

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 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 again in 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 (2016); *Cooper v. Berger* (“*Cooper I*”), 370 N.C. 392 (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 enforce laws and promulgate rules and regulations, to ensure the laws are faithfully executed. *McCrory*, 368 N.C. at 646; *Cooper I*, 370 N.C. at 418; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 607-08 (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. Disregarding these constitutional principles and ignoring the clear mandates of the State’s judicial branch, the North Carolina General Assembly takes aim at these established precedents and once again seeks to significantly interfere with the Governor’s executive powers and to take much of that power for itself.

3. On October 10, the General Assembly overrode the Governor’s veto and enacted Session Law 2023-____ (“Senate Bill 512”), which alters the structure and composition of the Economic Investment Committee, Environmental Management Commission, Commission for Public Health, Board of Transportation, Coastal Resources Commission, and the Wildlife Resources Commission, and prevents the Governor from performing his core constitutional function to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

4. On August 16, 2023, the General Assembly overrode the Governor’s veto and enacted Session Law 2023-108, which creates the Residential Code Council with thirteen members (six appointed by the General Assembly and 7 appointed by the

Governor, subject to confirmation by the General Assembly). While the Governor appoints a mathematical majority of the members of the Residential Code Council, Session Law 2023-108 requires an affirmative vote of nine members to approve any action, which prevents the Governor from performing his core constitutional function to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

5. Senate Bill 512 and Session Law 2023-108 unconstitutionally infringe 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).

6. They also fail to respect fundamental principles of representative government and the basic guarantees of the North Carolina Constitution, thus requiring the Governor to again secure the constitutional rights of his office and protect the constitutional powers allocated to the executive and judicial branches of state government by the people.

PARTIES AND JURISDICTION

7. Governor Roy Cooper is a resident of Wake County, North Carolina.

8. 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.

9. 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.

10. 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.

11. 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.

12. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, Governor Cooper seeks judgment declaring unconstitutional and enjoining the effectiveness of the following statutes that provide for the makeup of and appointment authority to the following executive boards and commissions:

- a. Part I of Senate Bill 512 amending N.C. Gen. Stat § 143B-437.54 (Economic Investment Committee);
- b. Part II of Senate Bill 512 amending N.C. Gen. Stat § 143B-283 (Environmental Management Commission);
- c. Part III of Senate Bill 512 amending N.C. Gen. Stat § 130A-30 (Commission for Public Health);
- d. Part IV of Senate Bill 512 amending N.C. Gen. Stat § 143B-350 (Board of Transportation);
- e. Part V of Senate Bill 512 amending N.C. Gen. Stat § 113A-104 (Coastal Resources Commission);
- f. Part VI of Senate Bill 512 amending N.C. Gen. Stat § 143-241 (Wildlife Resources Commission); and
- g. Sections 1.(a) and 1.(b) of Session Law 2023-108 enacting N.C. Gen. Stat. §§ 143-136.1 & 143-137.1 (Residential Code Council).

13. As further alleged below, a present and real controversy exists between the parties as to the constitutionality of the challenged statutes.

14. 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).

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

FACTS

I. SEPARATION OF POWERS IS A CORNERSTONE CONSTITUTIONAL PRINCIPLE.

16. 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.”

McCrorry, 368 N.C. at 635 (quoting N.C. CONST. art. I, § 6).

17. “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.

18. Our founders repeatedly 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.”).

19. These core principles guided our Supreme Court in *McCrorry v. Berger*, when Chief Justice Martin, writing for a bipartisan, six-Justice majority of the Court, held that the General Assembly had unconstitutionally encroached on the province of the Governor by establishing three commissions, according them final executive authority—including the authority to enforce the laws and promulgate rules and regulations—and then limiting the Governor’s ability to control those boards and commissions.

A. Executive Branch Powers and Duties are Vested Exclusively in the Governor

20. The Governor is the only executive branch officer vested with the executive power of the State under the North Carolina Constitution. N.C. CONST. art. III, § 1 (“The executive power of the State shall be vested in the Governor.”)

21. The Governor is also the sole executive branch officer with a constitutional duty to “take care that the laws be faithfully executed” as set out in Article III of the North Carolina Constitution. N.C. CONST. art. III, § 5(4).

22. Although the North Carolina Constitution creates other executive officers¹ that comprise the Council of State, our Constitution does not vest any powers

¹ The Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

or duties in the other members of the Council State. N.C. Const. art. III, §§ 7 & 8; N.C. CONST. art. III, § 7(2) (providing that the duties of the elected members of the Council of State “shall be prescribed by law.”). Instead, the executive power is vested solely in the Governor. N.C. CONST. art. III, § 1.

B. It is Well-Established that Control of Executive Boards and Commissions are Essential to the Governor’s Ability to Perform His Constitutional Duties.

23. “The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *McCrorry*, 368 N.C. at 645. 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. 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.

24. Although the General Assembly created each executive board, commission, and council at issue here, in doing so, it delegated the authority to make numerous discretionary decisions, including the extent to which administrative rules and regulations should be adopted to provide for execution of the laws enacted by the General Assembly. “As a result, the General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch.” *Cooper I*, 370 N.C. at 416 n.11.

25. The *McCrorry* Court made clear that the Governor’s ability to control executive branch officers, boards, and commissions—and, concomitantly, to control 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 (emphases added).

26. Under *McCrorry*, 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.

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

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 *McCrorry*, 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 (citations omitted).

28. 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.

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

Although we did not explicitly define “control” for separation-of-powers purposes in *McCrorry*, 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.

* * *

As was the case in *McCrorry*, 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.

Id. at 414–16.

30. 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, commission, or council 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.

31. By enacting Senate Bill 512 and Session Law 2023-108, the General Assembly takes direct aim at this well-settled constitutional interpretation and the principle of *stare decisis*, hoping that a new Supreme Court will give a different answer to the same question about the limits of legislative power, thereby unleashing Defendants Berger and Moore to consolidate their control over all three branches of government.

32. By seeking declaratory and injunctive relief enjoining the operation of Senate Bill 512 and Session Law 2023-108, 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.

