No. 267P18 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

ROY COOPER, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,

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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

From Wake County
No. 18 CVS 9805

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EXPEDITED RECORD ON APPEAL

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STATEMENT OF ORGANIZATION OF TRIAL COURT

Plaintiff Governor Cooper appeals from the 31 August 2018 Order Denying Request for Temporary Restraining Order entered by a three-judge panel in Wake County Superior Court, the Honorable Forrest D. Bridges, Thomas H. Lock, and Jeffery K. Carpenter presiding.

The record on appeal was filed in the Supreme Court on 1 September 2018 and was docketed on _____ 2018.

STATEMENT OF JURISDICTION

This action was commenced by the filing of a complaint and issuance of summonses on 6 August 2018 in Wake County Superior Court. The Amended Complaint was filed on 30 August 2018. The parties acknowledge that the trial court had personal jurisdiction; the issue of subject-matter jurisdiction is disputed.

18CV009305

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

FILED

COMPLAINT, MOTION FOR TEMPORARY RESTRAINING ORDER, AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Roy A. Cooper, III ("Governor Cooper"), in his official capacity as Governor of the State of North Carolina, seeking declaratory and injunctive relief under the North Carolina Constitution, hereby alleges and says:

INTRODUCTION

1. The General Assembly has proposed two amendments to the North Carolina Constitution that would take a wrecking ball to the separation of powers. These proposed amendments would rewrite bedrock constitutional provisions—

including the Separation of Powers Clause itself. They would overrule recent decisions of the North Carolina Supreme Court. They would strip the Governor of his authority to appoint thousands of officials to hundreds of boards and commissions that execute the laws of our State. They would confer exclusive authority on the General Assembly to choose those whom the Governor can consider to fill judicial vacancies. And they ultimately threaten to consolidate control over all three branches of government in the General Assembly.

2. When the people of North Carolina vote on these proposed amendments, however, the ballot will inform them of precisely none of this. Rather than allow the voters to make an intelligent decision whether to restructure their own state government, the General Assembly has adopted false and misleading ballot language that conceals the true—and truly extraordinary—nature of these proposed amendments. The General Assembly has therefore violated its duty to the people—imposed by the North Carolina Constitution in Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I—to describe these proposed amendments on the ballot in fair and accurate terms.

3. The separation of powers is grounded in the "inalterable truth" that "freedom is 'political power divided into small fragments.'" Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108 (Winter 1970) (quoting Thomas Hobbes). The Governor brings this action to preserve the separation of powers, prevent the wholesale transfer of constitutional authority from his Office to the General Assembly, fulfill his duty to take care that

the laws be faithfully executed, discharge his oath to support the North Carolina Constitution, and stop the General Assembly from perpetrating a deceitful scheme on the people of North Carolina. This Court should declare the false and misleading ballot language written by the General Assembly to be unconstitutional, and should immediately enjoin the inclusion of that language on the November 2018 ballot.

PARTIES AND JURISDICTION

4. On November 8, 2016, the voters of the State of North Carolina elected Plaintiff Governor Cooper to be their governor for a four-year term commencing on January 1, 2017. Governor Cooper is a resident of Wake County, North Carolina.

5. Defendant Philip E. Berger ("Berger") is the President Pro Tempore of the North Carolina Senate and, upon information and belief, is a resident of Rockingham County, North Carolina. Defendant Berger is sued in his official capacity.

6. Defendant Timothy K. Moore ("Moore") is the Speaker of the North Carolina House of Representatives and, upon information and belief, is a resident of Cleveland County, North Carolina. Defendant Moore is sued in his official capacity.

7. Defendant North Carolina Bipartisan State Board of Elections and Ethics Enforcement ("State Elections and Ethics Board" or "Board") is an executive agency of the State of North Carolina that is headquartered in Wake County, North Carolina.

8. Defendant James A. ("Andy") Penry is the Chair of the State Elections and Ethics Board and, upon information and belief, is a resident of Wake County, North Carolina. Defendant Penry is sued in his official capacity.

9. Defendants lack sovereign immunity with respect to the claims asserted herein because Governor Cooper seeks declaratory relief and injunctive relief directly under the North Carolina Constitution, and no other adequate remedy at law is available or appropriate, and because the claims in this case 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.

10. Governor Cooper seeks a declaration that (1) the ballot question in Section 5 of Session Law 2018-117 violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the proposed constitutional amendment in Sections 1 through 4 of Session Law 2018-117 (a true and correct copy of which is attached as **Exhibit A**), and (2) the ballot question in Section 6 of Session Law 2018-118 violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the proposed constitutional amendment in Sections 1 through 5 of Session Law 2018-118 (a true and correct copy of which is attached as **Exhibit B**).

11. Governor Cooper also seeks to enjoin the ballot questions in Section 5 of Session Law 2018-117 and Section 6 of Session Law 2018-118 from appearing on the ballot for the general election in November 2018.

12. This Court has jurisdiction over the parties and subject matter of this lawsuit.

13. Venue is proper in Wake County Superior Court pursuant to N.C. Gen. Stat. §§ 1-77(2) and 1-82 because this lawsuit is an as-applied constitutional challenge to ballot questions adopted by the General Assembly in Wake County.

HISTORICAL BACKGROUND

14. This action concerns proposed constitutional amendments that the General Assembly has recently adopted. But it arises in a broader historical context in which the General Assembly has repeatedly sought to trample upon the principle of separation of powers in our state government. That historical context is critical to understanding and resolving this case.

