

NORTH CAROLINA COURT OF APPEALS

JOSHUA H. STEIN, in his official
capacity as GOVERNOR OF THE
STATE OF NORTH CAROLINA

Plaintiff-Appellee/Appellant,

v.

DESTIN C. HALL, in his official
capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; and PHILIP E.
BERGER, in his official
capacity as PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE;

Defendants-Appellants/Appellees.

and

BRADFORD B. BRINER, in his official
capacity as NORTH CAROLINA
STATE TREASURER

Intervenor-Defendant-Appellee.

From Wake County
No. 25CV004705-910

LEGISLATIVE DEFENDANTS' APPELLEE BRIEF

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LEGISLATIVE DEFENDANTS' APPELLEE BRIEF

INTRODUCTION

The General Assembly's recent changes to the Utilities Commission and the Building Code Council ("BCC") represent a legitimate exercise of the General Assembly's express and plenary power to organize State agencies and assign duties to members of the Council of State. The Court should accordingly affirm the trial court's order upholding those changes as constitutional.

Contrary to the Governor's claims, the General Assembly's changes to the Utilities Commission and the BCC do not prevent the executive branch from performing any of its core functions and thus do not violate the separation of powers. In both cases, the executive branch continues to hold a majority of the appointments. In the case of the Utilities Commission, the only change is that one of the appointments previously made by the Governor has now been transferred to the Treasurer. But the executive branch still appoints three of the Commission's five members. In the case of the BCC, the Governor himself is authorized to appoint a seven of the board's thirteen members—an outright majority. He thus does not challenge the allocation of appointments, but focuses on the board's quorum requirement, which requires a supermajority to act before the BCC amends the State's building code.

Tellingly, the Governor's arguments on appeal look very different from those he originally asserted. In his Complaint, he asserted that the Vesting Clause¹ and

¹ N.C. Const. art. III, § 1 (the "Vesting Clause").

the Take Care Clause² require that *all* executive power be vested in the Governor, and the “Governor alone,” since only the Governor has the power to “take care that the laws be faithfully executed.” (R pp 5, 18). He thus asserted that the amendments to the Utilities Commission and BCC violate the Court’s decisions in *McCrorry*,³ *Cooper I*,⁴ and *Cooper Appropriations*⁵ because they do provide him “enough control” over those bodies to ensure they act in accordance with his “views and priorities.” (R pp 14, 20, 22).

But the Supreme Court has now eviscerated the Governor’s theory. In a published order issued this past May regarding the Board of Elections, the Supreme Court confirmed that our State’s executive branch does not consist of just the Governor, but also nine other elected, constitutional officers who comprise the Council of State. *See Stein v. Berger*, 387 N.C. 575, 575 (2025) (“*Stein I*”); *see also* N.C. Const. art. III, § 7(1). The Constitution also expressly authorizes the General Assembly to assign duties to other members of the Council of State, which includes the Treasurer. N.C. Const. art. III, § 7(2). This renders the Court’s decisions in *McCrorry*, *Cooper I*, and *Cooper Appropriations* “inapposite” to cases involving the allocation of power among the Governor and other members of the Council of State, as each case expressly noted. *Stein I*, 387 N.C. at 577.

² N.C. Const. art. III, § 5(4) (the “Take Care Clause”)

³ *State ex rel. McCrorry v. Berger*, 368 N.C. 633 (2016) (“*McCrorry*”).

⁴ *Cooper v. Berger*, 370 N.C. 392 (2018) (“*Cooper I*”).

⁵ *Cooper v. Berger*, 376 N.C. 22 (2020) (“*Cooper Appropriations*”).

Indeed, neither *McCrorry* nor any of its progeny addressed structures similar to those applied to the Utilities Commission or the BCC. And aside from *Stein I*, the only court to have done so—a three-judge panel of the superior court—has held them constitutional.⁶ Analyzing each using a functional, “case-by-case” analysis, as *McCrorry* purports to require, reveals that both are legitimate, exercises of the General Assembly’s power to reorganize State government. They thus do not violate the separation of powers, as the trial court correctly held.

BACKGROUND

The Governor’s lawsuit challenges three otherwise unrelated pieces of legislation adopted by supermajorities of the House and Senate over his veto.

First, the Governor challenges Sections 3F.1 of Session Law 2024-57 (“Senate Bill 382”), which changes the appointment of the Utilities Commission. Under Senate Bill 382, the Utilities Commission continues to consist of five members, three appointed by the executive branch and the remaining two appointed by the General Assembly. See N.C. Sess. L. 2024-57, § 3F.1(a) (amending N.C. Gen. Stat. § 62-10). The only difference is that Senate Bill 382 transfers one of the executive branch’s

⁶ See Order on Summary Judgment, *Cooper v. Berger, et al.*, No. 23-CV-028505-910 (Wake Co. Super. Ct., filed Feb. 28, 2024) (upholding changes to the Environmental Management Council, Wildlife Resources Council, and Coastal Resources Commission, which split a majority of appointments between the Governor and another member of the Council of State, as constitutional); see also *id.* (upholding changes to the Residential Code Council similar to those involving the BCC as constitutional). The Governor has appealed the trial court’s order in that case, which is pending as Case No. 24-440.

appointments from the Governor to the Treasurer, whose appointee took office effective 30 June 2025. *Id.*

Second, the Governor challenges Section 5.1 of Session Law 2024-49 (“Senate Bill 166”), which modified the structure of the BCC. Senate Bill 166 reduces the BCC’s membership from 17 to 13. Under the new structure, the Governor appoints a seven-member majority, while the General Assembly appoints a minority of six (three at the recommendation of the Speaker of the House of Representatives and three at the recommendation of the President Pro Tempore of the Senate). The Governor’s appointees are subject to Senate confirmation under Article III, Section 5(8) of the North Carolina Constitution. *Id.* And Senate Bill 166 requires a nine-member quorum to approve any action. N.C. Sess. L. 2024-49, §§ 5.1(a), (c) (amending N.C. Gen. Stat. §§ 143-136 (a), (e)).

