20CV 09542

FILED

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS _____
ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff, v. PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and THE STATE OF NORTH CAROLINA. Defendants.	**COMPLAINT**

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

INTRODUCTION

1. In 2016 and 2018, the Supreme Court of North Carolina reaffirmed the separation of powers as a foundational principle of our state government. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016); *Cooper v. Berger ("Cooper I")*, 370 N.C. 392, 809 S.E.2d 98 (2018) (citations omitted). In so doing, the Court held that, in order to fulfill the Governor's constitutional duties and conform with

separation-of-powers principles, the Governor must have sufficient control over administrative bodies that have final executive authority, such as the authority to promulgate rules and regulations. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256; *Cooper I,* 370 N.C. at 418, 809 S.E.2d at 114; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 607-08, 286 S.E.2d 79, 88 (1982) (finding it "crystal clear . . . that the duties of the [Environmental Management Commission] are administrative or executive in character and have no relation to the function of the legislative branch of government").

2. The North Carolina Rules Review Commission ("RRC") is, indisputably, an executive agency exercising final executive authority. It has the authority to veto, for substantive reasons, rules and regulations promulgated by executive agencies and commissions. Yet, in spite of the Supreme Court's clear teaching regarding gubernatorial control of such bodies, the General Assembly continues to appoint all ten commissioners on the RRC. The Governor has no power to appoint RRC commissioners, no power to supervise their day-to-day activities, and no meaningful power to remove them. The Governor lacks any meaningful control over the RRC, which violates separation of powers and prevents the Governor from fulfilling his constitutional duties.

3. The RRC statute, N.C. Gen. Stat. § 143B-30.1, was most recently amended for technical corrections by Session Law 2017-102, § 43. Though the Supreme Court provided clear directives about the necessary level of gubernatorial

control over executive agencies in *McCrory* and *Cooper I,* the General Assembly has failed to remedy the unconstitutional structure of the RRC.

4. The terms of five of the ten RRC commissioners expired in June 2020. The General Assembly reappointed four of these previous commissioners to two-year terms and appointed one new commissioner. *See* Session Law 2020-39, §§ 1.15, 2.35. These appointments were made entirely by the legislature, without input from the Governor.

5. N.C. Gen. Stat. § 143B-30.1(a), which creates and sets forth the structure of the RRC, unconstitutionally infringes on the Governor's executive powers in violation of the separation of powers. N.C. CONST. art. I, § 6; *id.* art. II, § 1; *id.* art. III, §§ 1, 5(4).

PARTIES AND JURISDICTION

6. Governor Roy Cooper ("Governor Cooper") is a resident of Wake County, North Carolina.

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

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

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

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

11. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, Governor Cooper seeks judgment declaring unconstitutional N.C. Gen. Stat. § 143B-30.1(a).

12. As further alleged below, a present and real controversy exists between the parties as to the constitutionality of N.C. Gen. Stat. § 143B-30.1(a).

13. Governor Cooper also seeks to restrain and enjoin the application of N.C. Gen. Stat. § 143B-30.1(a). Accordingly, this action is properly brought in the Superior Court Division of the General Court of Justice pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and 7A-245(a).

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

FACTS

A. SEPARATION OF POWERS IS A CORNERSTONE CONSTITUTIONAL PRINCIPLE.

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

> Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty. The Constitution of North Carolina therefore vests each of these powers in a

> different branch of government and declares that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."

McCrory, 368 N.C. at 635, 781 S.E.2d at 250 (quoting N.C. CONST. art. I, § 6).

16. "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments." *Wallace*, 304 N.C. at 601, 286 S.E.2d at 84.

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

18. These core principles guided our Supreme Court in *McCrory v. Berger*, when it held that the General Assembly had unconstitutionally encroached on the province of the Governor by establishing three commissions, according them executive authority—including the authority to promulgate rules and regulations—and then limiting the Governor's ability to control those commissions.

19. "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch."

McCrory, 368 N.C. at 645, 781 S.E.2d at 256. The constitutional guarantee of the separation of powers also "requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." *See id.* at 636, 781 S.E.2d at 250. To that end, "the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation . . . ." *Wallace*, 304 N.C. at 608–09, 286 S.E.2d at 89.