15. In 2014, the General Assembly created three state commissions (the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission) that performed executive functions, and granted itself—rather than the Governor—the power to appoint a majority of the voting members of each commission. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 636-38, 781 S.E.2d 248, 250-51 (2016).

16. Then-Governor Patrick L. McCrory brought suit. In January 2016, the North Carolina Supreme Court ruled that the General Assembly had violated the Separation of Powers Clause (Article I, § 6) and the Take Care Clause (Article III, § 5(4)) of the North Carolina Constitution by giving itself the power to appoint a majority of the voting members of the commissions at issue. *McCrory*, 368 N.C. at 647-49, 781 S.E.2d at 257-58.

17. In December 2016, prior to Governor-elect Cooper's taking office, the leadership of the General Assembly convened a special session to enact hastily

drawn legislation curtailing the Governor's powers. Among other things, the General Assembly merged the State Board of Elections with the State Ethics Commission and provided that the combined board would have eight members—four appointed by the General Assembly, and four appointed by the Governor.

18. Governor Cooper challenged this legislation. In March 2017, a three-judge panel unanimously ruled that the configuration of the new board violated the separation of powers. *See Cooper v. Berger*, Wake County Case No. 16-CVS-15636, Order on Cross-Motions for Summary Judgment (March 17, 2017).

19. The General Assembly was undeterred. In April 2017, it again merged the State Board of Elections with the State Ethics Commission to form the State Elections and Ethics Board—consisting this time of four Democrats and four Republicans appointed by the Governor.

20. Governor Cooper brought suit. In January 2018, the North Carolina Supreme Court ruled that the General Assembly had again violated the Separation of Powers Clause and the Take Care Clause of the North Carolina Constitution by preventing the Governor from appointing a majority of members to the Board who share his views on policy. *Cooper v. Berger*, 370 N.C. 392, 413-18, 809 S.E.2d 98, 110-14 (2018).

21. The General Assembly remained undeterred. In February 2018, it enacted another configuration of the Board, adding a ninth member unaffiliated with the two major parties and chosen by the other eight board members. Because this new configuration does not cure the separation of powers violation identified by

the Supreme Court, Governor Cooper brought suit to challenge it. That challenge is pending in this Court before a three-judge panel. *See Cooper v. Berger*, Wake County Case No. 18-CVS-3348.

22. In addition to repeatedly infringing the constitutional authority of the Governor, the General Assembly has also engaged in a pattern of actions and threatened actions over the last several years to politicize the courts and undermine the independence of the judiciary. For example, the General Assembly has reduced the number of judges on the Court of Appeals from 15 to 12, required partisan elections yet eliminated primaries for all judicial offices, and redrawn judicial districts in Mecklenburg and Wake Counties to partisan ends. The General Assembly has also threatened—but not yet acted—to reduce all judicial terms to two years, eliminate all emergency special superior court judgeships, and redraw the judicial districts for the entire State.

THE PROPOSED CONSTITUTIONAL AMENDMENTS: WOLVES IN SHEEP'S CLOTHING

23. The General Assembly has now devised a scheme to achieve by constitutional amendment what it has been unable to accomplish by statute or in litigation over the past several years: eliminate the separation of powers, usurp the Governor's executive authority, and seize control of the appointment of every member of virtually every board and commission in all three branches of state government—including the State Elections and Ethics Board and hundreds of other boards and commissions that perform executive (or judicial) functions. In furtherance of its repeated efforts to politicize and delegitimize the judiciary, the

General Assembly also seeks to usurp control over appointments to fill judicial vacancies. And, as an integral part of its scheme, the General Assembly has crafted ballot language that will mislead voters into ratifying its determination to grab all of this power for itself.

24. Over five days, from June 25 to June 29, 2018, the General Assembly adopted six proposed amendments to the North Carolina Constitution.

25. Contrary to typical practice, the General Assembly has not enacted enabling legislation for any of these proposed amendments that would assist the public in understanding how the proposals will be implemented.

26. This action concerns two of the currently proposed amendments, both of which the General Assembly adopted on June 28.

27. The first proposed amendment at issue would dismantle the two foundational provisions of the Constitution against which the General Assembly has repeatedly expressed its hostility in recent years (the Separation of Powers Clause and the Take Care Clause), overrule the Supreme Court's affirmation (in *McCrory v. Berger* and *Cooper v. Berger*) of the Governor's constitutional authority to appoint the majority of members of executive boards and commissions, and consolidate the appointment power for boards and commissions (legislative, executive, and judicial) in the General Assembly. Sections 1 through 4 of Session Law 2018-117 contain this proposed amendment (hereinafter the "Separation of Powers Proposal").

28. Section 5 of Session Law 2018-117 provides that the Separation of Powers Proposal shall be submitted to the voters in the November 2018 general

election, and that the following question shall appear on the ballot (hereinafter the "Separation of Powers Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority.

Session Law 2018-117, § 5.

29. The second proposed amendment at issue would repeal the provision of the North Carolina Constitution that grants the Governor the authority to fill judicial vacancies (Article IV, § 19), and replace it with a new provision that would make the General Assembly the gatekeeper for filling vacancies in judicial offices at all levels of the court system and reduce the Governor's role to selecting between two nominees the General Assembly has chosen for the bench. Sections 1 through 5 of Session Law 2018-118 contain this proposed amendment (hereinafter the "Judicial Vacancies Proposal").