II. SENATE BILL 512 AND SESSION LAW 2023-108 VIOLATE WELL-ESTABLISHED PRINCIPLES OF SEPARATION OF POWERS.

33. Senate Bill 512 and Session Law 2023-108 seek to alter the composition of numerous boards, commissions, and councils and interfere with the Governor’s ability to perform his exclusive constitutional duty to “take care” that the laws relating to the economy, the environment, public health, transportation, and construction “be faithfully executed.” N.C. Const. art. III § 5(4).

34. The boards, commissions, and councils at issue exercise clearly executive power. That power includes the enforcement of laws through the use of state funds, issuance of permits, imposition of fines and penalties, and the adoption of rules and regulations to implement the law. *See, e.g., Wallace*, 304 N.C. at 607–08 (rulemaking is “executive in character and ha[s] no relation to the function of the legislative branch of government.”); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, n.4 (2013) (holding that once the legislature delegates rulemaking authority to an executive agency, “[t]hrough 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.”).

35. The separation of powers clause bars the General Assembly from, *inter alia*, infringing on “the power of an executive branch agency to adopt rules and regulations.” *Cooper I*, 370 N.C. at 415.

36. Under the Supreme Court’s holdings in *McCrorry* and *Cooper I*, Senate Bill 512 and 2023-108 violate the Separation of Powers and Faithful Execution clauses because they deprive the Governor of the ability to control the policy views and priorities of the executive agencies charged with implementing the State’s laws. Despite each body being an executive agency that exercises final executive power—the State’s Chief Executive does not have constitutionally sufficient control over those bodies as a result of the challenged statutes.

37. “The relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor’s ability to execute the laws in any manner.” *Cooper I*, 370 N.C. at 417.

38. Indeed, as former Chief Justice Martin pointed out in his dissent in *Cooper I*, “*McCrorry* therefore clarified that the Governor must have ‘enough control’ over a body with final executive authority, such as by an appropriate combination of appointment and removal powers, to ensure that the laws are faithfully executed.” *Id.* at 423 (Martin, C.J., dissenting).

39. As the General Assembly’s staff attorneys noted in their legislative analysis of Senate Bill 512, the legislation “may implicate several provisions of the State’s constitution,” including Article I, Section 6 (separation of powers), Article II,

Section 1 (legislative power), Article III, Section 1 (executive power), Article III, Section 5(4) (faithful execution), and Article III, Section 5(8) (appointments).²

A. Part I of Senate Bill 512 Restructures the Economic Investment Committee in Violation of the Separation of Powers Clause and the Faithful Execution Clause

40. The Economic Investment Committee was established under Section 143B-437.54 as an agency of the Department of Commerce to administer the Job Development Investment Grant Program. For its part, the Job Development Investment Grant Program authorizes the Economic Investment Committee to enter into agreements with businesses to provide grants in accordance with statutory criteria. N.C. Gen. Stat. § 143B-437.52. The Job Development Investment Grant Program is intended to “create new jobs for the citizens of the State by encouraging and promoting the expansion of existing business and industry within the State and by recruiting and attracting new business and industry to the State.” N.C. Gen. Stat. § 143B-437.50(1).

41. Housed within a principal executive department, the Economic Investment Committee is primarily an executive agency with authority under Section 143B-135.234(c), among other things, to:

- a. Develop criteria to be used to determine whether conditions of Job Development Investment Grant Program are met (N.C. Gen. Stat. § 143B-437.52(a));
- b. Select Job Development Investment Grant Program grant recipients and enter community economic development agreements with businesses under the Job Development Investment Grant Program

² [https://dashboard.ncleg.gov/api/Services/BillSummary/2023/S512-SMTU-18\(e1\)-v-2](https://dashboard.ncleg.gov/api/Services/BillSummary/2023/S512-SMTU-18(e1)-v-2) (attached hereto as **Exhibit 1**)

which are binding on the State and not subject to State funds being appropriated by the General Assembly (N.C. Gen. Stat. § 143B-437.57(c));

- c. Evaluate and make recommendations on applications recommended by the Department of Commerce for the Site Infrastructure Development Fund (N.C. Gen. Stat. §143B-437.02); and
- d. Evaluate and make recommendations on applications recommended by the Department of Commerce for the Job Maintenance and Capital Development Fund (created as a restricted reserve in the Department of Commerce) (N.C. Gen. Stat. §143B-437.02).

42. Prior to the passage of Senate Bill 512, the Economic Investment Committee consisted of five members: (1) the Secretary of Commerce, (2) the Secretary of Revenue, (3) the Director of the Office of State Budget and Management, (4) one member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives for a two-year term, and (5) one member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate for a two-year term. N.C. Gen. Stat. § 143B-437.54(a) (2003). Section 143B-437.54(a) expressly prohibited members of the General Assembly from appointing its own members to serve on the Economic Investment Committee

43. Section 143B-437.54 is silent as to removal authority. However the Secretaries of Commerce and Revenue and the Director of the Office of State Budget and Management are appointed by the Governor and serve at the Governor's pleasure. N.C. Gen. Stat. § 143B-9; N.C. Gen. Stat. § 143C-2-1.

44. Section 143B-437.54 as amended by Senate Bill 512 adds two members to the Economic Investment Committee: the Speaker of the House of Representatives or their designee and the President Pro Tempore of the Senate or their designee.

45. Senate Bill 512 also repeals Section 120-123(76) and removes language from Section 143B-437.54, both of which prohibited the General Assembly from appointing its own members to the Economic Investment Committee.

46. The addition of the Speaker and President Pro Tempore as members of the Economic Investment Committee—and the ability of the General Assembly to appoint legislators—violates Article I, Section 6 of the North Carolina Constitution. *See Wallace*, 304 N.C. 591.

47. As the General Assembly’s staff attorneys noted in their legislative analysis for Senate Bill 512, “[g]iven the holding of *Wallace v. Bone*, Section [1] of the bill may pose constitutional concerns, inasmuch as that provision appoints members of the General Assembly to the Economic Investment Committee.” *See Exhibit 1* hereto at 4.