Finally, the Governor challenges Section 3A.1 of Senate Bill 382, which requires that the Governor fill vacancies on the appellate court with judges from the same political party (and which was addressed in Legislative Defendants’ opening brief).

On 24 June 2025, the trial court, which consisted of a three-judge panel, granted summary judgment for the Legislative Defendants upholding its changes to the Utilities Commission and the BCC. The panel granted summary judgment for the Governor on his challenge to the judicial vacancy statutes. Both parties, including the Treasurer who intervened, timely appealed as to those issues decided against them.

This brief addresses the General Assembly's changes to the Utilities Commission and the BCC, for which Legislative Defendants are Appellees.

STANDARD OF REVIEW

As the Supreme Court has repeatedly confirmed, the Court must presume that laws passed by the General Assembly are constitutional. *McKinney v. Goins*, 387 N.C. 35, 42, 911 S.E.2d 1, 7 (2025). 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 (2023) (emphasis added). “In cases of first impression,” like this one, “the presumption of constitutionality is especially strong.” *Stein I*, 387 N.C. at 577.

The Governor's claims involve a facial challenge, which represents the “most difficult challenge to mount successfully.” *State v. Bryant*, 359 N.C. 554, 564 (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 (2018) (“*Cooper Confirmation*”) (citation omitted)). 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 (emphasis added). In other words, the constitutional violation must be “plain and clear.” *McCrory*, 368 N.C. at 639 (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.

The requirements of this standard protect the separation of powers. “[T]he idea of the judiciary ‘preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations.” *Harper*, 384 N.C. at 323 (quoting *McCrorry*, 368 N.C. at 650 (Newby, J., concurring in part and dissenting in part)). The presumption of constitutionality thus serves as “a critical safeguard that preserves the delicate balance between this Court’s role as the interpreter of our [c]onstitution and the legislature’s role as the voice through which the people exercise their ultimate power.” *McKinney*, 387 N.C. at 43, 911 S.E.2d at 8.

The Governor cannot meet this burden.

ARGUMENT

The trial court correctly held the General Assembly’s changes to the Utilities Commission and the BCC are constitutional. Under our State Constitution, the General Assembly has express and inherent authority to reorganize State government, to allocate duties among members of the Council of State, and to decide who will appoint members of the statutory boards and commissions it creates. No provision of the Constitution prohibits the General Assembly from enacting the changes at issue, and nothing about those changes prevents the executive branch from carrying out any of its core functions. The analysis should end there.

On appeal, the Governor can no longer rely on the original argument raised in his Complaint—that the Vesting Clause and Take Care Clause grant the Governor

exclusive powers which require that he “alone” control a majority of every board and commission. Nor can he show that this case is governed by *McCrorry*. The Supreme Court’s decision in *Stein I* forecloses both lines of attack.

The Governor’s search for a new argument fares no better. Just as before, his claims rest on a fundamental misreading of our Constitutional text, history, and precedent. Indeed, most merely put a new spin on the same arguments the Supreme Court rejected in *Stein I*.

I. THE CHANGES TO THE UTILITIES COMMISSION AND THE BCC REPRESENT A LEGITIMATE EXERCISE OF THE GENERAL ASSEMBLY’S AUTHORITY TO REORGANIZE STATE GOVERNMENT.

The Utilities Commission and BCC are creatures of statute. No provision of the Constitution requires that they exist, that they be organized in any particular manner, that the Governor appoint their members, or that he be able to control their actions. Instead, the General Assembly, having created both boards, retains authority to reorganize them and to choose who will appoint their members.

Unlike the federal constitution, “our [State] constitution does not enumerate the powers of the General Assembly.” *Cooper Confirmation*, 371 N.C. at 815. 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 (quoting *Pope v. Easley*, 354 N.C. 544, 546 (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.*

This means the General Assembly has “broad power to reorganize the executive branch.” *Stein I*, 387 N.C. at 579. Even if there were no express Constitutional provision on point, the General Assembly still would have inherent authority to organize State agencies and adopt Senate Bill 382’s and Senate Bill 166’s changes to the Utilities Commission and BCC.

But here the General Assembly does not have to rely only on its inherent power. Its power to organize government and assign duties to the members of the executive branch is reflected directly in the constitutional text. Article III, Section 5(10), entitled “Administrative Reorganization,” provides that “[t]he *General Assembly* shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State” and has the authority to “alter them from time to time.” N.C. Const. art. III, § 5(10) (emphasis added). It then sets out procedures for the Governor to make or propose changes, but reserves the final authority over these decisions for the General Assembly. *Id.*

The Constitution also grants the General Assembly power to allocate duties among the Council of State. Along with the Governor, the Constitution creates nine “other elective officers” within the executive branch. *See* N.C. Const. art. III, § 2(1) (establishing the Lieutenant Governor), § 7(1) (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). It then grants the General Assembly express authority to assign duties to those officers by providing that “their respective duties shall be prescribed by law.”

N.C. Const. art. III, § 7(2); *see also id.* § 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”).

The General Assembly’s power to structure State agencies also includes the power to determine who appoints statutory officers (as well as the power to reserve those appointments for itself). *See McCrory*, 368 N.C. at 649 (concluding that the General Assembly has the power to appoint statutory officers).⁷ As a result, the Supreme Court’s separation of powers decisions all recognize that whether to create, eliminate, or move a 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 (emphasis added); *Stein I*, 387 N.C. at 579; *McCrory*, 368 N.C. at 643-44, 781 S.E.2d at 255-56;.

The General Assembly’s constitutional power to determine who appoints statutory officers is an outgrowth of its general power to make laws and establish the policies that govern the executive branch. *See, e.g., Rhyne v. K-Mart Corp.*, 358 N.C.