30. Section 6 of Session Law 2018-118 provides that the Judicial Vacancies Proposal shall be submitted to the voters in the November 2018 general election, and that the following question shall appear on the ballot (hereinafter the "Judicial Vacancies Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

Session Law 2018-118, § 6.

31. The consequences of these proposed amendments, and the reasons why the ballot questions adopted by the General Assembly are misleading and unconstitutional, are reviewed below.

THE CONSTITUTIONAL AMENDMENTS PUBLICATION COMMISSION

32. After the General Assembly adopted the currently proposed constitutional amendments, the North Carolina Constitutional Amendments Publication Commission (the "Commission") scheduled a meeting for July 31 to carry out its statutory duty to prepare short ballot captions for the proposed amendments. *See* N.C. Gen. Stat. § 147-54.10(a).

33. On July 23, the General Assembly issued a joint proclamation to convene a special session "to consider bills concerning any matters the General Assembly elects to consider." On July 24, the General Assembly convened and passed House Bill 3 (a true and correct copy of which is attached as **Exhibit C**). That bill prevented the Commission from writing captions for the proposed constitutional amendments.

34. On July 29, Governor Cooper vetoed House Bill 3.

35. At the July 31 Commission meeting, the Secretary of State and the Attorney General expressed concern that the Separation of Powers Proposal and the Judicial Vacancies Proposal threaten the separation of powers in our state government.

36. At the same meeting, the Secretary of State and the Attorney General expressed concern that the Separation of Powers Ballot Question and Judicial Vacancies Ballot Question are misleading and disingenuous.

37. On Saturday, August 4, the General Assembly convened to continue its extra session, listing an open-ended agenda, including votes to override the Governor's veto of House Bill 3. A sufficient number of legislators were present (three-fifths of the Senate and of the House) to propose a constitutional amendment, or to revise the currently proposed amendments. A bill was filed (Senate Bill 7) to amend the Judicial Vacancies Proposal. The General Assembly overrode the Governor's veto of House Bill 3. It adjourned *sine die*.

38. Under current law, the language presented to voters on the November 2018 ballot concerning the proposed amendments at issue here will be the language quoted above in paragraphs 28 and 30, preceded by the caption "Constitutional Amendment."

39. On information and belief, the State Board of Elections and Ethics may finalize the November 2018 ballot as soon as August 8.

GOVERNING LEGAL PRINCIPLES

40. Article XIII of the North Carolina Constitution permits the General Assembly to propose constitutional amendments, "but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." N.C. Const. art. XIII, § 4.

41. Article XIII requires that a proposed amendment be fairly and accurately reflected on the ballot. Otherwise, the General Assembly has not truly

"submitt[ed] the proposal to the qualified voters of the State for their ratification or rejection." N.C. Const. art. XIII, § 4.

42. The requirement that a proposed constitutional amendment be fairly and accurately reflected on the ballot also follows from provisions of Article I of the North Carolina Constitution.

43. Section 2 of Article I provides that "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. Constitutional amendments that are adopted through a ballot that does not fairly and accurately present the proposed amendment to the people cannot be a valid expression of the will of the people.

44. Section 3 of Article I likewise provides that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness." N.C. Const. art. I, § 3. This provision affirms that the right to amend the Constitution belongs solely and exclusively to the people—one corollary of which is that the people must be fairly and accurately informed of proposed amendments to the Constitution.

45. Section 19 of Article I preserves the right to due process of law, which encompasses a right to an ordered and lawful process for amending the Constitution. To satisfy due process, therefore, the General Assembly must adopt fair and accurate ballot language concerning proposed amendments.

46. Finally, Section 35 of Article I provides that "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Few principles, if any, are more fundamental to our system of government than the separation of powers. It would therefore violate Section 35—and compromise "the blessings of liberty"—to abolish the separation of powers through ballot language that fails even to acknowledge that consequence.

47. Both the General Assembly and the North Carolina Supreme Court have confirmed that North Carolina law requires ballot language to be fair and accurate. For example, by statute, the State Elections and Ethics Board must ensure that official ballots, among other things, are "readily understandable by voters" and "[p]resent all candidates and questions in a fair and nondiscriminatory manner." N.C. Gen. Stat. § 163A-1108(1)-(2). And the North Carolina Supreme Court has recognized that a referendum can be invalid if the official ballot contains a "misleading statement or misrepresentation." *Sykes v. Belk*, 278 N.C. 106, 119, 179 S.E.2d 439, 447 (1971).

48. The requirement that ballot questions be fair and accurate embodies multiple overlapping concepts. For example, ballot language is not fair and accurate if it is false, misleading, incomplete, or argumentative. At bottom, the Constitution mandates that the General Assembly fairly advise the voters of what is at stake and facilitate their intelligent, independent decision on the proposed amendment.

AS-APPLIED CHALLENGES TO BALLOT QUESTIONS

49. As applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal—and particularly within the historical context in which those proposals have arisen—the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question violate the North Carolina Constitution. These ballot questions are neither fair nor accurate. They are false. They are misleading. They are incomplete. And they are argumentative. Ultimately, these ballot questions do not fairly advise the voters of what is at stake or facilitate an intelligent, independent decision on the proposed amendments. The Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are therefore unconstitutional and should not be included on the November 2018 ballot.

I. The Separation of Powers Ballot Question violates the North Carolina Constitution as applied to the Separation of Powers Proposal.

50. The Separation of Powers Proposal would produce a tectonic shift in the balance of powers in our state government. But the Separation of Powers Ballot Question will conceal the true magnitude of this proposal from the voters. The Separation of Powers Ballot Question therefore violates the North Carolina Constitution.