48. The addition of the Speaker and President Pro Tempore (or their designees) also deprives the Governor of the ability to appoint or remove a majority of the Economic Investment Committee members. Section 143B-437.54, as amended by Senate Bill 512, therefore allows the General Assembly to take “too much control” over a committee that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

49. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints,” allowing the General Assembly—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Economic Investment Committee. *See McCrory*, 368 N.C. at 647.

50. Taken individually, the provisions of Part I of Senate Bill 512 amending Section 143B-437.54 violate the faithful execution and separation of powers clauses by:

- a. Allowing members of the General Assembly to be appointed to the Economic Investment Committee;
- b. Reducing the Governor's appointments to less than a majority of the members of the Economic Investment Committee; and
- c. Eliminating the Governor's power to remove a majority of the members of the Economic Investment Committee.

51. Taken as a whole, Section 143B-437.54, as amended, prevents the Governor from performing his core function under the North Carolina Constitution to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4).

52. Taken as a whole, the General Assembly's seizure of control over the execution of the laws from the Governor by enactment of Part I of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

B. Part II of Senate Bill 512 Restructures the Environmental Management Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause

53. N.C. Gen. Stat. § 143B-282 creates "the Environmental Management Commission of the Department of Environmental Quality with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State."

54. Housed within a principal executive department, the Environmental Management Commission is primarily an executive agency with authority under Sections 143B-282(1), among other things:

- a. "To grant a permit or temporary permit, to modify or revoke a permit, and to refuse to grant permits . . . with regard to controlling sources of air and water pollution."
- b. "To issue a special order . . . to any person whom the Commission finds responsible for causing or contributing to any pollution of water within such watershed or pollution of the air within the area for which standards have been established."
- c. "To conduct and direct that investigations be conducted pursuant to G.S. 143-215.3 and G.S. 143-215.108(c)(5)."
- d. "To direct the investigation of any killing of fish and wildlife."
- e. "To review and have general oversight and supervision over local air pollution control programs."
- f. "To declare an emergency when it finds a generalized dangerous condition of water or air pollution."
- g. "To declare and delineate and modify capacity use areas" and "grant permits for water use within capacity use areas."
- h. "To direct that investigations be conducted when necessary to carry out duties regarding capacity use areas."
- i. "To approve, disapprove and approve subject to conditions all applications for dam construction."
- j. "To have jurisdiction and supervision over the maintenance and operation of dams" and "direct the inspection of dams."
- k. "To have jurisdiction and supervision over oil pollution and dry-cleaning solvent use, contamination, and remediation."
- l. "To administer the State's authority under 33 U.S.C. § 1341 of the federal Clean Water Act."
- m. "To approve Coastal Habitat Protection Plans."
- n. To adopt rules for air quality and emission control standards, water quality standards, and other measures to protect the air and water resources of the State.

55. Under Section 143B-282.1, the Environmental Management Commission makes the final agency decision in contested cases that arise from civil penalty assessments.

56. As the Supreme Court stated in *Wallace*, “[i]t is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws.” *Wallace*, 304 N.C. at 608.

57. Prior to enactment of Part II of Senate Bill 512, Section 143B-283(a1) gave the Governor the right to appoint nine of the fifteen members of the Environmental Management Commission. The remaining six members were appointed by the General Assembly (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).

58. Section 2.1(a) of Senate Bill 512 amends Section 143B-283(a1) to remove the appointment of two members from the Governor’s control and gives those appointments to the Commissioner of Agriculture. As a result, the Governor no longer has the ability to appoint a majority of the members of the Environmental Management Commission.

59. The Commissioner of Agriculture is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Agriculture will be of the same party as the Governor, let alone that they will share the Governor’s policy preferences.

60. The current Commissioner of Agriculture, for example, is not a member of the Governor’s political party and has made clear his opposition to the policy views and priorities of the Governor. In *Cooper I*, the fact that nominees were to be chosen by the leader of the political party other than the one to which the Governor belongs was sufficient to render the provision inconsistent with Article III, Section 5(4) of the North Carolina Constitution. *Cooper I*, 370 N.C. at 416 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 [the Faithful Execution Clause].”).

61. Only the Governor is vested with “[t]he executive power of the State.” N.C. Const. art. III, §§ 1.

62. Only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 5(4).

63. In contrast, Council of State members like the Commissioner of Agriculture have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

64. The fact that a majority of the members of the Environmental Management Commission are appointed by an executive branch officer, therefore, is

not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

65. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly’s legislative power and violates the separation of powers clause.

66. Section 143B-284, prior to amendment, permitted the Governor to select the Environmental Management Commission’s chairperson from among its members.

67. Section 2.1(b) of Senate Bill 512 amended Section 143B-284 to remove the Governor’s ability to appoint the chairperson. Instead, the chairperson is to be elected by and from the members—a majority of whom are no longer appointed by the Governor.

68. Under Section 143B-283(b1) before enactment of Senate Bill 512, the Governor was permitted to remove any member “for misfeasance, malfeasance, or nonfeasance” in accordance with Section 143B-13. As amended by Senate Bill 512, the Governor is further limited to remove only those members whom he appointed “for misfeasance, malfeasance, or nonfeasance.” The Supreme Court in *Cooper I* recognized that removal power solely for cause was severely limited and, therefore, insufficient. 368 N.C. at 646 (“[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.”).

69. Because the Governor has no ability to appoint a majority of the Environmental Management Commission members, because he can only remove those members whom he appointed for cause, and because he cannot select the chairperson of the Commission, Part II of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

70. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of Agriculture] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Environmental Management Commission. *See McCrory*, 368 N.C. at 647.

71. Taken individually, the provisions of Part II of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Environmental Management Commission;
- b. Eliminating the Governor’s power to remove a majority of the members of the Environmental Management Commission; and
- c. Eliminating the Governor’s power to select the chairperson of the Environmental Management Commission to serve at the Governor’s pleasure.

72. Taken as a whole, Sections 143B-283 and -284, as amended by Senate Bill 512, prevent the Governor from performing his core function under the North

Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

73. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

C. Part III of Senate Bill 512 Restructures the Commission for Public Health in Violation of the Separation of Powers Clause and the Faithful Execution Clause

74. Under N.C. Gen. Stat. § 130A-29, “the Commission for Public Health is created with the authority and duty to adopt rules to protect and promote the public health” and “to adopt rules necessary to implement the public health programs administered by the Department [of Health and Human Services].”