20. The *McCrory* Court made clear that the Governor's ability to control executive branch officers, boards, and commissions—and, concomitantly, the exercise of final executive authority by those executive entities—depends on the Governor's ability to appoint such officials, "to supervise their day-to-day activities, and to remove them from office." 368 N.C. at 646, 781 S.E.2d at 256.

21. Under *McCrory*, the structure and composition of executive agencies must provide the Governor with sufficient "control over the views and priorities" of agency appointees to allow the Governor to ensure faithful execution of the laws. *Id.* at 647, 781 S.E.2d at 257.

22. In early 2018, the Supreme Court followed and applied the holding of *McCrory* to sustain the Governor's challenge to Session Law 2017-6—which established a new State Board of Elections and Ethics Enforcement—in *Cooper I*:

> As we have already noted, the North Carolina Constitution, unlike the United States Constitution, contains an explicit separation-of-powers provision. *See* N.C. Const. art. I, § 6 (stating that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from

> each other"). For that and other reasons, "the separation of powers doctrine is well established under North Carolina law." As we explained in *McCrory*, separation-of-powers violations can occur "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties."

Cooper I, 370 N.C. at 414, 809 S.E.2d at 111 (citations omitted).

23. Session Law 2017-6 required the Governor to appoint four members from a list of six provided by the Governor's own political party and four from a list of six provided by the opposing political party (assuming the Governor belongs to one of the two primary political parties). Thus, notwithstanding the Governor's nominal authority to appoint all eight members of the new State Board of Elections and Ethics Enforcement, the appointment provisions of Session Law 2017-6 ensured that the Governor could not appoint a majority of members who shared the Governor's views and priorities.

24. The Supreme Court held in *Cooper I* that this was unconstitutional:

> Although we did not explicitly define "control" for separation-of-powers purposes in *McCrory*, we have no doubt that the relevant constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well.
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> As was the case in *McCrory*, in which we determined that the General Assembly had exerted excessive control over certain executive agencies by depriving the Governor of

> "control over the views and priorities" of a majority of the members of the commissions at issue in that litigation, 368 N.C. at 647, 781 S.E.2d at 257, we conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, "leave[ ] the Governor with little control over the views and priorities" of the Bipartisan State Board, *id.* at 647, 781 S.E.2d at 257, by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs, limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.
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> The General Assembly cannot, however, consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution, structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to "take care that the laws be faithfully executed" because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members. An agency structured in that manner "leaves the Governor with little control over the views and priorities of the [majority of] officers" and prevents the Governor from having "the final say on how to execute the laws." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. As a result, the manner in which the membership of the Bipartisan State Board is structured and operates under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina [Constitution]. *Id.*

Id. at 414–16, 418, 809 S.E.2d at 111–14.

25. The holdings and teachings of *Wallace, McCrory, and Cooper I* are clear: the Separation of Powers Clause of the North Carolina Constitution requires that the Governor have the authority to appoint a majority of members of a State board exercising final executive authority. That is necessary so that the Governor, through his appointees, may "take care that the laws be faithfully executed," N.C. CONST. art. III, § 5(4), and implement executive policy consistent with his views and priorities, on issues delegated by the General Assembly to executive agencies. The failure of Session Law 2017-6 to do so was its principal constitutional failing.

26. By seeking declaratory and injunctive relief enjoining the operation of N.C. Gen. Stat. § 143B-30.1(a), this lawsuit seeks to restore the constitutional balance of power carefully crafted by our founders—and most recently re-adopted by the people of North Carolina in the Constitution of 1971.

B. N.C. GEN. STAT. § 143B-30.1(A) VIOLATES THE SEPARATION OF POWERS CLAUSE AND THE FAITHFUL EXECUTION CLAUSE.

(1) The RRC is an executive branch agency that exercises executive powers.

27. The RRC is established in Chapter 143B of the General Statutes (the Executive Organization Act of 1973). It is an executive branch agency responsible for "review[ing] administrative rules in accordance with Chapter 150B of the General Statutes." N.C. Gen. Stat. § 143B-30.2.

28. The North Carolina Court of Appeals has characterized the RRC as "an independent executive branch agency." *N.C. Bd. of Pharmacy v. Rules Review Comm'n*, 174 N.C. App. 301, 302 n.1, 620 S.E.2d 893, 894 n.1 (2005) ("The RRC is an

independent executive branch agency . . . ."), *rev'd in part on other grounds,* 360 N.C. 638 (2006); *see also N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 164, 814 S.E.2d 54, 64 (2018) (applying precedent regarding the non-delegation doctrine, which applies to delegations of authority to executive agencies).

