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STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

2018 DEC -3 AM 11: 53

SUPERIOR COURT DIVISION

17 CVS 6465

STATE OF NORTH CAROLINA,

WAKE COUNTY, C.S.C.

RY

Upon the relation of,

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

Plaintiff,

v.

**ORDER AND JUDGMENT**

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; CHARLTON  
L. ALLEN, in his official capacity as  
CHAIR OF THE NORTH CAROLINA  
INDUSTRIAL COMMISSION; and  
YOLANDA K. STITH, in her official  
capacity as VICE-CHAIR OF THE  
NORTH CAROLINA INDUSTRIAL  
COMMISSION,

Defendants.

THIS MATTER came on to be heard on October 25, 2018, before the undersigned Judge Presiding pursuant to Local Rule 2.2 on: (1) Plaintiff Governor Roy Cooper's ("the Governor") Motion for Partial Summary Judgment as to Counts 2-4; (2) Defendants Charlton L. Allen and Yolanda K. Stith's (the "Industrial Commission Defendants" or "NCIC Defendants") Motion to Transfer Counts 2-5 of the Amended Complaint to a three-

judge panel; (3) the NCIC Defendants' Motion for Summary Judgment as to Counts 2-5; and (4) the Motion for Summary Judgment as to Counts 2-5 filed by Defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (collectively, "Legislative Defendants").

By consent of all parties, this matter was heard out of county and out of session.

NOW, THEREFORE, having heard the arguments of counsel, and reviewed the foregoing Motions, the briefs and responsive briefs submitted by the parties, and the affidavits and other record evidence on file, the Court concludes as follows:

### **BACKGROUND AND JURISDICTION**

1. In the Amended Complaint, Plaintiff challenges Part V of Session Law 2016-125—which made two changes to the appointment provisions of the North Carolina Industrial Commission (the "NCIC"), the executive agency charged with enforcing the State's workers' compensation laws.

2. Part V of Session Law 2016-125 took from the Governor the authority to appoint the chair and vice-chair of the Commission for the entirety of his first term. The chair is the chief executive of the Industrial Commission and wields substantial authority and discretion over the execution of the State's workers' compensation laws. See N.C. Gen. Stat. § 97-77(b).

3. Part V of Session Law 2016-125 granted the current vice-chair of the Industrial Commission the exclusive privilege of a nearly nine-year term as a commissioner.

4. There are no genuine issues of material fact as to Counts 2 and 4, and Plaintiff is entitled to summary judgment in his favor as a matter of law.

5. A present and real controversy exists between the parties as to the constitutionality of Part V of Session Law 2016-125.

6. Plaintiff, as the head of the executive branch directly elected by the people, has standing to challenge the constitutionality of laws that infringe upon his authority and the executive branch's authority.

Simply put, if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim.

*Cooper v. Berger*, 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). See also N.C. CONST. art. I, § 6; art. III, §§ 1, 5(4); *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008).

7. The Court rejects Defendants' argument that the Governor's claims should be dismissed because he did not exhaust his remedies under N.C. Gen. Stat. § 1-515 *et seq.* See *Comer v. Ammons*, 135 N.C. App. 531, 537, 522 S.E.2d 77, 81 (1999) ("Mr. Comer is not directly challenging the election or its results; rather, the main thrust of his argument is that the election statutes were unconstitutional. Although Mr. Comer cannot avoid arguing that the defendant judges are holding office in an unlawful manner (having been elected via an unconstitutional election), his main argument lies not against the judges themselves, but against the statutes that allowed their election to office.").

8. Plaintiff's claims are ripe for judicial determination. *See, e.g., Cooper*, 370 N.C. at 416, 809 S.E.2d 113 n.12 (“[W]e do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor’s executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of Article III, Section 5(4) of the North Carolina Constitution.”).

9. 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.”).

10. On the record during the October 25 hearing, the parties stipulated to the certification of this judgment for immediate appeal under Rule 54(b). For that reason and for good cause shown, the Court finds that there is no just reason for delay and that this order is a final judgment as to Counts 2-5.

11. While legislative enactments do enjoy a presumption of constitutionality, “it is the duty of the courts to determine the meaning of the requirements of our Constitution. When a government action is challenged as unconstitutional, the courts have a duty to determine whether that action exceeds constitutional limits.” *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997) (citations omitted).