75. Housed within a principal executive department, the Commission for Public Health is primarily an executive agency with authority under Sections 130A-29(c), among other things, to adopt rules:

- a. “Necessary to implement the public health programs administered by the Department [of Health and Human Services].”
- b. “Establishing eligibility standards for participation in Department reimbursement programs.”
- c. “Establishing statewide health outcome objectives and delivery standards.”
- d. “Implementing immunization requirements for adult care homes . . . and for nursing homes.”
- e. “Establishing requirements for the sanitation of local confinement facilities.”

76. The Commission for Public Health is also authorized to:

- a. “[E]stablish reasonable standards governing the nature and scope of public health services rendered by local health departments.” N.C. Gen. Stat. § 130A-9.
- b. “[A]dopt rules concerning the imposition of administrative penalties.” N.C. Gen. Stat. § 130A-22(f).
- c. Create metropolitan water districts, sanitary districts, and mosquito control districts. N.C. Gen. Stat. § 130A-29(d).

77. Prior to enactment of Part III of Senate Bill 512, Section 130A-30(a) gave the Governor the right to appoint nine of the thirteen members of the Commission for Public Health. The remaining four members were appointed by the North Carolina Medical Society.

78. Section 3.1(a) of Senate Bill 512 amends Section 130A-30(a) to remove the appointment of four members from the Governor’s control and gives those appointments to the General Assembly—two upon the recommendation of the Speaker of the House of Representatives and two upon the recommendation of the President Pro Tempore of the Senate.

79. As amended, Section 130A-30(a) provides for 13 members: four elected by the North Carolina Medical Society, four appointed by the General Assembly, and five appointed by the Governor. One of the members appointed by the Governor must be a licensed pharmacist, one a licensed veterinarian, one a licensed optometrist, one a licensed dentist, and one a registered nurse.

80. The Governor may only remove those members whom he appointed to the Commission for Public Health “for misfeasance, malfeasance, or nonfeasance.” N.C. Gen. Stat. § 130A-30(c).

81. Because the Governor has no ability to appoint a majority of the Commission for Public Health members and because he can only remove those members whom he appointed for cause, Section 130A-130 as amended by Part III of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

82. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and North Carolina Medical Society] appoint[],” allowing the General Assembly and a non-governmental entity—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Commission for Public Health. *See McCrory*, 368 N.C. at 647.

83. Taken individually, the provisions of Part III of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Commission for Public Health; and
- b. Eliminating the Governor’s power to remove a majority of the members of the Commission for Public Health.

84. Taken as a whole, Section 130A-130, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

85. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part III of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

D. Part IV of Senate Bill 512 Restructures the Board of Transportation in Violation of the Separation of Powers Clause and the Faithful Execution Clause

86. Under N.C. Gen. Stat. § 143B-350, the Board of Transportation is created to “develop transportation policy and projects for the benefit of the citizens of the State.” Members of the Board of Transportation “serve as fiduciaries of the State Highway Fund and Highway Trust Fund.” N.C. Gen. Stat. 143B-350(f).

87. Housed within a principal executive department, the Department of Transportation, the Board of Transportation is primarily an executive agency with authority under Sections 143B-350(f), among other things:

- a. “To formulate policies and priorities, accountability and performance metrics for all modes, divisions, and central office of the Department of Transportation, including personnel within those divisions, and to hold those modes, divisions, and personnel accountable to those metrics.
- b. “To review and take action on each Spend Plan developed by the Department of Transportation.”
- c. “To ensure that the Department of Transportation is operating within the approved Spend Plan.”
- d. “To review and approve the Department’s use of bonds, including for federally funded projects.”
- e. “To advise the Secretary on matters to increase the performance, efficiency, and effectiveness of the day-to-day operations of the Department of Transportation.”
- f. “To ascertain the transportation needs and the alternative means to provide for these needs through an integrated system of transportation.”
- g. “To approve a schedule of all major transportation improvement projects and their anticipated cost. This schedule is designated the Transportation Improvement Program.”

- h. “To approve a schedule of State highway maintenance projects and their anticipated cost. This schedule is designated the Highway Maintenance Improvement Program.”
- i. “To assist the Secretary of Transportation in the performance of his duties in the development of programs and approve priorities for programs within the Department.”
- j. “To allocate all highway construction and maintenance funds appropriated by the General Assembly as well as federal-aid funds which may be available.”
- k. “To approve all highway construction programs.”
- l. “To review all statewide maintenance functions.”
- m. “To authorize the acquisition of rights-of-way for highway improvement projects, including the authorization for acquisition of property by eminent domain.”
- n. “To approve partnership agreements with the North Carolina Turnpike Authority, private entities, and authorized political subdivisions to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, with priority given to highways, roads, streets, and bridges.”

88. The Board of Transportation is also authorized to “promulgate rules, regulations, and ordinances concerning all transportation functions assigned to the Department of Transportation.” N.C. Gen. Stat. § 143B -350(g).

89. The Board of Transportation is composed of twenty voting members. Prior to enactment of Part IV of Senate Bill 512, Section 143B-350(b) gave the Governor the right to appoint fourteen members, each from a different geographic division across the state. The remaining six at-large members were appointed by the General Assembly—three upon the recommendation of the Speaker of the House of

Representatives and three upon the recommendation of the President Pro Tempore of the Senate.

90. Section 4.1(a) of Senate Bill 512 amends Section 143B-350(b) to permit the General Assembly to appoint fourteen members of the Board of Transportation, two from each of the seven Distribution Regions across the state. Six are to be appointed beginning in 2023 and eight are to be appointed beginning in 2025. The Governor is only permitted to appoint the six at-large members of the Board of Transportation.

91. Senate Bill 512 immediately removes all members from the Board of Transportation (fourteen of whom were appointed by the Governor) as of June 30, 2023 and provides for “[a] new board of 20 voting members” to be appointed with terms beginning on July 1, 2023.