⁷ As the Supreme Court explained in *McCrory*, the People have refused to relinquish the power to determine who appoints statutory officers. *See McCrory*, 368 N.C. 639-644. While the Constitution of 1868 provided for the direct election of the Council of State and granted the Governor exclusive power to appoint both constitutional and statutory officers, the latter provisions were short-lived. Such an expansive shift of the appointment power to the Governor was “not . . . satisfactory to the dominant sentiment of the State.” *State ex rel. Salisbury v. Croom*, 167 N.C. 223, 226 (1914). Accordingly, just eight years later in 1876, the People amended the appointments clause to return control over the appointment of statutory officers to the General Assembly. John V. Orth & Paul Martin Newby, *The N.C. State Constitution*, p.25 (2d ed. 2013). The power to appoint decide who appoints statutory officers has remained with the General Assembly since. *McCrory*, 368 N.C. at 644.

160, 169–70, 594 S.E.2d 1, 8–9 (2004) (“The legislative branch is without question ‘the policy-making agency of our government’”). In fact, the ability to structure administrative agencies serves as a primary *check* on the exercise of executive power. Tension between, and within, executive agencies serves as a “procedural safeguard” against the use and abuse of executive power. *See Adams v. N. Carolina Dep’t of Nat. & Econ. Res.*, 295 N.C. 683, 698 (1978) (“Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated.”). It is thus an “essential” tool to ensure executive officials carry out the policies reflected in the State’s laws. *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 409 (1980) (noting that controls imposed through the Administrative Procedure Act, including the requirement that agencies submit rules to the Rules Review Commission before enactment, “minimize the potential of unfairness in embodying” too much power “in one person or agency”).

In sum, the General Assembly’s reorganization of the Utilities Commission and Building Code Council are legitimate exercises of its power to establish, organize, and reorganize State agencies, as well as the General Assembly’s express power under Article III, Section 7(2) to assign the duties of the “other elective officers” who comprise the Council of State.

II. THE SUPREME COURT HAS REJECTED THE GOVERNOR’S ARGUMENT THAT *McCRORY* “CONTROLS” THIS CASE.

Although the Governor maintains that this case is “controlled” by *McCrorry*, the Supreme Court already rejected that argument in *Stein I*.

In *Stein I*, the Governor challenged legislation that transferred the Board of Elections to the Department of the State Auditor and granted the Auditor power to appoint all of the board's members. Just as he originally did here, the Governor claimed the Legislature's changes to the Board of Elections violated *McCrorry* because they supposedly reassigned the Governor's "exclusive" duties under the Vesting Clause and Take Care Clause to another member of the Council of State. *Stein I*, 587 at 575.

In doing so, the Governor ignored the Supreme Court's repeated warnings that its decisions in *McCrorry*, *Cooper I*, and *Cooper Confirmation* do not apply to cases involving the allocation of duties to other members of the Council of State. See *McCrorry*, 368 N.C. 633, 646 n.5 ("Our opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State."); *Cooper I*, 370 N.C. 392, 407 n.4 (same); *Cooper Confirmation*, 371 N.C. 799, 806 n.5 (same). The trial court, following the Governor's lead, accepted his arguments and treated those cases as "dispositive."

In May, the Supreme Court affirmed this Court's decision to stay the trial court's order, holding that the trial court had "unambiguously misapplied [the Supreme] Court's precedent." *Stein I*, 387 N.C. at 576-78 ("The three-judge panel mistakenly concluded that *McCrorry*, *Cooper I*, and *Cooper Confirmation* controlled this case.").

The Court flatly rejected the Governor’s arguments. As the majority explained, “[i]t is well settled that the state constitution apportions executive power among the ten individually elected officers of the Council of State.” *Stein I*, 387 N.C. at 577. Thus, while “the Governor heads the executive branch, . . . [he] does not unilaterally exercise the executive power.” *Id.* Instead, the Constitution expressly charges *the General Assembly* with authority to allocate duties among the officers who serve on the Council of State. *See* N.C. Const art. III, § 7(2). Likewise, the Take Care Clause does not grant the Governor “exclusive power.” Instead, the Governor’s obligation to “take care that the laws be faithfully executed” in N.C. Const. art. III, § 5(4) reflects “*a nonexclusive duty conferred upon all ten Council of State members.*”

This Court should heed the Supreme Court’s warnings. The Supreme Court’s prior decisions in *McCrorry*, *Cooper I*, and *Cooper Confirmation* did not address the structures at issue here, both of which allocate a majority of appointments to the executive branch. Those cases are thus inapt. At minimum, they do not apply to Senate Bill 382’s changes to the Utilities Commission, which merely transfer one of the executive branch’s appointments from one constitutional official to another.

III. THE TRIAL COURT CORRECTLY HELD THE STRUCTURE OF THE UTILITIES COMMISSION IS CONSTITUTIONAL.

Faced with *Stein I*, the Governor offers a series of alternative arguments why the General Assembly’s changes to the Utilities Commission are supposedly unconstitutional. None, however, withstands scrutiny.

A. Senate Bill 382's Changes to the Utilities Commission Do Not Implicate the Separation of Powers.

To begin with, the General Assembly's decision to reassign one of the executive branch's appointments to the Utilities Commission to the Treasurer does not implicate the Separation of Powers. Instead, it reflects a decision that the General Assembly is expressly empowered to make.

By its text, the Separation of Powers Clause only addresses the separation of powers *between* branches; it does not dictate the allocation of power *within* a single branch. 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.”).⁸ The Supreme Court has consistently framed separation of powers cases in the same manner. Thus, in *McCrorry*, the Court explained that a separation of powers violation occurs only when legislation “unreasonably disrupts a *core power of the executive.*” *McCrorry*, 368 N.C. at 645 (emphasis added); *Harper*, 384 N.C. at 298 (“A violation of separation of powers only occurs when one *branch* of government exercises, or prevents the exercise of, a power reserved for another *branch* of government.” (emphasis added)).

⁸ As the Supreme Court has explained, the Separation of Powers Clause “does not establish the various powers” that belong to each branch. *Harper*, 384 at 298, 886 S.E.2d at 399. Thus, the clause should “be considered as general statement of broad, albeit fundamental constitutional principle’ and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance. *Id.* (citation omitted).