A. The Separation of Powers Proposal would fundamentally alter the structural protections embedded in the North Carolina Constitution.

51. "Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty." *McCrory v. Berger*, 368 N.C. at 635, 781 S.E.2d at 250.

52. The North Carolina Constitution enshrines the separation of powers—and thereby preserves liberty—through two provisions that are at issue here.

53. The Separation of Powers Clause provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

54. The Take Care Clause provides that "[t]he Governor shall take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

55. In *Cooper v. Berger* and *McCrory v. Berger*, the North Carolina Supreme Court ruled that these foundational provisions assign constitutional authority to the Governor to appoint the members of boards and commissions that perform executive functions. *See Cooper v. Berger*, 370 N.C. at 413-18, 809 S.E.2d at 110-14; *McCrory v. Berger*, 368 N.C. at 644-49, 781 S.E.2d at 255-58.

56. In particular, in *Cooper v. Berger*, the North Carolina Supreme Court ruled that the Governor has the constitutional power to appoint a majority of members to the State Elections and Ethics Board who share his policy preferences. 370 N.C. at 413-18, 809 S.E.2d at 110-14.

57. The Separation of Powers Proposal would transform all of this. It would rewrite, and reduce, the Separation of Powers Clause and the Take Care Clause. It would overrule *Cooper v. Berger* and *McCrory v. Berger*. It would reallocate power from the Governor to the General Assembly. And it would ultimately undo, for short-sighted, partisan reasons, the separation of powers that our founders so carefully and deliberately sought to preserve in our Constitution.

58. The Separation of Powers Proposal would amend the Separation of Powers Clause by adding this provision:

> The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of *any board or commission* prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission.

Session Law 2018-117, § 2 (emphasis added).

59. The Separation of Powers Proposal, in a companion passage, would amend the Take Care Clause by adding this sentence:

> In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of *any board or commission*, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.

Session Law 2018-117, § 4 (emphasis added).

60. Finally, the Separation of Powers Proposal would amend the Appointments Clause (Article III, § 5(8)) by adding this statement:

> The legislative delegation provided for in Section 6 of Article I of this Constitution *shall control any executive, legislative, or judicial appointment* and shall be faithfully executed as enacted.

Session Law 2018-117, § 4 (emphasis added).

61. The effect of blue-penciling the Constitution in this manner would be, at minimum, to overrule the North Carolina Supreme Court's decisions in *Cooper v. Berger* and *McCrory v. Berger*. Whereas those decisions held that the Separation of Powers Clause and the Take Care Clause grant the Governor constitutional authority over the appointment of members of executive boards and commissions,

the Separation of Powers Proposal would give the General Assembly the power to appoint every member of virtually every state board and commission in state government—including boards and commissions that perform executive or judicial functions.

62. The Separation of Powers Proposal would also overrule *Cooper v. Berger*'s more particular holding that the Governor has the constitutional authority to appoint a majority of members of the State Elections and Ethics Board who share his policy views. The proposal would convert the State Elections and Ethics Board from a statutory body to a constitutional one, and it would grant the General Assembly the authority to appoint all eight members of the Board. Session Law 2018-117, § 1. The Separation of Powers Proposal would thus strip the Governor of his appointment authority with respect to the Board, even though it would continue to perform executive functions.

63. The General Assembly's newfound authority over boards and commissions would not end, however, with the appointment power. The Separation of Powers Proposal would also grant the General Assembly control over the "powers," "duties," "responsibilities," and "terms of office" of boards and commissions in all three branches. Session Law 2018-117, §§ 2, 4. The General Assembly would therefore exercise absolute authority not only over the membership of hundreds of boards and commissions throughout state government, but also over everything they do. The consequence would be that, rather than continuing to "separate[e] the legislative, executive, and judicial powers of state government,"

McCrory v. Berger, 368 N.C. at 635, 781 S.E.2d at 250, our Constitution would combine those powers in a single branch: the General Assembly.

B. The Separation of Powers Ballot Question does not fairly and accurately reflect the General Assembly's seizure of power over all three branches of government.

64. Although the Separation of Powers Proposal would dissolve the separation of powers in our state government and transfer massive amounts of constitutional authority from the Governor to the General Assembly, one could never know it from reading the ballot question the General Assembly has crafted.

65. The Separation of Powers Ballot Question describes the Separation of Powers Proposal as a "[c]onstitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority." Session Law 2018-117, § 5.

66. This ballot question does not fairly and accurately represent the Separation of Powers Proposal. Far from fairly advising the voters and facilitating an intelligent decision on the Separation of Powers Proposal, the ballot question conceals that the proposal would grant the General Assembly unbridled authority over boards and commissions in all three branches of our state government. As applied to the Separation of Powers Proposal, therefore, the Separation of Powers Ballot Question violates Article XIII of the North Carolina Constitution and should not appear on the November 2018 ballot.

67. Although the Separation of Powers Ballot Question is rotten from root to branch, it is at its worst in asserting that the Separation of Powers Proposal would "clarify the appointment authority of the Legislative and the Judicial Branches." Session Law 2018-117, § 5. This statement is unfair and inaccurate in multiple ways.