92. As the General Assembly’s staff attorneys noted in their legislative analysis for Senate Bill 512, the restructuring of the Board of Transportation “may pose constitutional concerns, inasmuch as under this provision, the Governor would have fewer appointees than the General Assembly to the Board of Transportation.” See Exhibit 1 hereto at 5.

93. Section 143B-350(e), prior to amendment, permitted the Governor to select the Board of Transportation’s chairperson from among its members. The vice-chairperson was elected by and from the members.

94. Section 4.1(a) of Senate Bill 512 amended Section 143B-350(e) to allow the Board of Transportation to elect its chairperson and vice-chairperson from among its members—a majority of whom are no longer appointed by the Governor.

95. The Governor may only remove those members whom he appointed to the Board of Transportation under Section 143B-350(d).

96. Because the Governor has no ability to appoint or remove a majority of the Board of Transportation members, Part IV of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

97. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints,” allowing the General Assembly—not the Governor—to “exert most of the control over the executive policy that is implemented” by the State Board of Transportation. *See McCrory*, 368 N.C. at 647.

98. Taken individually, the provisions of Part III of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Board of Transportation;
- b. Eliminating the Governor’s power to remove a majority of the members of the Board of Transportation; and
- c. Eliminating the Governor’s power to select the chairperson of the Board of Transportation to serve at the Governor’s pleasure.

99. Taken as a whole, Section 143B-350, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina

Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

100. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part IV of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

E. Part V of Senate Bill 512 Restructures the Coastal Resources Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause

101. Under N.C. Gen. Stat. § 113A-104, the Coastal Resources Commission is established within the Department of Environmental Quality.

102. Housed within a principal executive department, the Coastal Resources Commission is primarily an executive agency with authority, among other things, to:

- a. “Approve Coastal Habitat Protection Plans.” N.C. Gen. Stat. § 113A-106.1.
- b. Adopt rules establishing guidelines for the coastal area, including “statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area.” N.C. Gen. Stat. § 113A-107.
- c. “Define rates of sea-level change for regulatory purposes.” N.C. Gen. Stat. § 113A-107.1.
- d. Adopt rules designating “geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof.” N.C. Gen. Stat. § 113A-113.
- e. Issue permits for any development in an area of environmental concern. N.C. Gen. Stat. § 113A-118.
- f. Administer the Public Beach and Coastal Waterfront Access Program “for the purpose of acquiring, improving, and maintaining property

along the Atlantic Ocean and coastal waterways to which the public has rights-of-access or public trust rights.” N.C. Gen. Stat. § 113A-134.2.

103. Prior to enactment of Part V of Senate Bill 512, Section 113A-104 gave the Governor the right to appoint nine of the thirteen members of the Coastal Resources Commission. The remaining four members were appointed by the General Assembly (two at the recommendation of the Speaker of the House of Representatives and two at the recommendation of the President Pro Tempore of the Senate).

104. Section 5.1(a) of Senate Bill 512 amends Section 113A-104(b1) to remove the appointment of three members from the Governor’s control. As amended, Section 113A-104(b1) permits the General Assembly to appoint six members, the Commissioner of Insurance to appoint one member, and the Governor to appoint six members.

105. The Commissioner of Insurance is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Insurance will be of the same party as the Governor or that they will share the Governor’s policy preferences.

106. The current Commissioner of Insurance, Mike Causey, for example, is not a member of the Governor’s political party and has made clear his opposition to the policy views and priorities of the Governor. In *Cooper I*, the fact that nominees were to be chosen by the leader of the political party other than the one to which the Governor belongs was sufficient to render the provision inconsistent with Article III, Section 5(4) of the North Carolina Constitution. *Cooper I*, 370 N.C. at 416 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 [the Faithful Execution Clause].”).

107. Only the Governor is vested with “[t]he executive power of the State” and only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 1, 5(4).

108. In contrast, Council of State members like the Commissioner of Insurance have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

109. The fact that a majority of the members of the Coastal Resources Commission are appointed by an executive branch officer, therefore, is not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

110. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly's legislative power and violates the Separation of Powers Clause.

111. Section 113A-104(i), prior to amendment, permitted the Governor to select the Coastal Resources Commission's chairperson from among its members. The vice-chairperson was elected by and from the members.

112. Section 5.1(a) of Senate Bill 512 removed the Governor's ability to appoint the chairperson. Instead, both the chairperson and the vice-chairperson are to be elected by and from the members—a majority of whom are no longer appointed by the Governor.

113. The Governor's ability to remove members of the Coastal Resources Commission is limited to instances of misfeasance, malfeasance, and nonfeasance. N.C. Gen. Stat. § 143B-13(d); see *Cooper I*, 368 N.C. at 646 (“[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.”).

114. Because the Governor has no ability to appoint a majority of the Coastal Resources Commission members and because he cannot select the chairperson of the Commission, Part V of Senate Bill 512 allows the General Assembly to “too much control” over a board that exercises “final executive authority.” See *McCrorry*, 368 N.C. at 636.

115. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of Insurance] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—rather than the Governor—to “exert most

of the control over the executive policy that is implemented” by the Coastal Resources Commission. *See McCrory*, 368 N.C. at 647.

116. Taken individually, the provisions of Part IV of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Coastal Resources Commission; and
- b. Eliminating the Governor’s power to select the chairperson of the Coastal Resources Commission to serve at the Governor’s pleasure.

117. Taken as a whole, Section 113A-104, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

118. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part V of Senate Bill 512 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

F. Part VI of Senate Bill 512 Restructures the Wildlife Resources Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause

119. Under N.C. Gen. Stat. § 143-240 the Wildlife Resources Commission is established within the Department of Environmental Quality. The North Carolina Wildlife Resources Commission was created as “a separate State agency” with the duty to “manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the State of North Carolina, and to administer the laws relating to game, game and freshwater fishes, and other wildlife resources.” N.C. Gen. Stat. § 143-239.

120. “The Wildlife Resources Commission has jurisdiction over the conservation of wildlife resources” and “all activities connected with the conservation and regulation of wildlife resources.” N.C. Gen. Stat. § 113-132(b).