29. The RRC describes itself as an "executive agency created by the General Assembly." *See* "About the Rules Review Commission," N.C. Office of Administrative Hearings, https://www.oah.nc.gov/rules-division/rules-review-commission/about-rules-review-commission (last visited August 27, 2020); *see also* Defendant-Appellees' Brief at 27, *N.C. Bd. of Pharmacy v. Rules Review Comm'n*, 174 N.C. App. 301 (2005), 2004 WL 3120967, at * 13 ("The RRC is itself an executive branch agency . . . .").

30. These descriptions are consistent with the RRC's role. The RRC has final executive authority over the implementation of permanent and temporary executive agency rules in North Carolina. In order for such rules adopted by other executive agencies to become effective, they must first get the approval of the RRC. N.C. Gen. Stat. § 150B-21.8 ("An agency must submit temporary and permanent rules adopted by it to the Commission before the rule can be included in the North Carolina Administrative Code."); *see also id.* § 150B-21.1(b)–(b3) (review of temporary rules); *id.* § 150B-21.10 (review of permanent rules).

31. The RRC is tasked with determining whether permanent and temporary rules adopted by executive agencies meet all of the following criteria:

a. It is within the authority delegated to the agency by the General Assembly.

b. It is clear and unambiguous.

c. It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

d. It was adopted in accordance with Part 2 of this Article.

N.C. Gen. Stat. § 150B-21.9(a).

32. N.C. Gen. Stat. § 150B-21.9(a) confers on the RRC the authority to review—and reject—an executive agency's proposed rules from a substantive perspective, not just a procedural perspective. The power to determine whether a proposed rule is within an agency's delegated authority, for example, authorizes the RRC to veto an executive agency's policy judgment regarding how a statute should be implemented.

33. The RRC, and its employed staff, understands its authority under N.C. Gen. Stat. § 150B-21.9(a) as allowing it to review the substantive policy decisions of an executive branch agency set forth in a proposed rule, and, pursuant to that understanding, has rejected proposed rules, or parts of proposed rules, for substantive reasons.

34. For example, in October 2018, the RRC objected to a proposed rule submitted by the Department of Public Safety ("NCDPS"), pursuant to the agency's statutory authority to promulgate rules "necessary to establish a plan under which temporary State law-enforcement assistance will be provided to the cities and counties." N.C. Gen. Stat. § 160A-288.1. The RRC acknowledged that NCDPS's proposed rule governed the "establish[ment of] agreements for the city or county to

reimburse the costs after the [NCDPS] Secretary provided the assistance," but vetoed the rule on grounds that it disagreed with NCDPS's policy judgment that such reimbursement agreements were a "necessary" component of any plan pursuant to which State law enforcement personnel would be temporarily provided to cities and counties.

35. Likewise, in June 2017, the RRC lodged numerous objections to proposed rules submitted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse (the "Mental Health Commission"), a constituent body of the Department of Health & Human Services ("NCDHHS"), pursuant to the Mental Health Commission's statutory authority, N.C. Gen. Stat. § 15A-1002, to promulgate rules governing the "approv[al]" of "forensic evaluators" responsible for assessing the mental capacity of a criminal defendant to proceed to trial.

36. In objecting to the proposed rule, the RRC vetoed the Mental Health Commission's policy choice to require, among other things, that approved "forensic evaluators" be employed by an organization approved by NCDHHS to manage the care of beneficiaries who receive services for mental health, developmental disabilities or substance.

37. The RRC's objection, which followed the suggestion of RRC's employed staff, served to substitute the RRC's policy preferences for those of the Mental Health Commission by forcing the commission to change its proposed rule and allow for approval of forensic evaluators not employed by mental health organizations approved by NCDHHS. As reflected in an RRC staff's summary, the RRC's other objections to

the Mental Health Commission's proposed rules governing the standards for approval of forensic examiners similarly served to usurp the commission's substantive policy-making authority.

38. The RRC's objection to NCDHHS's proposed forensic evaluator rule is indicative of the approach to substantive oversight of executive policy-making that the RRC takes in superintending executive agencies' development of proposed rules.