68. First and foremost, it is false and misleading to state that the Separation of Powers Proposal would "clarify" the General Assembly's appointment authority. Session Law 2018-117, § 5. This proposal would *transform* and *expand* the General Assembly's authority. The North Carolina Supreme Court held, in *Cooper v. Berger* and *McCrory v. Berger*, that the General Assembly does not have unfettered control over appointments to state boards and commissions. The Separation of Powers Proposal would overrule those decisions and rewrite the Constitution to state the opposite: that the General Assembly does have unfettered control over such appointments. *Id.*, §§ 2, 4. It would also extend this control to appointments within all three branches of government. *See id.*, § 4 (providing that the General Assembly's appointment power would control "any executive, legislative, or judicial appointment"). The General Assembly's choice of "clarify" therefore misrepresents the extraordinary impact of the proposed amendment. It also hides the ball from voters by concealing the context that gave rise to the proposed amendment and failing to alert them that the proposal would overrule existing, recent Supreme Court decisions. And the word "clarify" is ultimately inappropriate argumentation that voters should ratify the proposed amendment.

After all, as a voter confronted with the ballot question would be led to think, how could anyone reasonably oppose "clarifying" the law?

69. Second, it is deceptive and incomplete to state that the Separation of Powers Proposal would clarify the "appointment authority" of the General Assembly. Session Law 2018-117, § 5. The Separation of Powers Proposal addresses far more than the General Assembly's "appointment authority." The proposal would add language to the Separation of Powers Clause and the Take Care Clause stating not only that the General Assembly shall control the "appointments" of boards and commissions, but also that the General Assembly shall control the "powers," "duties," "responsibilities," and "terms of office" of boards and commissions. *Id.*, §§ 2, 4. The proposed rewriting of these core provisions of the North Carolina Constitution is therefore far more sweeping than the ballot question lets on.

70. Third, it is false to state that the Separation of Powers Proposal would clarify the appointment authority of "the Legislative and Judicial Branches." Session Law 2018-117, § 5. The Separation of Powers Proposal has nothing whatever to do with the appointment authority of the judicial branch.

71. The Separation of Powers Ballot Question's statement that the Separation of Powers Proposal would "establish a bipartisan Board of Ethics and Elections to administer ethics and election laws," Session Law 2018-117, § 5, is also unfair and inaccurate in multiple ways.

72. First, it is false, misleading, and incomplete for the ballot question to state that the Separation of Powers Proposal would "establish" the State Elections and Ethics Board. Session Law 2018-117, § 5. That Board already exists. Indeed, it is a Defendant in this case. The General Assembly's use of the word "establish" falsely and deceptively suggests—with the aim of fooling voters into ratifying the proposal—that the voters need a constitutional amendment to create a board to administer our ethics and elections laws.

73. Second, it is incomplete to state that the Separation of Powers Proposal would establish the State Elections and Ethics Board without providing any information about the manner in which the proposal would do so. In particular, the ballot question fails to convey that the General Assembly would appoint every member of the Board, and that the proposed amendment would therefore nullify the Governor's constitutional authority to appoint those members. Again, the context is critical: The Separation of Powers Proposal would overrule *Cooper v. Berger* and declare victory for the General Assembly in the years-long constitutional struggle over appointments to the State Elections and Ethics Board. By failing to mention these matters, the ballot question not only fails to advise the voters fairly, but also actively discourages them from making an informed, intelligent decision.

74. Third, it is misleading and argumentative to state that the Separation of Powers Proposal would make the State Board of Elections and Ethics "bipartisan." Session Law 2018-117, § 5. Nothing in the proposed amendment ensures that the Board would be bipartisan. Although the proposed amendment

provides that the Board would have eight members and that no more than four members could be from the same political party, the proposed amendment does not require that the General Assembly actually appoint eight members to the Board. *See id.*, § 1. The proposed amendment would thus permit the General Assembly to appoint four Republicans, but to appoint fewer than four Democrats—and thereby achieve partisan control of the Board. In any event, even if the Board as constituted would have four members from each major party, it is still misleading to describe the board as "bipartisan." "Bipartisan" suggests that the Board will *act* in a bipartisan manner. But the proposed amendment does not and cannot guarantee such a result. Indeed, having four members from each party could just as easily produce partisan gridlock—precisely why the Supreme Court invalidated this same structure in *Cooper v. Berger*. *See* 370 N.C. at 415-16, 809 S.E.2d at 112-113 & n.12. Ultimately, therefore, characterizing the Board as "bipartisan" is nothing more than argument—which has no place on a fair ballot.

75. The statement that the Separation of Powers Proposal would "prohibit legislators from serving on boards and commissions exercising executive or judicial authority," Session Law 2018-117, § 5, compounds the unfairness and inaccuracy of the Separation of Powers Ballot Question. Although the Separation of Powers Proposal contains such a prohibition, *id.*, § 3, the ballot question fails to mention that legislators are *already* prohibited—by the separation of powers provision in the present Constitution—from serving on boards and commissions exercising executive or judicial authority. Indeed, the North Carolina Supreme Court held as much

more than three decades ago. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982). Thus, the proposal's prohibition on appointing legislators to such boards and commissions is superfluous—another illustration of how the ballot question is misleading. By failing to inform voters of existing law, the ballot question suggests that legislators can currently receive appointments to executive or judicial boards and commissions, and that the proposed amendment is necessary to stop such appointments. Yet Supreme Court precedent stops such appointments.

76. This last portion of the ballot question also contributes to the unfair and inaccurate nature of the question as a whole. It suggests that the proposed amendment would take away power from the General Assembly—namely, the power to appoint its own members to executive and judicial boards and commissions. In fact, the proposed amendment would dramatically load the scales of power in favor of the General Assembly.