121. Housed within a principal executive department, the Wildlife Resources Commission is primarily an executive agency with authority, among other things, to:

- a. Adopt rules regulating the State’s wildlife resources, including boating and water safety, hunting, fishing, and the use of public land under the Commission’s jurisdiction.
- b. Issue hunting and fishing licenses.
- c. Issue permits relating to the possession and transportation of wildlife.
- d. “Regulate the possession and transportation, including importation and exportation” of non-farm animals.
- e. Employ law enforcement officers
- f. “Lease or purchase lands, equipment, and other property . . . establish wildlife refuges, management areas, and boating and fishing access areas.” N.C. Gen. Stat. § 113-306,
- g. “Develop a plan and policy of wildlife management for all lands owned by the State.”
- h. “To adopt and publish an endangered species list” and “to adopt and implement conservation programs for endangered” species. N.C. Gen. Stat. § 113-333.

122. Prior to enactment of Part VI of Senate Bill 512, Section 113-241 gave the Governor the right to appoint eleven of the nineteen members of the Wildlife Resources Commission. The remaining eight members were appointed by the General Assembly (four at the recommendation of the Speaker of the House of Representatives

and four at the recommendation of the President Pro Tempore of the Senate). At least one member recommended by the Speaker of the House of Representatives and one member recommended by the President Pro Tempore of the Senate had to be members of the minority party in the General Assembly.

123. Sections 6.1(a) and 6.1(b) of Senate Bill 512 amend Section 113-241 to remove the Governor's ability to appoint a majority of the members of the Wildlife Resources Commission by giving one of the at-large appointments previously made by the Governor to the Commissioner of Agriculture and creating two additional seats to be appointed by the General Assembly. As amended, Section 113-241 allows the Governor to appoint ten members of the Wildlife Resources Commission, the Commissioner of Agriculture to appoint one member, and the General Assembly to appoint ten members.

124. The Commissioner of Agriculture is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Agriculture will be of the same party as the Governor or that they will share the Governor's policy preferences.

125. The current Commissioner of Agriculture, Steve Troxler, for example, is not a member of the Governor's political party and has made clear his opposition to the policy views and priorities of the Governor. *See Cooper I*, 370 N.C. at 416 n.12.

126. Only the Governor is vested with "[t]he executive power of the State." N.C. Const. art. III, §§ 1.

127. Only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 5(4).

128. In contrast, Council of State members like the Commissioner of Agriculture have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

129. The fact that a majority of the members of the Wildlife Resources Commission are appointed by an executive branch officer, therefore, is not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

130. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly’s legislative power and violates the Separation of Powers Clause.

131. The Governor may only remove those members whom he appointed from the Wildlife Resources Commission.

132. Because the Governor has no ability to appoint or remove a majority of the Wildlife Resources Commission members, Part VI of Senate Bill 512 allows the General Assembly to take “too much control” over a commission that exercises “final executive authority.” *See McCrorry*, 368 N.C. at 636.

133. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of

Agriculture] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Wildlife Resources Commission. *See McCrory*, 368 N.C. at 647.

134. Taken individually, the provisions of Part VI of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Wildlife Resources Commission;
- b. Eliminating the Governor’s power to remove a majority of the members of the Wildlife Resources Commission; and
- c. Eliminating the Governor’s power to select the chairperson of the Wildlife Resources Commission to serve at the Governor’s pleasure.

135. Taken as a whole, Section 113-241, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

136. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part VI of Senate Bill 512 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

G. Session Law 2023-108 Structures the Residential Code Council in Violation of the Separation of Powers Clause and the Faithful Execution Clause

137. Prior to the enactment of Session Law 2023-108, N.C. Gen. Stat. § 143-136 created the Building Code Council, which was responsible for preparing and adopting the North Carolina State Building Code. N.C. Gen. Stat. § 143-138.

138. The Building Code Council is primarily an executive agency with authority, among other things, to adopt revisions or amendments to the North Carolina State Building Code, “including provisions applicable to the North Carolina Energy Conservation Code, the North Carolina Electrical Code, the North Carolina Fuel Gas Code, the North Carolina Plumbing Code, the North Carolina Mechanical Code, [and] the North Carolina Existing Building Code.” N.C. Gen. Stat. § 143-136(d).

139. Section 143-136 gives the Governor the right to appoint all seventeen members of the Building Code Council—without the need for Senate confirmation. The Governor may remove members from the Building Code Council at any time

140. Prior to the enactment of Session Law 2023-108, a Residential Code Committee was comprised of seven members of the Building Code Council—who were all appointed and subject to removal by the Governor. The Residential Code Committee was responsible for recommending revisions to the Building Code applicable to one- and two-family residential construction. No revision or amendment to the Building Code applicable to residential construction could be considered by the Building Code Council unless recommended by the Residential Code Committee. N.C. Gen. Stat. 143-136(c).

141. Section 1.(b) of Session Law 2023-108 repeals Section 143-136(c) and transfers the authority to adopt and amend the State Building Code as it pertains to residential construction from the Building Code Council to a new Residential Code Council.

142. The new Residential Code Council consists of thirteen members, six appointed by the General Assembly and seven appointed by the Governor. The Governor's appointees are subject to confirmation by a majority of Senators under Article III, Section 5(8) of the North Carolina Constitution. Session Law 2023-108 is silent as to the Governor's authority to remove members.

143. Session Law 2023-108 requires nine members of the Residential Code Council to constitute a quorum and nine members present are necessary to approve any action of the Residential Code Council, including amendment or revision to the North Carolina Residential Code. N.C. Gen. Stat. § 143-136.1(e).

144. Therefore, although the Governor may appoint more members of the Residential Code Council than the General Assembly appoints, Session Law 2023-108 nonetheless deprives the Governor sufficient control over a council that exercises "final executive authority." *see McCrory*, 368 N.C. at 636.

145. Because he cannot appoint enough members to constitute a quorum or take action and his appointees are subject to Senate confirmation, Session Law 2023-108 allows the General Assembly to take "too much control" over a board that exercises "final executive authority." *See McCrory*, 368 N.C. at 636.