This renders Senate Bill 382's changes to the Utilities Commission readily distinguishable from *McCrorry* and *Cooper I*. The Governor and the Treasurer are both elected constitutional officers *within* the executive branch. See N.C. Const. art. III, §§ 1 (establishing the office of Governor), 7(1) (establishing the Treasurer and "other elective officers"). Senate Bill 382 does not take any power away from the executive branch, nor does it interfere with the performance of any of its core functions. Indeed, the *executive branch* continues to appoint three of the commission's five members—a majority. The only difference is that the Treasurer, rather than the Governor, now makes one of those appointments. That is not a separation of powers problem. See *Stein I*, 387 N.C. at 577 ("The present case concerns the General Assembly's ability to reassign certain duties among executive constitutional officers within the executive branch. It does not implicate the classic separation of powers question of whether certain functions belong in the executive or legislative branches. This renders *McCrorry*, *Cooper I*, and *Cooper Confirmation* inapposite, as each case explicitly noted.").

Reassigning an appointment from the Governor to the Treasurer also does not implicate any other limit imposed by the Constitution. As the Court explained in *Stein I*, executive functions, powers, and duties fall into three categories: (i) powers "prescribed by the constitutional text itself"; (ii) powers "inherent in a given executive role"; and (iii) powers "assigned by law." *Stein I*, 387 N.C. at 578-79. "Although some executive functions, powers, and duties are exclusive to one of the ten Council of State

members, other could plausibly be assigned to several, or even all, of the ten.” *Id.* 387 N.C. at 578.

The Constitution expressly grants the General Assembly authority to assign duties to Council of State members when it provides that “their respective duties shall be prescribed by law.” N.C. Const. art. III, § 7(2). Thus, “unless a function or power is constitutionally committed to a particular executive branch office, it is the constitutional responsibility of the legislature” to determine to which officer it will be assigned. *Stein I*, 387 N.C. at 580 (Berger, J., concurring) (citing *McCrorry*, 368 N.C. at 633 (Newby, J., concurring in part)). “Put another way, the ultimate responsibility for assigning duties among executive branch officials, absent an express commitment by the constitution, ‘has indeed been squarely placed int the hands of the General Assembly.’” *Id.* (citation omitted).

The power to appoint members of the Utilities Commission is a power “assigned by law.” The Constitution does not mention the Utilities Commission, much less require that the Governor appoint its members. And nothing inherent in the functions of the Governor require that he have the exclusive power to make such appointments. Indeed, the Court has repeatedly held that the “appointment power in North Carolina is ‘not an executive, legislative, or judicial power, but only a mode of filling the offices created by law.’” *Cooper Confirmation*, 371 N.C. at 813 (quoting *Cunningham v. Sprinkle*, 124 N.C. 638, 643 (1899)). Thus, the power to appoint members to the Utilities Commission is simply a power created by an act of the

General Assembly. It therefore can be assigned, or reassigned, to any member of the Council of State in accordance with Article III, Section 7(2).

B. *McCrory* is Inapposite.

As a second argument, the Governor boldly proclaims that “*McCrory* already held that [the Utilities Commission’s] structure violates the separation of powers.” (Gov. Br. at 21). Not so.

The Supreme Court made clear in *Stein I* that *McCrory* is “inapposite.” *Stein I*, 387 N.C. at 577. *McCrory* dealt only with the allocation appointments between the executive branch and the General Assembly. Since the Governor was the only executive branch official involved, the Court had no opportunity to address the allocation of appointment authority among executive branch officials—nor could the Court have reached that issue as part of its holding.

In his brief, the Governor twists *McCrory*’s holding, arguing it suggests that the Governor must have sufficient control over any board or commission that is housed within a “cabinet agency.” (Gov. Br. at 26 (citing *McCrory*, 368 N.C. at 646 n.5)). Yet, once again, *McCrory* did no such thing. Yes, the Court stressed that its decisions took “no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State.” *McCrory*, 368 N.C. 633, 646 n.5; *Cooper I*, 370 N.C. 392, 407 n.4 (same); *Cooper Confirmation*, 371 N.C. 799, 806 n.5 (same). But that is not the same as holding that the Governor must appoint a majority of every board and commission housed within a cabinet agency. Indeed, since *McCrory*, *Cooper I*, and *Cooper Confirmation* only involved the Governor, any such statement would have been mere

orbiter dicta. *Berens v. Berens*, 284 N.C. App. 595, 601 (2022) (“The mandate itself is limited to holdings made by this Court in response to issues presented on appeal; any other discussions made within the opinion is *obiter dicta*.” (citation omitted)).⁹

Nor does anything about *McCrorry*’s logic require that the Governor must control a majority of appointments to any board or commission housed within a cabinet agency. *McCrorry* only held that an arrangement where the General Assembly appoints a majority of board or commission’s members gives it—rather than the executive branch—too much control and thus interferes with the executive branch’s take care obligation. *McCrorry*, 368 N.C. at 645, 781 S.E.2d at 256 (emphasis added). But, as the Supreme Court held in *Stein I*, the duty to “take care that the laws be faithfully executed” is not one that belongs exclusively to the Governor. *Stein I*, 387 N.C. at 578, n. 4. Instead, it may be assigned to any Council of State member, “or even to all ten.” *Id.*

The Governor’s position also conflates the power to appoint with the power to control. The Treasurer does not “control” the Utilities Commission, or its execution of the law, merely because he appoints one Commission member. This is consistent with the principle that the power to appoint an official does not involve the exercise of

⁹ The Court in *McCrorry* also acknowledged that legislation placed the Department of Environmental and Natural Resources (DENR) within one of the Governor’s cabinet agencies. 368 N.C. at 646 n.5 (citing N.C. Gen. Stat. §§ 143B-6(6), 143B-9). But the Court did so mainly to note that DENR falls within the “Governor’s purview” before making the additional point that the legislation allowed the boards and commissions, a majority of which were appointed by the legislature, to overrule DENR’s permit decisions—an arrangement the Court concluded gave the General Assembly “too much control.” *Id.* at 646.

executive power, but is instead merely a means to fill the office. *Cooper Confirmation*, 371 N.C. at 813 (quoting *Cunningham*, 124 N.C. at 643); *see also McCrory* 368 N.C. 633 (Newby, J. concurring in part and dissenting in part) (citing the Utilities Commission as an example of this principle because it was independent commission performing judicial functions but residing in executive branch with members appointed by Governor subject to legislative confirmation).