## NCIC DEFENDANTS' MOTION TO TRANSFER<sup>1</sup>

12. NCIC Defendants assert in their Motion to Transfer Counts 4 and 5 of the Amended Complaint that this matter must be heard and decided by a three-judge panel pursuant to N.C. Gen. Stat. § 1-267.1 and Rule 42(b)(4) because they present a facial challenge to a statute. At the hearing, over the objection of Plaintiff, NCIC Defendants asserted that Counts 2 and 3 should also be transferred to a three-judge panel.

13. Plaintiff opposes the transfer motion and contends that Counts 2-4 of the Amended Complaint are as-applied challenges, not facial challenges because the constitutionality of the challenged provisions depends on the surrounding factual circumstances.

14. Plaintiff does not dispute that a three-judge panel would otherwise have to determine Count 5 (which is a facial challenge), but Plaintiff has not moved for summary judgment with respect to that claim. Moreover, under Rule 42(b)(4), a three-judge panel should only hear arguments as to the facial challenge “if, *after all other matters in the action have been resolved*, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case.” N.C. R. Civ. P. 42(b)(4) (emphasis added).

15. The difference between a facial and an as-applied challenge “is that an as-applied challenge represents a plaintiff’s protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff’s contention that a statute is incapable of constitutional application

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<sup>1</sup> NCIC Defendants also filed a Motion to Stay pending the outcome of the November 2018 election, but that motion was abandoned at the hearing.

in any context. . . . Only in as-applied challenges are facts surrounding the plaintiff's particular circumstances relevant." *Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 786 S.E.2d 335, 347 (N.C. Ct. App. 2016) (quotation cleaned up).

16. With respect to Counts 2-4 of the Amended Complaint, the particular factual circumstances are relevant. In this case, the challenged amendment allowed former Governor Patrick L. McCrory, in his final days in office, to appoint the chair and vice-chair of the Industrial Commission for a four-year term that would cover all but one day of Governor Cooper's term. Based on the undisputed record in this case, the individuals appointed by Governor McCrory do not share the policy views and priorities of Governor Cooper. See Affidavit of Jayant Joshi; Am. Compl. ¶¶ 79-83.

17. By contrast, if Plaintiff is re-elected and appoints a new NCIC chair and vice-chair on December 31, 2020, the amended N.C. Gen. Stat. § 97-77(b)—if still in effect—could not present a separation of powers violation because the Governor would be appointing the chair and vice-chair of his choice without any legislative interference.

18. Similarly, the particular facts relating to the amendment of N.C. Gen. Stat. § 97-77(a1)—namely the fact that Ms. Stith is the spouse of Governor McCrory's chief of staff—are relevant to the determination of its constitutionality.

19. Plaintiff concedes that if he prevails on his claim as to Count 4, his claim as to Count 5 will be moot.

20. Because the particular factual circumstances surrounding Counts 2-4 of the Amended Complaint are relevant, the Court, in its discretion, determines that it has jurisdiction to rule on these claims because they are as-applied. Defendants' Motion to Transfer is denied.

### COUNTS 2-3

21. Before the enactment of Part V of Session Law 2016-125, the Governor had the authority to fill vacancies on the Industrial Commission only for “the remainder of the unexpired term.” See N.C. Gen. Stat. § 97-77(a1). A regular Industrial Commission term is six years.

22. In Part V of Session Law 2016-125, Legislative Defendants amended Section 97-77(a1) to allow Governor McCrory to fill a vacancy for “a term of six years plus the remainder of the unexpired term.” 2016 N.C. SESS. LAWS 125, § 24.(a).

23. Notably for the purposes of the Court’s analysis here, this amendment to Section 97-77(a1) was designed to expire upon its first and only use, namely “upon the filling of a vacancy pursuant to [Section 24.(a).]” As a result, the moment Governor McCrory filled the vacancy on the Industrial Commission for the remainder of an unexpired term plus a term of six years, the vacancy provision of Section 97-77(a1) reverted to its previous statutory form. See 2016 N.C. SESS. LAWS 125, §§ 24.(b) and (c). Likewise, no other Governor could use that statutory authorization to fill a vacancy on the Industrial Commission for a similar term.