146. Session Law 2023-108 "leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoint," allowing the General Assembly to "exert most of the control over the executive policy that is implemented" by the Residential Code Council. *See McCrory*, 368 N.C. at 647.

147. As a result, Section 143-136.1 and related amendments to Article 9 of Chapter 143 made by Session Law 2023-108 prevent the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

148. The General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Session Law 2023-108 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

COUNT 1: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
Part I of Senate Bill 512 (Economic Investment Committee) Facially Violates the Separation of Powers Clauses of the North Carolina Constitution

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

150. A present and real controversy exists between the parties as to the constitutionality of Part I of Senate Bill 512.

151. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-437.54 and the repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 unconstitutionally violate the Separate of Powers Clause that is “a cornerstone of our state and federal governments.” *Wallace*, 304 N.C. at 601.

152. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-437.54 prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he Separation of Powers Clause requires that, as the three branches of government carry out their

duties, one branch will not prevent another branch from performing its core functions.”).

153. Accordingly, Part I of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

154. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 143B-437.54 and repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 2: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
Part II of Senate Bill 512 (Environmental Management Committee)
Facially Violates the Separation of Powers and Faithful Execution Clauses
of the North Carolina Constitution

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

156. A present and real controversy exists between the parties as to the constitutionality of Part II of Senate Bill 512.

157. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

158. Accordingly, Part II of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

159. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 3: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
Part III of Senate Bill 512 (Commission for Public Health) Facially Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution

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

161. A present and real controversy exists between the parties as to the constitutionality of Part III of Senate Bill 512.

162. Individually, and as whole, the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

163. Accordingly, Part III of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

164. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 4: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
Part IV of Senate Bill 512 (Board of Transportation) Facially Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution

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

166. A present and real controversy exists between the parties as to the constitutionality of Part IV of Senate Bill 512.

167. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

168. Accordingly, Part IV of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

169. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent

injunction declaring that the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 5: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
**Part V of Senate Bill 512 (Coastal Resources Commission) Facially Violates
the Separation of Powers and Faithful Execution Clauses of the North
Carolina Constitution**

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

171. A present and real controversy exists between the parties as to the constitutionality of Part V of Senate Bill 512.

172. Individually, and as whole, the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

173. Accordingly, Part V of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

174. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 6: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
**Part VI of Senate Bill 512 (Wildlife Resources Commission) Facially
Violates the Separation of Powers and Faithful Execution Clauses of the
North Carolina Constitution**

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

176. A present and real controversy exists between the parties as to the constitutionality of Part VI of Senate Bill 512.

177. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

178. Accordingly, Part VI of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

179. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

COUNT 7: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
**Session Law 2023-108 (Residential Code Council) Facially Violates the
Separation of Powers and Faithful Execution Clauses of the North
Carolina Constitution**

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

181. A present and real controversy exists between the parties as to the constitutionality of amendments and additions to Chapter 143, Article 9 enacted by Sections 1.(a) and 1.(b) of Session Law 2023-108.

182. The enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 in Session Law 2023-108 unconstitutionally prevents the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrory*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

183. Accordingly, Session Law 2023-108 facially violates the separation of powers clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

184. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 are unconstitutional and are 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 the amendments to N.C. Gen. Stat. § 143B-437.54 and repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

2. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

3. 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 the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

4. 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 the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

5. 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 the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

6. 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 the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

7. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and the North Carolina Rules of Civil Procedure 57 and 65, declaring that the enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 are unconstitutional and are therefore void and of no effect; and

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

Respectfully submitted this the 10th day of October, 2023

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COMPLAINT EXHIBIT 1
Bill Analysis—Senate Bill 512:
Greater Accountability for
Boards/Commissions



SENATE BILL 512: Greater Accountability for Boards/Commissions.

2023-2024 General Assembly

Committee:	Senate Rules and Operations of the Senate	Date:	April 5, 2023
Introduced by:	Sens. Daniel, Rabon, Berger	Prepared by:	Kristen L. Harris Staff Attorney
Analysis of:	First Edition		

OVERVIEW: *Senate Bill 512 would amend the compositions of and appointments to various boards and commissions in North Carolina.*

CURRENT LAW AND BILL ANALYSIS:

PART I. UTILITIES COMMISSION

Section 1.(a) would transfer the North Carolina Utilities Commission (the Commission) from the Department of Commerce to the Department of State Treasurer (the Department or the Treasurer.) The Commission would be administratively located within the Department but would exercise all its prescribed statutory powers independently.

Section 1.(b) would increase the number of commissioners on the Commission from seven to nine and change the appointments as follows beginning July 1, 2023:

- The Governor currently appoints seven commissioners and would appoint four commissioners subject to confirmation by the General Assembly.
- The General Assembly would appoint four commissioners, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- The Treasurer would appoint one commissioner subject to the confirmation by the General Assembly.

The Governor would designate one commissioner to serve as chair of the Commission every three years, instead of every four. In the case of death, incapacity, resignation, or vacancy for any other reason in the office of any commissioner appointed by the Governor or the Treasurer prior to the expiration of the term, the appointing authority must submit the name of a successor to the General Assembly for confirmation within four weeks of the vacancy.

Section 1.(c) would give two new four-year appointments beginning on July 1, 2023, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

Section 1.(d) for the three terms expiring on June 30, 2023, would give one appointment to the Governor and two to the General Assembly, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

For the three terms expiring on June 30, 2025, would give two appointments to the Governor and one to the Treasurer.

For the term expiring on June 30, 2027, would give one appointment to the Governor.

Jeffrey Hudson
Director



Legislative Analysis
Division
919-733-2578

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Section 1.(e) would make a conforming change.

PART II. ECONOMIC INVESTMENT COMMITTEE

Sections 2.1. would add the Speaker of the House of Representatives and the President Pro Tempore of the Senate, or their designees, as members of the Economic Investment Committee (the Committee) and remove the prohibition that members of the Committee appointed by General Assembly cannot be members of the General Assembly. Members of the Committee, serving as ex officio members or designees of members appointed by the General Assembly, would serve until they are no longer in office or are replaced with another designee. The Committee would act only upon a decision of a majority of its members.

