreme Court's most recent case regarding the political question doctrine, but it does not announce a new standard for how to determine whether an issue is a nonjusticiable political question. Compare *Harper*, 384 N.C. at 350, 886 S.E.2d at 431 ("In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government, or there is not a judicially discoverable or manageable standard by which to decide it, or it requires courts to make policy determinations that are better suited for the policymaking branch of government."), with *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962) (stating that a case held to be a political question involves, among other factors, either "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion") and *Cooper I*, 370 N.C. at 407-08, 809 S.E.2d at 107 (describing a political question as "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government" and lack "satisfactory criteria for a judicial determination" (internal quotation marks omitted)).

10. Moreover, the reach of *Harper* is limited to redistricting, the General Assembly's explicit redistricting authority in the Constitution, and the lack of explicit constitutional text prohibiting or limiting the General Assembly's authority, whereas *Cooper I* is limited to a separation of powers challenge where the General Assembly restructures and reconstitutes a board with final executive authority. This Panel cannot look past *Cooper I*, the controlling authority for this specific separation of powers issue, to a case that examines a wholly different authority granted to the General Assembly and relies on different sections of the Constitution, in order to apply the political question doctrine. Accordingly, the Governor's claim is justiciable as a matter of law.

11. Having determined that *Cooper I* is on point with the facts of this case as to justiciability, the Panel now turns to apply the functional *McCrorry* test. First, the Panel concludes that the State Board and the County Boards exercise primarily executive functions. The State Board's duties and authorities have not changed since *Cooper I* was announced, where the Supreme Court determined that the State Board's duties are executive in nature. Likewise, the County Boards perform executive functions in each county.

12. Because the State Board and County Boards exercise executive functions, the question becomes whether the Governor, under the Session Law, has sufficient control. Again, *Cooper I* is controlling. Our Supreme Court has held that “Article III, Section 5(4) of the North Carolina Constitution requires ‘the Governor [to] have enough control over’ commissions or boards that ‘are primarily administrative or executive in character’ ‘to perform his [or her] constitutional duty,’” *Cooper I*, 370 N.C. at 414, 809 S.E.2d at 111 (quoting *McCrorry*, 368 N.C. at 645-46, 781 S.E.2d at 256). The degree of control depends on the ability to appoint members, supervise their activities, and remove them from office. *Id.*

13. The constitutional provision “also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well.” *Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112.

14. Without explicitly defining “control,” it is still clear that the Session Law infringes upon the Governor's constitutional duties. First, all appointment powers were removed from the Governor and given to the General Assembly for the State Board and the County Boards. Second, Defendants have the final decision on the Chair and Executive Director of the State Board if the members are unable to reach a majority decision. Similarly, if the County Board members cannot reach a decision on their Chair, the General Assembly selects the Chair. Finally, the Governor has no power to remove members of the State Board and County Boards, whether for lack of attendance or for cause. *Cooper I*, 370 N.C. at 416, 809 S.E.2d at 112-13 (concluding that the statute at issue left the Governor with little control over the Board because, in part, it “significantly constrain[ed] the Governor’s ability to remove members”). Defendants’ actions are the most stark and blatant removal of appointment power from the Governor since *McCrorry* and *Cooper I*. *Cooper I* and *McCrorry* control, and the Session Law must be permanently enjoined.

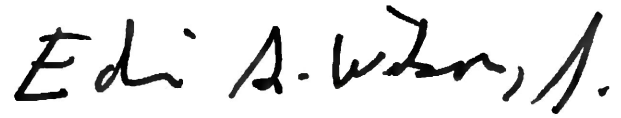
THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff’s Motion for Summary Judgment is GRANTED.
2. Defendant’s Motion to Dismiss and Motion for Judgment on the Pleadings are DENIED.
3. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and Rules 57 and 65 of the North Carolina Rules of Civil Procedure, the Panel hereby enters final judgment declaring that the following are unconstitutional and are therefore void and permanently enjoined:

Parts II, IV, and VIII of Session Law 2023-139.

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SO ORDERED, this the 8th day of March, 2024.

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The Honorable Edwin Wilson
Superior Court Judge

Handwritten signature of Lori Hamilton in black ink.

The Honorable Lori Hamilton
Superior Court Judge

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The Honorable Andrew Womble
Superior Court Judge