24. On December 16, 2016, the same day Session Law 2016-125 was signed into law, Governor McCrory appointed Defendant Stith, the spouse of his chief of staff, to fill an already-existing vacancy on the Industrial Commission, which had a term scheduled to end on April 30, 2019. The General Assembly approved the appointment on the same day. See 2016 N.C. JOINT RES. 27.

25. Accordingly, as soon as the vacancy on the Industrial Commission was filled—for a nearly nine-year term running through April 30, 2025—the language of Section 97-77(a1) immediately reverted to its original form.

26. The text of Session Law 2016-125 provides no explanation of why the General Assembly believed a single appointee named by an outgoing Governor and confirmed by an outgoing General Assembly was entitled to an extended term on the Industrial Commission or how doing so would advance North Carolina's general welfare.

27. Article I, Section 32 of the North Carolina Constitution (the "Exclusive Privileges Clause") provides: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. CONST. art. I, § 32.

28. The Supreme Court has described the Exclusive Privileges Clause as

a guaranty that every valid enactment of a general law applicable to the whole State shall operate uniformly upon persons and property, giving to all under like circumstances equal protection and security and neither laying burdens nor conferring privileges upon any person that are not laid or conferred upon others under the same circumstances or conditions.

*State v. Fowler*, 193 N.C. 290, 292, 136 S.E. 709, 710 (1927).

29. More recently, the Supreme Court held that a statute that provides an exclusive privilege to a person or group of people will only survive constitutional scrutiny if:

(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest.

*Emerald Isle v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987).



30. In assessing the “intent” of the statutory privilege, “the Court should consider the language of the statute, the spirit of the act and what the act seeks to accomplish.” *Emerald Isle*, 320 N.C. at 654, 360 S.E.2d at 764. Of course, the most accurate reflection of the intent of the legislature is the text of the statute itself.

31. Session Law 2016-125 has no preamble and does not otherwise provide a statement of intent. There is no legislative history to help the Court understand its purpose. However, because of the unique structure of the amendment, the intent of the drafters is plain—the amendment was intended to reward one person, and only one person, with a special, extended term on the Industrial Commission.

32. The Court finds that because the legislature designed the amendment so that it could only be exercised one time before the law reverted to its prior form, and because the amendment was exercised within hours of its enactment, the sole purpose of the amendment was to reward the spouse of the Governor’s chief of staff with an exclusive privilege.

33. Accordingly, the Court finds that the amendment was not intended to promote the general welfare of the State.

34. The Court further finds that the statutory design of Part V of Session Law 2016-125 establishes that the legislature did not believe—and had no basis to believe—that a special extended term on the Industrial Commission “serves the public interest,” since every other commissioner has been appointed to a term that does not exceed six years. To the contrary, it has apparently been the long-standing judgment of the General Assembly that the public interest is best served by limiting vacancy appointments to the Industrial Commission (and other boards and commissions) to the remainder of the

unexpired term. That judgment was reflected in the text of Section 97-77(a1) prior to the challenged amendment, and, with the exception of a several-hour period on December 16, 2016, that remains the law today.

35. NCIC Defendants contend that they should prevail on Count 2 because the benefit provided to Defendant Stith is “in consideration of public services.”

36. However, the “exclusive benefit” at issue is not Defendant Stith’s salary or employment benefits; rather, it is the special, extended term of office unavailable to any other person.

37. The Court finds that Defendant Stith provided no consideration for the special, extended term of office she received under Part V of Session Law 2016-125.

38. In sum, the portion of Part V of Session Law 2016-125 amending North Carolina General Statutes § 97-77(a1) does not satisfy either prong of the *Emerald Isle* test, and it is not in consideration of public services. Accordingly, beyond any reasonable doubt, it violates the Exclusive Privileges Clause (Article I, Section 32) of the North Carolina Constitution.

39. Because the Court has determined that Plaintiff should prevail on Count 2 of the Amended Complaint, the Court dismisses Count 3 as moot.

#### **COUNT 4**

40. Under N.C. Gen. Stat. § 97-77(a) and (a1), the Governor appoints commissioners to a six-year term on the Industrial Commission, subject to “confirmation by the General Assembly.” The terms are staggered, meaning that, barring an unexpected vacancy, Governor Cooper will not have appointed a majority of Commission members until the final year of his first term.