77. Last, but not least, the Separation of Powers Ballot Question does not even contain the words "separation of powers." It is difficult to imagine anything more misleading than ballot language that fails to inform voters that they are amending the Separation of Powers Clause of their Constitution.

78. For all of these reasons, the Separation of Powers Ballot Question fails to portray the Separation of Powers Proposal fairly and accurately. Instead, it misrepresents and conceals what the voter is facing—portraying the proposal as a necessary, good-government amendment, when by its terms, it strips the Governor of constitutional authority and undoes the separation of powers that is central to

our state government and so vital to the preservation of liberty. The Separation of Powers Ballot Question therefore violates Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I.

II. The Judicial Vacancies Ballot Question violates the North Carolina Constitution as applied to the Judicial Vacancies Proposal.

79. The Judicial Vacancies Ballot Question fares no better. It similarly fails to represent the Judicial Vacancies Proposal fairly and accurately, and therefore violates the North Carolina Constitution as well.

A. The Judicial Vacancies Proposal would eviscerate the Governor's constitutional authority to fill judicial vacancies and transfer that authority to the General Assembly.

80. The Judicial Vacancies Proposal would fundamentally alter the constitutional system for appointments to fill vacancies in the offices of justice and judge in the North Carolina General Court of Justice.

81. Under Article IV, § 19 of the North Carolina Constitution, the Governor is empowered to make appointments to fill all vacancies in the offices of justice or judge.

82. Under Article IV, § 22 of the North Carolina Constitution, the sole "qualification" to serve as a judge or justice is that a person must be an attorney licensed to practice law in North Carolina.

83. The Judicial Vacancies Proposal would repeal Article IV, § 19, and would replace it with a new provision that eliminates any meaningful power of the Governor to appoint justices and judges to fill vacancies in those offices by requiring

the Governor to select between as few as two nominees submitted to him or her by the General Assembly. *See* Session Law 2018-118, § 1.

84. The proposed amendment also would entirely remove the appointment power from the Governor and transfer that power to the General Assembly when the Governor does not appoint one of the General Assembly's nominees within ten days after those nominees are submitted to him, or to the Chief Justice of the Supreme Court in certain circumstances when the General Assembly is in adjournment. *See* Session Law 2018-118, § 1.

85. In addition, the proposal would amend the list of legislative actions not subject to veto by the Governor in Section 22 of Article II of the Constitution to include bills enacted by the General Assembly pursuant to its self-conferred role in judicial appointments. Session Law 2018-118, § 5.

86. Under the proposed amendment, the two or more nominees submitted to the Governor would come from a majority vote of the General Assembly. A "Nonpartisan Judicial Merit Commission" or "local merit commission[]" would be the source of the list of eligible nominees. Session Law 2018-118, § 1. The proposed amendment would impose no constraints—merit-based or otherwise—on the General Assembly's choice of nominees from that list. *See id.* In other words, the General Assembly would have no obligation to submit the nominees it deemed superior to others in terms of professional merit; rather, nominees would be identified merely by majority vote subject to no other test of absolute or relative merit or qualifications.

87. The role of the "nonpartisan commissions" would be solely to receive nominations from "the people" through a process the proposed amendment does not specify or even describe. These commissions would evaluate whether the potential nominees were "qualified or not qualified to fill the vacant office, as prescribed by law." Session Law 2018-118, § 1. The only qualification required for a justice or judge under current law is, as noted above, that he or she be an attorney licensed to practice in North Carolina who has not attained the mandatory retirement age. This proposed amendment would not require the "nonpartisan commissions" to evaluate and select nominees on the basis of any other professional qualification or standard. In sum, the proposed amendment prescribes a selection process unconnected to any evaluation of merit of candidates for the bench.

B. The Judicial Vacancies Ballot Question does not fairly or accurately portray the proposed amendment.

88. The Judicial Vacancies Ballot Question so distorts the actual meaning of the Judicial Vacancies Proposal that it violates the constitutional requirement that proposed amendments be fairly and accurately submitted to the voters.

89. The Judicial Vacancies Ballot Question describes the Judicial Vacancies Proposal as a "[c]onstitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections." Session Law 2018-118, § 6.

90. This ballot question will not fairly apprise voters of the actual meaning and import of the Judicial Vacancies Proposal, and will instead lure them into

ratifying the proposed amendment using false, misleading, incomplete, and argumentative language.

91. In the first instance, the Judicial Vacancies Ballot Question fails the test of completeness by neglecting to apprise the voters of how the Judicial Vacancies Proposal would change current law. It does not advise the voters that the Governor currently has the constitutional power to choose whom to consider for appointment to fill judicial vacancies. It also does not inform the voters that the proposed amendment would repeal the constitutional provision—Article IV, § 19—granting the Governor that power, or that it would transfer such power to the General Assembly by authorizing it to identify persons eligible for appointment and requiring the Governor to choose an appointee from as few as two persons so identified. Nor does the Judicial Vacancies Ballot Question advise the voters that the Chief Justice of the North Carolina Supreme Court is granted the power of appointment when the General Assembly is adjourned, and that the General Assembly reserves the power of appointment to itself if the Governor does not act within ten days.