39. For instance, in 2017, counsel to the RRC told representatives of NCDHHS that N.C. Gen. Stat. § 108A-54's grant of authority to the Secretary to "[a]dopt rules related to the Medicaid and NC Health Choice programs" was "not . . . a particularly broad grant of authority." According to the RRC's counsel, for the Secretary to have authority to adopt a rule regarding a specific aspect of the Medicaid and NC Health Choice program there must be a "clear delegation of the legislative authority" to act in the specific area; the general grant of rulemaking authority in Section 108A-54 regarding the program would not be sufficient to survive RRC review. *Id.*

40. The narrow compass the RRC gives to statutory delegations of rulemaking authority has a chilling effect on executive branch policy-making. Executive agencies refrain from engaging in rule-making for fear that the RRC will second-guess gubernatorial policy choices regarding the execution of statutes.

41. As these examples illustrate, in assessing whether rules adopted by other executive agencies meet the criteria set forth in Section 150B-21.9(a), the RRC is required to, and does, make executive policy judgments. By empowering the RRC to

determine whether an executive agency rule is within the scope of the agency's delegated authority and "reasonably necessary," for example, *id.* § 150B-21.9(a)(3), the RRC's authority falls squarely within the Governor's authority to make interstitial policy judgments. *See Cooper I,* 370 N.C. at 416 n.11, 809 S.E.2d at 113 n.11.

42. Rulemaking is "executive in character and ha[s] no relation to the function of the legislative branch of government." *Wallace,* 304 N.C. at 607–08, 286 S.E.2d at 88; *McCrory*, 368 N.C. at 645–46, 781 S.E.2d at 256 (holding that three commissions with rulemaking authority were "primarily administrative or executive in character"); *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 n.4 (2013) (holding that once the legislature delegates rulemaking authority to an executive agency, though "[t]hough these activities take 'legislative' . . . forms . . . they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'"); *Consumer Energy Council of Am. v. Fed. Energy Reg. Comm'n*, 673 F.2d 425, 471 (D.C. Cir. 1982) ("[R]ulemaking is substantially a function of administering and enforcing the public law.").

43. That is why the Separation-of-Powers Clause bars the General Assembly from infringing on "the power of an executive branch agency to adopt rules and regulations." *Cooper I*, 370 N.C. at 415, 809 S. E. 2d at 112.

44. Without the RRC's approval, permanent rules adopted by other executive agencies will not become effective. *See* N.C. Gen. Stat. §§ 150B-21.3, 150B-21.8, 150B-21.10, 150B-21.11, 150B-21.12.

45. When the RRC rejects a permanent rule adopted by another executive agency, the agency's only recourse is to file a declaratory judgment action. *Id.* § 150B-21.12(d).

46. In contrast to permanent rules, an executive agency "may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required" by one or more of the circumstances outlined in the statute. N.C. Gen. Stat. § 150B-21.1(a) (listing circumstances such as "[a] serious and unforeseen threat to the public health, safety, or welfare," and "[t]he effective date of a recent act of the General Assembly or the United States Congress.").

47. An executive agency that has adopted a temporary rule "must also prepare a written statement of its findings of need for a temporary rule stating why adherence to the notice and hearing requirements in G.S. 150B-21.2 would be contrary to the public interest and why the immediate adoption of the rule is required" for submission to the RRC. N.C. Gen. Stat. § 150B-21.1(a4).

48. In addition to the usual review applied to permanent rules, for temporary rules, the RRC is tasked with reviewing the agency's statement and determining whether adherence to usual notice and hearing requirements "would be contrary to the public interest" and whether an enumerated circumstance exists that requires immediate adoption of the rule. *Id.* § 150B-21.1(b).

49. As with permanent rules, the RRC has broad discretion to block temporary rules adopted by other executive agencies. *See id.* §§ 150B-21.3, 150B-21.1.

The decision whether notice and hearing requirements "would be contrary to the public interest" is a quintessential policy decision that, under North Carolina law, should reflect the policy priorities of the Governor.

50. When the RRC rejects a temporary rule adopted by another executive agency, the agency's only recourse is to file an action for declaratory judgment. *Id.* § 150B-21.1(c).

51. In short, the RRC is the final arbiter of how and when other executive branch agencies—in the exercise of their statutory authorities—may make binding administrative regulations. Put differently, the RRC has (and frequently exercises) the authority to veto rules and regulations promulgated by executive agencies—and therefore the executive policy decisions set forth in the rules and regulations proposed by those executive agencies.