41. Prior to Part V of Session Law 2016-125, Chapter 97's limit on the Governor's ability to appoint commissioners was balanced by his or her ability to appoint the chair and vice-chair of the Commission at his or her discretion. Before the amendment to Section 97 77(b), the sitting Governor had the right to appoint the chair and vice-chair of the Industrial Commission at any time, and those individuals served in their leadership positions at the pleasure of the Governor. See N.C. Gen. Stat. § 97-77(b) (2016) ("One member, to be designated by the Governor, shall act as chairman. . . The Governor may designate one vice-chairman from the remaining commissioners.").

42. As amended by Part V of Session Law 2016-125, N.C. Gen. Stat. § 97-77(b) (hereinafter, "Section 97-77(b)") now reads:

On December 30, 2016, and every four years thereafter, one member shall be designated by the Governor to act as chairman for a term of four years. . . On December 30, 2016, and every four years thereafter, one member shall be designated by the Governor to act as vice-chairman for a term of four years.

43. There is no provision in Chapter 97 for the Governor to remove the chair or vice-chair before the end of the chair or vice-chair's term.<sup>2</sup>

44. On or about December 30, 2016, Governor McCrory designated Defendant Allen to be chair and Defendant Stith to be vice-chair of the Industrial Commission for four-year terms (i.e., for all but one day of Governor Cooper's first term in office).

45. The record is undisputed that Defendants Allen and Stith do not share the policy views and priorities of Governor Cooper. See *generally* Affidavit of Jayant Joshi; Am. Compl. ¶¶ 79-83.

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<sup>2</sup> It is unclear whether N.C. Gen. Stat. § 143B-13 allows the Governor to remove the chair or vice-chair for "cause," but the answer to that question is not material to this Order.

46. The Supreme Court's decision in *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018), speaks directly to the parties' contentions in this case.

This Court has held that Article III, Section 5(4) of the North Carolina Constitution requires "the Governor [to] have enough control over" commissions or boards that "are primarily administrative or executive in character" "to perform his [or her] constitutional duty," with the sufficiency of the Governor's "degree of control" "depend[ing] on his [or her] ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office.

*Id.* at 414, 809 S.E.2d at 111 (citations omitted).

47. In that case our Supreme Court invalidated a legislative act that prevented the Governor from fulfilling his constitutional duty of faithfully executing our State's ethics and elections laws. The Court held:

Although we did not explicitly define "control" for separation-of-powers purposes in *McCrary*, 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.

*Cooper*, 370 N.C. at 414-15, 809 S.E.2d at 111-12.

48. The *Cooper* Court confirmed that the North Carolina Constitution requires the Governor to have sufficient control of executive branch boards and commissions to allow him or her to "affirmatively implement the policy decisions" that are in accord with the Governor's views and priorities. Accordingly, the Court held:

The General Assembly cannot . . . 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.”

*Id.* at 418, 809 S.E.2d at 114 (citations omitted) (emphasis added).

49. In other words, the Governor must be able—“within a reasonable period of time”—to (1) appoint a majority of commission members who support the Governor’s policy views and priorities; (2) have the discretion to remove commission members; and (3) exercise sufficient supervisory control over the commission to ensure that the Governor’s “views and priorities” are reflected in how the commission executes the laws.

*Id.* (emphasis added).

50. The Court finds that the Industrial Commission is primarily executive in nature. See *In re Redmond*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (holding that the Industrial Commission “primarily is an administrative agency of the state”) (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985)).

51. The Industrial Commission is charged by statute with administering (i.e., executing) numerous North Carolina General Statutes. See, e.g., North Carolina Workers’ Compensation Act (Chapter 97 of the General Statutes); the Tort Claims Act (Article 31 of Chapter 143 of the General Statutes); Law-Enforcement Officers’, Firemen’s, Rescue Squad Workers’ and Civil Air Patrol Members’ Death Benefits Act (Article 12A of Chapter 143 of the General Statutes); the Childhood Vaccine-Related Injury Compensation Program (Article 17 of Chapter 130A of the General Statutes); Compensation to Persons Erroneously Convicted of Felonies (Article 8 of Chapter 148 of

the General Statutes); and the Eugenics Asexualization and Sterilization Compensation Program (Article 9, Part 30 of Chapter 143B of the General Statutes).