Thus, try as he might, the Governor cannot fit this case in the *McCrory* box. The Court should decline his invitation to make the same mistake as the trial court in *Stein I* by reading *McCrory* to “control” situations it never addressed.

C. The Utilities Commission Does Not Perform Predominantly Executive Functions.

McCrory and *Cooper I* are inapposite for another, possibly more fundamental, reason. Even under the Governor’s own formulation, those cases only apply to boards and commissions that are “predominately executive in character” and which “exercise final executive authority.” *McCrory*, 368 N.C. at 646. The Utilities Commission, however, does not fit that test.

The primary functions of the Utilities Commission involve rulemaking and ratemaking, *see* N.C. Gen. Stat. §§ 62-23; 130-159.2 (which are quasi-legislative functions), as well as conducting hearings, factfinding, and adjudicating disputes (which are quasi-judicial). *See id.* §§ 62-23, -40, -60, -110.1. The governing statutes recognize these different functions and require that “[t]he Commission . . . separate its administrative or executive functions, its rule making functions, and its functions

judicial in nature to such extent as it deems practical and advisable in the public interest.” N.C. Gen. Stat. § 62-23.

These are not predominantly executive or administrative functions. “The rate making activities of the Commission are a legislative function. Rule making is likewise an exercise of the delegated legislative authority of the Commission, under G.S. 62-30 and G.S. 62-31, to supervise and control the public utilities of this State and to make reasonable rules and regulations to accomplish that end.” *State ex rel. Utilities Comm’n v. Edmisten*, 294 N.C. 598, 603, 242 S.E.2d 862, 866 (1978) (internal citation omitted). This quasi-legislative role is a substantial component of the Commission’s duties. N.C. Gen. Stat. §§ 62-31, -32(b), -43.

The Commission is also given “quasi judicial powers; it is made a court of record, primarily for the purpose of preserving its records and facilitating review.” *Atl. Greyhound Corp. v. N. Carolina Utilities Comm’n*, 229 N.C. 31, 35, 47 S.E.2d 473, 476 (1948). Indeed, its staff includes “hearing examiners; court reporters; a chief clerk and deputy clerk; a commission attorney and assistant commission attorney,” among others. N.C. Gen. Stat. § 62-14(a). The governing statutes provide that “the Commission may exercise all powers and jurisdiction of a court of general jurisdiction—including the power to enter a declaratory judgment—over matters pertaining to public utilities and their rates, services, and operations.” *State ex rel. Utilities Comm’n v. Bald Head Island Transportation, Inc.*, 296 N.C. App. 199, 209, (2024). For example, the Commission is statutorily tasked with serving as an arbiter in disputes involving public utilities, with its final judgment having the same force

and effect as a judgment in superior court in that county. N.C. Gen. Stat. § 62-40. It may conduct “formal investigations where a record is made of testimony under oath[.]” *Id.* § 62-60 (recognizing this as a judicial function).

It also has detailed rules for conducting quasi-judicial proceedings. *See* N.C. Gen. Stat. §§ 62-60 to -89. These include, for example, rules for *ex parte* communications, *id.* § 62-70, practice and procedure, *id.* § 62-72, and the burden of proof, *id.* § 62-75. For practitioners before the Commission, there are rules for submitting findings of fact, briefs, and oral argument. *See, e.g., id.* § 62-78. And for the Commission, there are requirements for written orders or recommended orders. *E.g., id.* §§ 62-76(c), -78, -79. It also imposes its own appellate procedure and requirements. *Id.* §§ 62-90 to -98.

Even, certificates of convenience or need, which the Governor claims represent the exercise of “final executive authority,” (Gov. Br. at 23 (referencing N.C. Gen. Stat. §§ 62-110, -110.1)), are, in fact, also the product of a quasi-judicial process. “As a condition for receiving a certificate [of public convenience or need],” the Commission must first hold a public hearing to consider information submitted by the applicant in support of their petition for a certificate of public convenience or need. N.C. Gen. Stat. § 62-110.1(e). During such a hearing, the Commission reviews evidence presented by the applicant, *id.* § 62-110.1, and weighs that evidence and its credibility. *See State ex rel. Utilities Comm’n v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 569 (1997) (“The credibility of the testimony and the weight to be accorded it are for the Commission to decide[.]” (citation omitted)) (appeal from decision of Utilities

Commission regarding issuance of certificate). Thus, ultimate issuance of a certificate is not pursuant to an executive process; it is accomplished through a judicial one.

Consequently, because the Utilities Commission is not predominately executive in character, *McCrorry* and its progeny are inapplicable.

D. Senate Bill 382's Changes to the Utilities Commission Do Not Violate the Administrative Departments Clause.

Next, the Governor contends that assigning an appointment to the Treasurer violates the "Administrative Departments Clause" in Article III, Section 11. According to the Governor, that clause requires the General Assembly to assign Council of State members "only duties that are sufficiently related to the 'major purpose' of the member's core constitutional functions." (Gov. Br. at 27).

But, once again, the Governor relies on a gloss rather than the constitutional text. Article III, Section 11 requires that, "[n]ot later than July 1, 1975, all administrative agencies shall be grouped into not more than 25 principal administrative departments, so as to group them as far as practicable according to their major purposes." N.C. Const. Art. III, Section 11.

Thus, by its text, the Administrative Departments Clause addresses only the departments in which agencies are located—it does not address the allocation of duties between Council of State members or who may be assigned the duty to appoint members of boards and commissions created by the General Assembly. This is an important distinction, since the power to appoint an official is different from

exercising the power of the position. *Cooper Confirmation*, 371 N.C. at 813 (quoting *Cunningham*, 124 N.C. at 643).¹⁰

History, too, confirms this. The Administrative Departments Clause was adopted as an amendment to the Constitution in 1970. Soon After, the General Assembly enacted the Executive Reorganization Act of 1971 (“ERO”), N.C. Gen. Stat. § 143A-1, *et seq.*, to implement it. Together, Section 11 and the ERO were an administrative solution to a state government that had, at the time, “an array of 200 state agencies of various titles and descriptions[.]” *Report of the North Carolina State Constitution Study Commission 1968*, p. 130 (“*Study Commission*”). The solution was to cut those 200 agencies down to 25. N.C. Const. Art. III, § 11. But as the Constitutional Study Commission noted, under the proposed (and later adopted) Article III, Section 11,

The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily.