(2) N.C. Gen. Stat. § 143B-30.1(a) prevents the Governor from exercising his executive function of ensuring that North Carolina's laws are faithfully executed.

52. N.C. Gen. Stat. § 143B-30.1(a), both on its own and when combined with the overarching statutory framework that the RRC operates within, is unconstitutional in a number of respects.

53. Under the Supreme Court's holdings in *McCrory* and *Cooper I,* N.C. Gen. Stat. § 143B-30.1(a) violates the Separation of Powers and Faithful Execution clauses because it deprives the Governor of the ability to control the policy views and priorities of the executive agency charged with reviewing all permanent and temporary rules adopted by the State's many other executive agencies. Almost every feature of the

RRC illustrates that—despite the body being an *executive* agency that exercises final *executive* power—the State's Chief Executive does not have constitutionally sufficient control over the RRC.

(a) Appointment

i. The General Assembly appoints all ten RRC members.

54. The RRC is comprised of ten members, *all* of whom are appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. N.C. Gen. Stat. § 143B-30.1(a).

55. In *McCrory*, the Supreme Court held that the challenged legislation violated the separation of powers by leaving the Governor with insufficient control over the three commissions at issue. 368 N.C. at 647, 781 S.E.2d at 257. In assessing the amount of control the legislation afforded Governor McCrory over the commissions, the Supreme Court noted that the legislation "gives the General Assembly the power to appoint a majority of each commission's voting members and gives the Governor only two or three appointees per commission." *Id.* at 646, 781 S.E.2d at 256.

56. These constitutionally infirm commissions were appointed as follows:

a. The Oil and Gas Commission had nine members—three appointed by the Governor and six appointed by the General Assembly;

b. The Mining Commission had eight members—two appointed by the Governor and four appointed by the General Assembly, along with the chair of the N.C. State University Minerals Research Laboratory Advisory Committee and the State Geologist (*ex officio* and non-voting); and

c. The Coal Ash Management Commission had nine members—three appointed by the Governor and six appointed by the General Assembly.

Id. at 636–37, 781 S.E.2d at 250–51.

57. In *Cooper I,* the Supreme Court held that the Governor did not have sufficient control over the so-called Bipartisan State Board of Elections and Ethics. *Cooper I,* 370 N.C. at 416, 809 S.E.2d at 112. In assessing the amount of control the Governor had, the Supreme Court considered the Governor's power to appoint board members and noted "that the Governor is unable, within a reasonable period of time, to take care that the laws be faithfully executed because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences." *Id.* at 418, 809 S.E.2d at 114 (internal quotation marks omitted). The State Board at issue was comprised of:

> eight members appointed by the Governor, four of whom must be members of the political party with the highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question and four of whom must be members of the political party with the second highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question.

Id. at 415, 809 S.E.2d 112.

58. The constitutional violation is even more stark here. The Governor has *no* ability to appoint *any* commissioners to the RRC, let alone a majority. Though the Supreme Court has recently rejected schemes that provided the Governor with

comparatively more appointment power in *McCrory* and *Cooper I,* the General Assembly continues to appoint *all* of the RRC commissioners.

ii. The Governor has circumscribed powers of vacancy appointment.

59. The Governor's power of vacancy appointment over RRC commissioners is sharply circumscribed, as he may only appoint individuals recommended by the Speaker of the House of Representatives or the President Pro Tempore of the Senate.

> Before making an appointment, the Governor shall consult the officer who recommended the original appointment to the General Assembly (the Speaker of the House of Representatives, the President Pro Tempore of the Senate, or the President of the Senate), and ask for a written recommendation. After receiving the written recommendation, the Governor must within 30 days either appoint the person recommended or inform the officer who made the recommendation that he is rejecting the recommendation. Failure to act within 30 days as required under the provisions of the preceding sentence shall be deemed to be approval of the candidate, and the candidate shall be eligible to enter the office in as full and ample extent as if the Governor had executed the appointment. The Governor shall not appoint a person other than the person so recommended.

N.C. Gen. Stat. §§ 143B-30.1(a), 120-122.

60. In *Cooper I,* the Supreme Court held that legislation requiring the Governor "to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences" violated the separation of powers. 370 N.C. at 418, 809 S.E.2d at 114.

61. The Governor's power over vacancy appointments to the RRC is even more constrained. The Governor is only able to appoint individuals recommended by the Speaker of the House of Representatives and the President Pro Tempore of the Senate, and is rendered a mere functionary in this process.