52. The Industrial Commission, as part of administering Chapter 97, promulgates rules and regulations pursuant to N.C. Gen. Stat. § 97-80(a) and makes policy determinations relating to the State's workers' compensation program.

53. The chair of the Industrial Commission is designated by statute as the "chief executive officer of the Industrial Commission," and is given substantial statutory authority to direct the activities of the commission. Under N.C. Gen. Stat. § 97-77(b), the chair of the Industrial Commission "shall have such authority as is necessary to direct and oversee the Commission."

54. Among the chair's duties is the power to "hire or fire personnel and transfer personnel within the Industrial Commission." N.C. Gen. Stat. § 97-77(b). The chair also has the sole authority to appoint deputy commissioners to six-year terms of service and to designate the chief deputy commissioner. Deputy commissioners act as hearing officers, and serve as the "public face" of the Industrial Commission across the State.

55. The sole authority granted to the chair to appoint deputy commissioners for six-year terms means that the chair has the power to substantially impact the implementation and interpretation of the laws covering, among other things, workers' compensation and tort claims against the State.

56. Applying the analytical framework set forth in *Cooper*, Section 97-77(b) violates separation of powers. Under that framework, the Governor must have the ability, "within a reasonable period of time," to exercise sufficient supervisory control over the

commission to ensure that the Governor's "views and priorities" are reflected in how the commission executes the laws. *Cooper*, 370 N.C. at 418, 809 S.E.2d at 114.

57. According to the amended statute, and as-applied in this case, Plaintiff will have no authority—for the entirety of his first term—to appoint a chair or vice-chair who shares his policy views and priorities.

58. Moreover, Chapter 97 provides no mechanism for the Governor to remove the chair or vice-chair. At most the Governor may be able to remove the chair and vice-chair for cause under the default provisions of N.C. Gen. Stat. § 143B-13, but the Supreme Court has called such a removal power "circumscribed." *Cooper*, 370 N.C. at 418, 809 S.E.2d at 114.

59. Because Plaintiff did not appoint the chair and vice-chair and cannot remove them except for, at best, "cause," he has limited ability to supervise their activities and, therefore, is prevented from ensuring faithful execution of our State's workers' compensation laws.

60. The amendment to Section 97-77(b) directly conflicts with the electorate's selection of Governor Cooper and the policies he was elected to pursue. See *Cooper*, 370 N.C. at 418, 809 S.E.2d at 114; *Young v. Bailey*, 368 N.C. 665, 671, 781 S.E.2d 277, 281 (2016) ("The election of a particular candidate signifies public support for that candidate's platform, policies, and ideology.").

61. Defendants contend that Plaintiff's argument should be rejected because, after this lawsuit was filed, the General Assembly enacted N.C. Gen. Stat. § 143A-79.3 which effected a "Type II" transfer of the Industrial Commission from the Department of

Commerce to the Department of Insurance, which is headed by an elected member of the Council of State.

62. Plaintiff responds that under Article III, Section 1 of the Constitution, “[t]he executive power of the State shall be vested in the *Governor*.” Moreover, under Article III, Section 5(4), the *Governor* has the constitutional duty to ensure faithful execution of the laws.

63. The Court concludes that N.C. Gen. Stat. § 143A-79.3 does not, and cannot, create an executive branch agency that is not subject to the Governor’s control. While the General Assembly has the authority to “prescribe the functions, powers, and duties” of executive departments (N.C. CONST. art. III, § 5(10)), it cannot—by statute—take executive power specifically granted to the Governor in the Constitution and give it to a Council of State member.

64. Even if the General Assembly has the authority, under some circumstances, to transfer an agency’s functions, powers, and duties to a department headed by a member of the Council of State, it did not do so here. The transfer of the Industrial Commission to the Department of Insurance was a “Type II” transfer, which, under N.C. Gen. Stat. § 143A-6(b), means that the Industrial Commission “shall exercise all its prescribed statutory powers independently of the head of the principal department [i.e., the Commissioner of Insurance].”