¹⁰ Indeed, if one were to adopt the Governor’s interpretation of the Administrative Departments Clause, it would mean that *McCrorry* itself is wrongly decided, since it held that the General Assembly may choose in its discretion who will appoint statutory boards and commissions, and may even retain such appointments for itself. *McCrorry*, 368 N.C. at 661. It would also invalidate other arrangements within State government that have long been treated as constitutional in which officials in one branch are charged with appointing offices housed in another, or which allow the branches to share appointments. *See, e.g.*, N.C. Gen. Stat. § 7A-752 (providing that the head of the Office of Administrative Hearings shall be appointed by the Chief Justice); *see also id.* § 7A-375 (Judicial Standards Commission) (providing for thirteen members severally appointed by the Chief Justice, State Bar Council, Governor, and General Assembly).

Study Commission, pp. 131-132. In other words, the amendment was not intended to limit the General Assembly's plenary authority to reorganize State government, including the power to assign duties to Council of State members.

Indeed, no court has ever held that the Administrative Departments Clause limits the General Assembly's otherwise plenary power to assign duties to Council of State members under Article III, Section 7(2). Indeed, the majority in *Stein I* clearly stated powers that are neither expressly or inherently assigned to a single officer may be "plausibly assigned to several, or even all, of the ten" Council of State members. 387 N.C. at 578, 915 S.E.2d at 148. Nowhere did the majority suggest that the General Assembly's discretion under Article III, Section 7(2)—which, of course, represents a policy decision—was somehow limited by the Administrative Departments Clause.

E. The Court Should Reject the Governor's Novel "Core Function" Test.

In the absence of any express limit on the General Assembly, the Governor tries to leverage the language of "major purpose" to imply one. Relying on the concurrence of just a single justice, he suggests that permitting the Treasurer to appoint one Utilities Commission member violates the constitution because the regulation of utilities has nothing to do with the Treasurer's "core constitutional role." But the rule he cites was not adopted by the majority in *Stein I*, and thus is not mentioned anywhere in majority's opinion.

Prohibiting the General Assembly from assigning Council of State members any duty that falls outside their "core constitutional role" would also create an

unworkable rule. Most of the positions on the Council of State—such as the Commissioner of Labor, Commissioner of Agriculture, Commissioner of Insurance, or Auditor—do not have any historical or traditional function within government that the Court might use determine what the Founders intended their “core constitutional role” to be.

Indeed, the Governor struggles to try to define the Treasurer’s “core constitutional role.” In his brief, he asserts that the Treasurer’s role is “to ensure that ‘no money shall be drawn from down from the State treasury but in consequence of appropriations made by law’ and to ‘publish annually’ ‘an accurate account of the receipts and expenditures of State funds.’” (Gov’s App. Br. at 27 (citing N.C. Const. art. V, § 7)). But those provisions do not explicitly refer to the Treasurer. Instead, they have typically been seen as a limits placed on all executive officials that are intended to protect the General Assembly’s exclusive power of the purse. *See Cooper Appropriations*, 376 N.C. at 37 (“The appropriations clause ‘states in language no man can misunderstand that the legislative power is supreme over the public purse.’” (citation omitted)). Nowhere does the Constitution say that these constitute the “core constitutional roles” of the Treasurer, or that his role is limited to just the two functions the Governor identifies.

The Governor also fails to explain what test should be applied to duties that relate to, but do not squarely fit within, a Council of State member’s “core role.” For instance, the Treasurer is charged with overseeing the State Health Plan, the State and Teachers’ Employee Retirement Plan, and the Local Government Commission.

Is it okay to assign these duties to the Treasurer because they are “substantially related” to his core functions—whatever those may be? What about duties that are only “rationally related”? But again, the only duty the Treasurer performs under this statute is to appoint an executive official. That person will actually be responsible for implementing the functions of the Commission. Our courts have not said the duty of appointment is a core role of any one individual, thus it can—and has—been given to numerous officers in government.

In the end, which official should perform which duty is a policy decision for which there is no manageable judicial standard. As a result, it is likely a nonjusticiable political question—especially given Article III, Section 7(2) express textual commitment to the General Assembly. But whether not it is justiciable, it is a decision that is committed, at least in the first instance, to the People and their elected representatives in the Legislature. This Court should decline the Governor’s invitation to create limitations on the General Assembly’s power to assign executive duties under Article III, Section 7(2) that otherwise do not exist in the text itself.

F. The General Assembly Does Not “Effectively” Control the Treasurer’s Appointment or a Majority of Appointments to the Utilities Commission.

In a last-ditch effort to overturn Senate Bill 382’s changes to the Utilities Commission, the Governor offers an argument that strains credulity: because Senate Bill 382 gives one of the executive branch’s three appointments to the Treasurer, it somehow allows the General Assembly to “control the Utilities Commission.” (Gov. Br. at 29).

How the Governor gets there is not readily apparent. He points out that, like the Governor's appointment, the Treasurer's appointment is subject to confirmation. But, of course, the Supreme Court has already held that requiring confirmation of executive nominees does not offend the separation of powers. *See Cooper Confirmation*, 371 N.C. at 811-12. He also seems to focus on the fact that since the General Assembly can assign duties to the Council of State members, it can reassign them at any time. (Gov. Br. at 28-29).

None of that amounts to "control over the Commission," and all of it is unwarranted speculation on a facial challenge. The executive branch, not the General Assembly, continues to hold a majority of appointments to the Utilities Commission. And what the Governor asserts is unconstitutional about the Commission is baked into our Constitution: it expressly grants the General Assembly power to organize and reorganize state agencies, to assign their duties and functions, to change them from time to time, and to assign the duties of the officers who comprise the Council of State. N.C. Const. art. III, §§ 5(10), 7(2).