92. The Judicial Vacancies Ballot Question also fails to advise the voters that the General Assembly's acts to put forth its nominees or to elect judges in certain instances are not subject to the Governor's veto power. Moreover, unlike the existing exceptions from the veto power in the Constitution, the proposed veto exception for judicial vacancy bills is not expressly limited to bills on that subject "and containing no other matter." N.C. Const. art. II, § 22(5); *see* Session Law 2018-

118, § 5. The absence of this limitation is striking. It suggests that the Judicial Vacancies Proposal might be a Trojan horse through which the General Assembly will attempt to circumvent the veto power by placing unrelated legislation inside a judicial vacancy bill. Although such an attempt at circumvention would be subject to constitutional challenge on other grounds, the possibility that the General Assembly might rely on this proposed amendment to attempt such a maneuver exacerbates the ballot question's failure even to mention the veto power.

93. In addition to being materially incomplete, the Judicial Vacancies Ballot Question is false and misleading.

94. For instance, the representation that the Judicial Vacancies Proposal will "implement a nonpartisan merit-based system that relies on professional qualifications," Session Law 2018-118, § 6, falsely implies that merit-based professional qualifications will determine who is selected for judicial appointment. In fact, the sole role of the "nonpartisan commissions" specified in the proposed amendment is to determine whether nominees are "qualified" "as provided by law." *Id.*, § 1. And, as explained above, the sole "qualification" provided by current law to serve as a justice or judge of the General Court of Justice is to be an attorney licensed to practice in North Carolina. Further, the General Assembly's identification of nominees to be submitted to the Governor from those determined to be "qualified" is not subject to any further standard of qualification or merit, and instead is determined by a simple majority vote of the General Assembly.

95. Similarly, nothing in the proposed amendment specifies the process for nomination of persons to the "nonpartisan commissions" or limits nominations to those who satisfy any merit-based standard. Thus, the representation in the Judicial Vacancies Ballot Question that the system is "merit-based" has no support in the actual method by which candidates reach those commissions.

96. The representation in the ballot question that the system will rely on "professional qualifications rather than political influence," Session Law 2018-118, § 6, is not only false and misleading, but also improper argument that the General Assembly is "taking politics out" of judicial selection. This representation is demonstrably false because nothing in the proposed amendment reduces the role of "political influence" in the selection process. The proposal would only shift the authority to identify eligible persons from the Governor to the General Assembly, with the latter body ultimately deciding who will be selected for consideration through a majority vote unguided by any standards that could remove or mitigate the role of "political influence" in that process.

97. Further, the phrase "political influence" in the Judicial Vacancies Ballot Question carries a pejorative connotation that impugns the current system, but without disclosing to the voters any of the basic facts of the current system to enable them to reach their own judgment as to which system they should prefer. The ballot question is unduly argumentative in this respect as well, suggesting that political influence corrupts the current system in a way that the proposed amendment would cure.

98. Similarly, the use of "nonpartisan" to describe the system that the proposed amendment would establish is misleading and argumentative. The most critical step in the selection process will be the identification of the limited slate of nominees—as few as two—to be submitted to the Governor for appointment. The General Assembly, and no one else, will choose those nominees by a simple majority vote, a process that has no nexus to "nonpartisan." The word "nonpartisan" in the ballot question implies that the current system is "partisan" in a sense that the proposed system would not be, and will tend to mislead the voters into believing that, by voting for the proposed amendment, they will be endorsing a system that is "nonpartisan."

99. For all of these reasons, the Judicial Vacancies Ballot Question fails to portray the Judicial Vacancies Proposal fairly and accurately. Instead, it misrepresents and conceals the consequences of the proposed amendment to induce voters to ratify it—and thus to strip the Governor of constitutional authority in favor of granting the General Assembly control over the process for filling judicial vacancies. The Judicial Vacancies Ballot Question violates Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I.

THE CHALLENGED BALLOT QUESTIONS POSE AN IMMEDIATE THREAT OF IRREPARABLE HARM

100. Under current law, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question will appear on the ballot for the November 2018 general election. *See* Session Law 2018-117, § 5; Session Law 2018-118, § 6.

101. On information and belief, the State Board of Elections and Ethics may finalize the November 2018 ballot as soon as August 8.

102. Absent an immediate injunction, therefore, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question will appear on the November 2018 ballot.

103. Including the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the November 2018 ballot threatens in multiple ways to inflict immediate and irreparable injury on Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

104. For example, including those ballot questions on the ballot threatens to strip the Governor and his Office of constitutional power by misleading voters into ratifying the Separation of Powers Proposal and the Judicial Vacancies Proposal—proposed amendments that would impair the separation of powers and effectuate a massive transfer of constitutional authority from the Governor to the General Assembly.

105. Permitting the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question to be included on the ballot would also violate Governor Cooper's duty to take care that the laws (which include the provisions of the North Carolina Constitution) be faithfully executed, N.C. Const. art. III, § 5(4), and his oath to support the North Carolina Constitution, N.C. Const. art. III, § 4.

106. These threatened constitutional violations are *per se* irreparable harm sufficient to support a preliminary injunction. *See, e.g.*, *High Point Surplus Co. v.*

Pleasants, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable."); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (similar).

FIRST CLAIM FOR RELIEF:
The ballot question in Section 5 of Session Law 2018-117 violates the North Carolina Constitution

107. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

108. A present and real controversy exists between the parties as to the constitutionality of the Separation of Powers Ballot Question.

109. The Separation of Powers Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Separation of Powers Proposal because the Separation of Powers Ballot Question does not fairly and accurately reflect the Separation of Powers Proposal.

110. Governor Cooper is entitled to declaratory relief ruling that the Separation of Powers Ballot Question is unconstitutional as applied to the Separation of Powers Proposal.

111. Governor Cooper is also entitled to preliminary and permanent injunctive relief against the inclusion of the Separation of Powers Ballot Question on the ballot for the November 2018 general election.