(b) Removal

62. In addition, the Governor has, at most, extremely circumscribed power to remove RRC commissioners. The statute creating the RRC mentions vacancies created by "resignation, dismissal, ineligibility, death, or disability," but is silent as to who has the power to dismiss members. N.C. Gen. Stat. § 143B-30.1(c); *see also* N.C. Gen. Stat. § 143B-13(d).

63. Even if the Governor may remove RRC members for cause or misfeasance, malfeasance, or nonfeasance, that power would not provide the Governor with sufficient control of the policy views and priorities of the RRC. The Supreme Court in *Cooper I* recognized that removal power solely for cause was severely limited and, therefore, insufficient. 368 N.C. at 646, 781 S.E.2d at 257 ("[T]he challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause.").

(c) Supervision

64. Without the authority to appoint or remove members of the RRC, the Governor is unable to adequately supervise the RRC's work to ensure faithful execution of the laws. *See McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

65. Indeed, the General Assembly has even insulated the RRC from the Governor's supervision with respect to litigation. In the exercise of its sole discretion, the RRC may waive statutes governing the retention of private counsel in litigation brought by other agencies of the State. *See* N.C. Gen. Stat. § 143B-30.1(g). Absent such waiver authority, retention of private counsel requires approval from both the Governor and the Attorney General. *See* N.C. Gen. Stat. §§ 114-2.3, 147-17.

66. Ultimately, the RRC is a far-reaching administrative agency charged with exercising executive power, but insulated from any meaningful executive control and supervision.

* * *

67. Taken as a whole, N.C. Gen. Stat. § 143B-30.1(a), both on its own and when combined with the overarching statutory framework for agency rulemaking, leaves the Governor with little to no functional control over the policy views and priorities of the RRC. The Governor has no meaningful power to appoint, remove, or supervise the RRC commissioners.

68. Under the Supreme Court's holdings in *Wallace*, *McCrory*, and *Cooper I,* N.C. Gen. Stat. § 143B-30.1(a) violates the Separation of Powers and Faithful Execution clauses because it deprives the Governor of the ability to control the executive agency charged with reviewing all permanent and temporary rules adopted by the State's many other executive agencies.

69. The RRC consistently rejects permanent and temporary rules after they are adopted by executive agencies, impeding the Governor's ability to carry out his

constitutional duties and violating the separation of powers. In just the past two years, the RRC has blocked approximately 193 rules from taking effect.

70. Unless N.C. Gen. Stat. § 143B-30.1(a) is invalidated and enjoined, the RRC will continue to stymie executive rulemaking pursuant to an unconstitutional statutory scheme that violates the Constitution's separation of powers, N.C. CONST. art. I, § 6, and interferes with the Governor's constitutional duty to ensure the laws are faithfully executed, *id.* art. I, § 6; art. III, §§ 1, 5(4), in plain violation of the Supreme Court's holding in *Wallace*, *McCrory,* and *Cooper I.*

COUNT 1: DECLARATORY JUDGMENT

N.C. GEN. STAT. § 143B-30.1(A) VIOLATES THE SEPARATION OF POWERS GUARANTEED BY THE NORTH CAROLINA CONSTITUTION.

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

72. A present and real controversy exists between the parties as to the constitutionality of N.C. Gen. Stat. § 143B-30.1(a).

73. N.C. Gen. Stat. § 143B-30.1(a), both on its own and when combined with the overarching statutory framework that the RRC operates within, unconstitutionally allows the General Assembly to exercise executive authority, and it prevents the Governor from performing his core executive function of ensuring that the laws are faithfully executed.

74. Accordingly, N.C. Gen. Stat. § 143B-30.1(a) violates the Separation of Powers Clause (Article I, Section 6) and the Executive Power Clauses (Article III,

Sections 1 and 5(4)) of the North Carolina Constitution and is therefore void and of no effect.

75. Pursuant to N.C. Gen. Stat. §§ 1-253–1-267 and North Carolina Rule of Civil Procedure 57, the Governor is entitled to a judgment declaring that N.C. Gen. Stat. § 143B-30.1(a) is unconstitutional and is therefore void and of no effect.

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows:

1. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that N.C. Gen. Stat. § 143B-30.1(a) is unconstitutional and therefore void and of no effect; and

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

Respectfully submitted this the 27th day of August, 2020.

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