In the end, the Governor's assertion that the General Assembly somehow now "controls" the Commission lacks any basis in law or fact.

IV. SENATE BILL 166's CHANGES TO THE BUILDING CODE COUNCIL ARE CONSTITUTIONAL.

The Governor's challenge to Senate Bill 166 does no better. Under Senate Bill 166, the Governor appoints 7 of the BCC's 13 members and its chair. 2024 N.C. Sess. L. 49, § 5.(a) (N.C. Gen. Stat. § 143•136 (a)-(a1)).

The Governor's appointees thus represent a majority of the BCC. Yet the Governor claims that he does not have enough control over the BCC because (i) he only has a "bare majority of appointments" and a quorum of nine is needed to act; and (ii) he lacks authority to remove members without cause. (*See* Gov. Br. at 31-34). That is incorrect.

To start, the BCC does not perform predominantly executive functions. The BCC's primary function is to "prepare and adopt" the North Carolina building codes, N.C. Gen. Stat. § 143-138, and to establish the procedures by which the code is enforced. *Id.* § 143-139(a). The BCC also hears appeals from enforcement agencies charged with enforcing and administering the code, although its role is limited to providing opinions about the code's proper interpretation. *See id.* § 143-141(b). Importantly, the BCC does not enforce or administer the code. That role is instead delegated to the State Fire Marshal and local building inspectors. *See id.* § 143-139. The BCC's primary role is thus limited to quasi-legislative and quasi-judicial functions. *See Utilities Comm'n v. Edmiston*, 294 N.C. at 603; *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, *aff'd in part, review dismissed in part*, 352 N.C. 671 (2000) (Legislative decisions are "those that affect the entire community because they set general policies . . .").

But even if the BCC performed primarily executive functions, the Governor's arguments would still fail. First, the Governor claims that even though he appoints a majority of the BCC's members, because the law requires a nine-member quorum to act it "deprives the executive branch of sufficient control that the laws

administered by the [BCC] are faithfully executed.” (See Gov. Br. at 32-33). This, of course, assumes that his appointees will always vote together as a bloc in favor of the Governor’s desired policy. It also assumes that none of the General Assembly’s appointees will ever vote for an outcome desired by the Governor. These assumptions are purely speculative, particularly given the diversity of specific construction backgrounds all the appointees must have. An argument of hypothetical circumstances cannot defeat a facial challenge. *McKinney*, 387 N.C. at 44. In any event, if the Governor cannot control the BCC with seven appointees how can the General Assembly control it with only six appointees? The answer is it cannot.

What is more, the General Assembly—as the policy-making branch—is within its authority to prioritize stability in the law. By requiring a higher quorum for the BCC to act, the General Assembly has prioritized stability and the *status quo* in our building code. And if this stability benefits anyone, it benefits the Governor. As the Governor notes, before Senate Bill 166 the BCC consisted of 17 members, all of whom were appointed by the Governor. (See Gov. Br. at 8). The appointees were not subject to confirmation or approval by the General Assembly and the Governor could remove BCC members without cause, at any time. *Id.* In other words, Senate Bill 166’s quorum requirement ensures that only a broad consensus can change policies enacted by a BCC dominated by gubernatorial appointees.

Further, to the extent that the Governor relies on *Cooper I*, his arguments are misplaced. The structure of the BCC is substantially different from the one at issue in *Cooper I*. There, the Court took issue with the fact that the Governor was required

to choose appointees from a list provided by the opposite political *party*, and thus would have to appoint members who were “in all likelihood not supportive of, if not openly opposed to,” his positions. 370 N.C. at 392. The defect in such a regime, the Court held, was that the Governor would be “unable, within a reasonable period of time” to exercise duties under the Take Care Clause. *Id.* But requiring a Democratic governor to appoint Republican officials is a far cry from giving the Governor a majority of appointments but requiring a supermajority to act. Indeed, in *Cooper I* the Court noted that “the General Assembly has the authority to provide the commission with a reasonable degree of independence from short-term political interference and to foster the making of independent, non-partisan decisions.” *Cooper I*, 370 N.C. at 417.

The Governor’s arguments that Senate confirmation and the lack of unfettered removal power inhibit his executive control lack merit. (*See* Gov. Br. at 33-34). The Governor selects his appointees. And as the Supreme Court held recently, “[t]he Governor’s power to nominate is significant, and the ultimate appointee will be a person that he alone has chosen, subject only to an up-or-down vote by the Senate.” *Cooper Confirmation*, 371 N.C. at 801. The Governor may also remove his appointees for “misfeasance, malfeasance, or nonfeasance.” *See* 2024 N.C. Sess. L. 49, § 5.1(a) (amending N.C. Gen. Stat. § 143•136(a1)). Thus, Senate Bill 166’s confirmation requirement still “leaves the Governor with enough control to take care that the laws be faithfully executed, and therefore does not violate the separation of powers clause.” *Id.*

At bottom, the Governor contends that our Constitution entitles him to control every vote the BCC takes. It does not. Nowhere in *McCrory*—on which he relies for this proposition—or any other decision, is it asserted that “enough control” over a board exists only if the Governor has control over its outcomes.

V. THE GOVERNOR’S CHALLENGE TO THE UTILITIES COMMISSION AND THE BCC PRESENT A NONJUSTICIABLE POLITICAL QUESTION.

Ultimately, just as the Court suggested in *Stein I*, the Governor’s challenge to the Utilities Commission and BCC present a nonjusticiable political question, since questions about the proper appointment structure and which duties should be assigned to which Council of State members involve policy decisions, which are expressly committed to the General Assembly and for which there are no manageable judicial standards.

“When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch.” *Harper*, 384 N.C. at 325 (2023). “[C]ourts must refuse to review political questions, that is, issues that are better suited for the political branches.” Here, whether it be regarding appointments to the Utilities Commission or the quorum associated with Building Code Council, the text of the Constitution provides the process by which the political branches decide the best policy; and it does not involve the judicial branch. Even though the political question doctrine was not specifically invoked by the trial court in its decision, it was preserved, (*see* Rule 9(b) Supp., p. 95), and thus presents an alternative basis to affirm the trial court’s ruling.