PART III. ENVIRONMENTAL MANAGEMENT COMMISSION

Section 3.1. would change two of the Governor's nine appointments on the 15-member Environmental Management Commission (the Commission) to two appointments made by the Commissioner of Agriculture. Each appointing authority could reappoint a member of the Commission to an additional term if the member qualified for membership or remove a member. The General Assembly would continue to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.

A chair and vice-chair would be elected by and from members of the Commission rather than designated by the Governor.

PART IV. COMMISSION FOR PUBLIC HEALTH

Section 4.1. would change the 13-person membership of the Commission for Public Health as follows:

- The Governor currently appoints nine members and would appoint five.
- The General Assembly would appoint four members, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- Four members would continue to be elected by the North Carolina Medical Society.

Any appointment to fill a vacancy created by resignation, dismissal, death, or disability would be filled by the appointing authority. Each appointing authority would be able to remove a member.

The General Assembly would make appointments for the four terms expiring on April 30, 2023.

PART V. BOARD OF TRANSPORTATION

Section 5.1.(a) would amend the appointments to the 20-member Board of Transportation (the Board) as follows:

- The Governor currently appoints 14 members and would appoint six.
- The General Assembly currently appoints six members and would appoint 14, seven upon recommendation of the Speaker of the House of Representatives and seven upon recommendation of the President Pro Tempore of the Senate.

The Board, rather than the Governor, would select a chair and vice-chair for two-year terms.

Section 5.1.(b) would designate six division appointments and five at-large appointments expiring in 2024 to the General Assembly, six at-large appointments expiring in 2026 to the Governor, and two division appointments and one at-large appointment expiring in 2026 to the General Assembly.

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PART VI. COASTAL RESOURCES COMMISSION

Section 6.1. would amend the appointments to the 13-member Coastal Resources Commission (the Commission) as follows:

- The Governor currently appoints nine members and would appoint six.
- The General Assembly currently appoints four members and would appoint six.
- The Commissioner of Insurance would appoint one member.

The chair and vice-chair of the Commission would be elected by the Commission members rather than selected by the Governor.

PART VII. WILDLIFE RESOURCES COMMISSION

Section 7.1.(a) would increase the number of members on the Wildlife Resources Commission (the Commission) by changing the number of appointments by the General Assembly from eight to 10 members, five upon recommendation of the Speaker of the House of Representatives and five upon recommendation of the President Pro Tempore of the Senate. The Governor would continue to appoint 11 members.

Sections 7.1.(b) and (c) would change the Governor's two at-large member appointments to one and give the Commissioner of Agriculture one at-large appointment. This section would become effective June 30, 2025.

PART VIII. NORTH CAROLINA RAILROAD BOARD OF DIRECTORS

Section 8.1. would amend the appointments to the 13-person membership of the North Carolina Railroad Board of Directors (the Board) as follows:

- The Governor currently appoints seven members and would appoint six.
- The State Treasurer would appoint one member.
- The General Assembly would continue to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.

The Treasurer's appointee would replace a Governor's appointee with a term expiring in 2023, and the effective date of this section would be determined by actions taken by the Board and notice to the Revisor of Statutes.

PART IX. BOARD OF DIRECTORS OF THE UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

Section 9.1. would make changes to the 24-member Board of Directors of the University of North Carolina Health Care System as follows:

- There would be four ex officio members instead of eight.
- Eight at-large members would be appointed annually by the General Assembly, one upon recommendation of the Speaker of the House of Representatives and one upon recommendation of the President Pro Tempore of the Senate.
- The Board of Governors would continue to appoint 12 at-large members.
- The Board of Directors would no longer appoint four at-large members.

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The section would also provide for appointments in 2023, 2024, 2025, and 2026 to allow for staggering of terms of the members.

PART X. MISCELLANEOUS

Section 10.1 would provide a severability clause.

EFFECTIVE DATE: Except as otherwise provided, this act would be effective July 1, 2023.

BACKGROUND:

Legislation involving appointments to boards and commissions may implicate several provisions of the State's constitution, including:

- Article I, Section 6 of the State's Constitution, which provides:

Sec. 6. Separation of powers.

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

- Article II, Section 1, of the State's Constitution, which provides:

Section 1. Legislative power.

The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

- Article III, Section 1 of the State's Constitution, which provides:

Section 1. Executive power.

The executive power of the State shall be vested in the Governor.

- Article III, Section 5, Clauses 4 and 8, of the State's Constitution (Executive), which provides:

Sec. 5. Duties of Governor.

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed.

...

(8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

Such legislation has been challenged on constitutional grounds in the past – two relevant decisions of the State's Supreme Court include:

- [State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 \(1982\)](#)

In this case, the Court considered a challenge to legislation that appointed four members of the General Assembly to serve on the Environmental Management Commission (EMC). The Court held that the statute allowing the General Assembly to appoint legislators to the EMC was a separation of powers violation under the State constitution, and stated:

"It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws... [T]he 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."

Given the holding of Wallace v. Bone, Section 2 of the bill may pose constitutional concerns, inasmuch as that provision appoints members of the General Assembly to the Economic Investment Committee, if a court determines the Committee's duties are administrative or executive in nature.

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- [McCrorry v. Berger, 368 N.C. 633, 781 S.E. 2d 248 \(2016\)](#)

In this case, the Court considered a challenge to legislation that gave the General Assembly a majority of the members of the Coal Ash Commission, Oil & Gas Commission, and Mining Commission relative to the Governor. The Court held that the challenged appointment provisions violated the separation of powers clause, and stated:

"When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself."

Given the holding of McCrorry v. Berger, Section 5 of the bill may pose constitutional concerns, inasmuch as under this provision, the Governor would have fewer appointees than the General Assembly to the Board of Transportation.

Note, however, that McCrorry v. Berger did not consider how appointment of other officers of the Executive Branch, such as the Commissioners of Agriculture or Insurance, or by other bodies, such as the Medical Society, to a board or commission may impact a separation of powers analysis. Therefore, it's unclear if McCrorry v. Berger concerns would apply to other Sections of the bill.