65. Therefore, just as the State Board of Elections in *Cooper v. Berger* was labeled as independent by the legislature, so too is the Industrial Commission in this case. And just as the Supreme Court found in *Cooper* that the Constitution requires the Governor to have sufficient control of the State Board of Elections, this Court finds that



the Governor must have sufficient control of the Industrial Commission to ensure faithful execution of the laws.

66. Finally, Defendants contend that *McCrary* and *Cooper* are not controlling in this case because NCIC commissioners and deputy commissioners are subject to the Code of Judicial Conduct. N.C. Gen. Stat. § 97-78.1. This argument was foreclosed by the Supreme Court in *In re Redmond*. While the Industrial Commission does perform some quasi-judicial duties, it “primarily is an administrative agency of the state.” See *In re Redmond*, 369 N.C. at 493, 797 S.E.2d at 277.

67. Our Constitution establishes a government made up of three distinct branches. See N.C. CONST. art I, § 6. Defendants contend, however, that the Industrial Commission is wholly independent and not subject to oversight by *any* branch of government. They are incorrect; there is no fourth branch of government.

68. Part V of Session Law 2016-125 would clearly, and beyond any reasonable doubt, deprive the Governor of the ability “within a reasonable period of time” to control the views and priorities of the leadership of the Industrial Commission.

69. Accordingly, the Court concludes that, as applied in this case, N.C. Gen. Stat. § 97-77(b), as amended by Part V of Session Law 2016-125, violates separation of powers and is therefore unconstitutional.

70. In light of the Court’s ruling on Count 4, the Court dismisses as moot Count 5 of the Amended Complaint.

### **CONCLUSION**

**It is therefore ORDERED, ADJUDGED, AND DECREED that:**

1. Defendants’ Motion to Transfer and Motion to Stay are denied.

2. Plaintiff's Motion for Partial Summary Judgment is granted as to Counts 2 and 4 and denied as moot as to Counts 3.

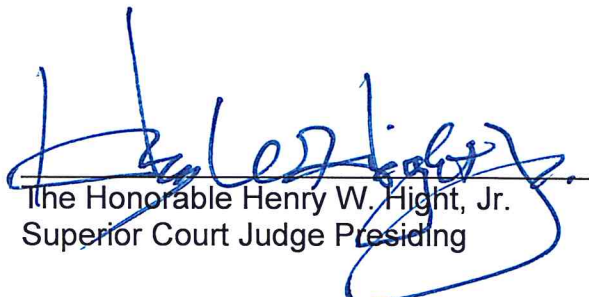
3. Counts 3 and 5 of the Amended Complaint are dismissed without prejudice as moot.

4. 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 Part V of Session Law 2016-125 is unconstitutional as applied and is therefore void and permanently enjoined as to Plaintiff.

5. This Judgment is certified for immediate review pursuant to Rule 54(b).

6. The parties shall bear their own costs.

This the 5<sup>th</sup> day of November, 2018.

  
The Honorable Henry W. Hight, Jr.  
Superior Court Judge Presiding

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE  
WAKE COUNTY 2018 DEC -3 AM 11:52 SUPERIOR COURT DIVISION  
FILE NO: 17-CVS-6465

STATE OF NORTH CAROLINA, )  
upon relation of ROY A. COOPER, )  
III, individually and in his official )  
capacity as Governor of the State )  
of North Carolina, )  
Plaintiffs. )  
v. )  
PHILIP E. BERGER, in his official )  
capacity as President Pro Tempore )  
of the North Carolina Senate, *et al.*, )  
Defendants. )

ORDER

Before the Court is a consent motion to permit William W. Stewart, Jr., Andrew Spradlin, and the law firm Millberg Gordon Stewart PLLC to withdraw as counsel of record for defendants Charlton L. Allen, in his official capacity as Chair of the North Carolina Industrial Commission and Yolanda K. Stith, in her official capacity as Vice-Chair of the North Carolina Industrial Commission (collectively NCIC).

For good cause, the motion is GRANTED and the Court permits William W. Stewart, Jr., Andrew Spradlin, and the law firm Millberg Gordon Stewart PLLC to withdraw as counsel of record for NCIC. J. Heydt Philbeck with the law firm of Bailey and Dixon, LLP, will continue to represent NCIC moving forward.

IT IS SO ORDERED.

This the 5<sup>th</sup> day of November, 2018.

  
The Honorable Superior Court Judge