In *Cooper I*, the Supreme Court noted that an issue was *not* a political question if it required a court to resolve “a conflict between two competing constitutional provisions.” *Cooper I*, 370 N.C. at 412; *see also id.* at 439-40 (Newby, J, dissenting) (“The majority’s approach eliminates the political question doctrine and inserts the judiciary into every separation-of-powers dispute between the political branches.”).¹¹ But later in *Harper*, the Supreme Court rejected the notion that being asked to construe two constitutional provisions was a justiciable issue. It noted that:

a court must refrain from adjudicating a claim when any one of the following is present: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion.

Harper, 384 N.C. at 325. Then more recently, in a related case on whether a law can constitutionally give appointment authority to other Council of State members, a Supreme Court majority on a writ of supersedeas appeared to support the notion that an intra-branch transfer of appointment power was within the express authority of the General Assembly and therefore a potential political question. *See Stein I*, 387 N.C. at 576 (citing *Harper* and the political question doctrine as a basis for staying an order of unconstitutionality); *id.* at 580-81 (Berger, J., concurring) (citing *Harper*

¹¹ If this case reaches the Supreme Court, Legislative Defendants maintain, and thus expressly preserve, the argument that *Cooper I* was wrongly decided, and that allocating statutory appointments, whether between the Council of State members, or to the General Assembly itself, remains a political question.

and discussing the express commitment to the General Assembly). These recent precedents frame the political question here.

The Constitution expressly commits responsibility for assigning duties to the multiple executive officers who serve on the Council of State to the General Assembly in its discretion under Article III, Section 7(2). Except for those specific duties that it assigns to particular officers, the Constitution does not limit the General Assembly's authority to decide which Council of State member should perform which duty—including appointments. Nor does it provide any judicially manageable standards for the Court to use when reviewing those decisions. Deciding which Council of State member is best suited to perform otherwise unassigned duties (especially those duties that exist only by operation of statute) requires the type of policy decision that can be made only by the political branches. *Stein I*, 387 N.C. at 580 (Berger, J., concurring) (“Put another way, the ultimate responsibility for assigning duties among executive branch officials, absent an express commitment by the constitution, has indeed been squarely placed in the hands of the General Assembly.”).

Further, Article III, Section 5(10) provides a specific pathway for the Governor to alter the functions, powers, and duties among the agencies and department heads. If those changes affect *existing law*, the Governor's executive order is presented to the General Assembly and becomes law if there is no action by the legislative branch. How executive powers and duties are disbursed among the Council of State members is a political question that is expressly reserved for the General Assembly, and the

courts do not have any role in second-guessing the policy questions involved in that type of intra-branch dispute.

The issue does not change when examining the Building Code Council. The General Assembly has the express ability to set up a Council and establish its functions, powers, and duties. How that agency must act—be it majority, unanimously, or with a higher quorum than simple majority—is a policy decision within the discretion of the General Assembly in setting up the Council.

CONCLUSION

For each of the foregoing reasons, the Court should affirm the trial court's order granting summary judgment for Legislative Defendants and upholding the General Assembly's changes to the Utilities Commission and BCC.

Respectfully submitted, this the 30th day of September, 2025.

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House of Representatives*

CERTIFICATION

The undersigned counsel of record certifies in accordance with N.C. R. App. P. 28(j)(2) the foregoing Legislative Defendants/Appellants' Opening Brief, filed in proportionally spaced type, contains no more than 8,750 words, including footnotes and citations in the text, but excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance, and counsel's signature block.

/s/ Matthew Tilley

Matthew F. Tilley (N.C. Bar No. 40125)

ADDENDUM

Order on Summary Judgment, *Cooper v. Berger, et al.*,
No. 23-CV-028505-910 (Wake Co. Super. Ct., filed Feb. 28, 2024) Add. 1-24

DATE: February 28, 2024
TIME: 02/28/2024 12:37:41 PM

WAKE COUNTY
SUPERIOR COURT JUDGES OFFICE

BY: K. Myers

NORTH CAROLINA

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

WAKE COUNTY

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

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

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

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

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

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

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

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

A. Residential Code Council

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

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

48. Applying the three-factor test from *McCrorry*, 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 *McCrorry*, and do not hold now, that the entire concept of an “independent” agency is totally foreign to North Carolina constitutional law.”)

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

60. Applying the three-factor test from *McCrorry*, 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. *McCrary*, 368 N.C. at 647, 781 S.E.2d at 257; N.C. CONST. art. I, § 6.

E. Board of Transportation

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

66. Applying the three-factor test from *McCrorry*, 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. *McCrorry*, 368 N.C. at 647; N.C. CONST. art. I, § 6.

CONCLUSION

It is therefore ORDERED, ADJUDGED, AND DECREED that:

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

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

3. Pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and North Carolina Rules of Civil Procedure 57 and 65, the Court hereby enters final judgment declaring that the following, and only the following, are unconstitutional and are therefore void and permanently enjoined:

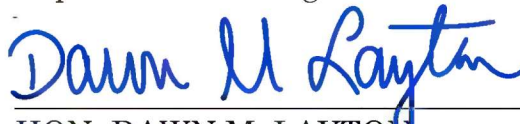
- a. Part I of Session Law 2023-136 ("Senate Bill 512") amending N.C. Gen. Stat § 143B-437.54 (EIC) and
 - b. Part IV of Senate Bill 512 amending N.C. Gen. Stat § 143B-350 (BOT).
4. The parties shall bear their own costs.

SO ORDERED, ADJUDGED, AND DECREED.

This the 28th day of February, 2024.



HON. JOHN M. DUNLOW
Superior Court Judge



HON. DAWN M. LAYTON
Superior Court Judge



HON. PAUL A. HOLCOMBE III
Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on September 30, 2025, upon all parties set forth below by email addressed as follows:

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