112. Absent such relief, the unconstitutional Separation of Powers Ballot Question will be included on the ballot for the November 2018 general election.

113. Including this unconstitutional ballot question on the ballot threatens immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

114. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

115. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

116. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

SECOND CLAIM FOR RELIEF:
The ballot question in Section 6 of Session Law 2018-118 violates the North Carolina Constitution

117. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

118. A present and real controversy exists between the parties as to the constitutionality of the Judicial Vacancies Ballot Question.

119. The Judicial Vacancies Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Judicial Vacancies Proposal because the Judicial Vacancies Ballot Question does not fairly and accurately reflect the Judicial Vacancies Proposal.

120. Governor Cooper is entitled to declaratory relief ruling that the Judicial Vacancies Ballot Question is unconstitutional as applied to the Judicial Vacancies Proposal.

121. Governor Cooper is also entitled to preliminary and permanent injunctive relief against the inclusion of the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

122. Absent such relief, the unconstitutional Judicial Vacancies Ballot Question will be included on the ballot for the November 2018 general election.

123. Including this unconstitutional ballot question on the ballot threatens immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

124. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

125. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

126. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

127. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

128. For the reasons set forth above, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question violate Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal, respectively.

129. Those violations constitute irreparable harm as a matter of law, and no further showing of irreparable harm is required.

130. In the alternative, the facts alleged above and the other facts of record establish irreparable harm to Governor Cooper, the Office of the Governor, and the people of North Carolina if the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are included on the ballot for the November 2018 general election.

131. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

132. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

133. The temporary and permanent injunctive relief sought by Governor Cooper will preserve the status quo while the Court adjudicates the constitutionality of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question.

134. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

135. Accordingly, pursuant to N.C. Rule of Civil Procedure 65, Governor Cooper moves for a temporary restraining order and preliminary injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Governor Cooper respectfully prays that the Court:

1. Issue a temporary restraining order and preliminary injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election during the pendency of this litigation;

2. Enter a declaratory judgment that the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are unconstitutional as applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal, respectively;

3. Enter a permanent injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election;

4. Award Governor Cooper his costs and expenses pursuant to applicable law; and

5. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 4th day of August, 2018.

John R. Wester
North Carolina Bar No. 4660
jwester@robinsonbradshaw.com
J. Dickson Phillips, III
North Carolina Bar No. 8941
dphillips@robinsonbradshaw.com
Adam K. Doerr
North Carolina Bar No. 37807
adoerr@robinsonbradshaw.com
Erik R. Zimmerman
North Carolina Bar No. 50247
ezimmerman@robinsonbradshaw.com
Morgan P. Abbott
N.C. Bar No. 50546
mabbott@robinsonbradshaw.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 N. Tryon St., Ste. 1900
Charlotte, North Carolina 28246
Telephone: 704.377.2536
Facsimile: 704.378.400

Attorneys for Plaintiff Roy A. Cooper, III, Governor of the State of North Carolina

EXHIBIT A

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-117
HOUSE BILL 913

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO ESTABLISH A BIPARTISAN BOARD OF ETHICS AND ELECTIONS ENFORCEMENT AND TO CLARIFY BOARD APPOINTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article VI of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:

(a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.

(b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader."

SECTION 2. Section 6 of Article I of the North Carolina Constitution reads as rewritten:

"**Sec. 6. Separation of powers.**

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

(2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission."

SECTION 3. Section 20 of Article II of the North Carolina Constitution reads as rewritten:

"**Sec. 20. Powers of the General Assembly.**

(1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

(2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers."

SECTION 4. Section 5 of Article III of the North Carolina Constitution reads as rewritten:

"**Sec. 5. Duties of Governor.**

...

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.

...

(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. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative, or judicial appointment and shall be faithfully executed as enacted.

...."

SECTION 5. The amendments set out in Sections 1 through 4 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

SECTION 6. If a majority of the votes cast on the question are in favor of the amendments set out in Sections 1 through 4 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendments to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office.

SECTION 7. If the amendments are approved by the qualified voters as provided in this section, Sections 2 through 4 of this act become effective upon certification and Section 1 becomes effective March 1, 2019.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28th day of June, 2018.

s/ Kathy Harrington
Presiding Officer of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT B

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-118
SENATE BILL 814

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO PROVIDE FOR NONPARTISAN JUDICIAL MERIT COMMISSIONS FOR THE NOMINATION AND RECOMMENDATION OF NOMINEES WHEN FILLING VACANCIES IN THE OFFICE OF JUSTICE OR JUDGE OF THE GENERAL COURT OF JUSTICE AND TO MAKE OTHER CONFORMING CHANGES TO THE CONSTITUTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article IV of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 23. Merit selection; judicial vacancies.**

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a

majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law."

SECTION 2. Section 10 of Article IV of the North Carolina Constitution reads as rewritten:

"**Sec. 10. District Courts.**

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly."

SECTION 3. Section 18 of Article IV of the North Carolina Constitution is amended by adding a new subsection to read:

"(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office."

SECTION 4. Section 19 of Article IV of the North Carolina Constitution is repealed.

SECTION 5. Subsection (5) of Section 22 of Article II of the North Carolina Constitution reads as rewritten:

"(5) Other exceptions. Every bill:

(a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;

(b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;

(c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter;~~or~~

(d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;

(e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or

(f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,

shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses."

SECTION 6. The amendments set out in Sections 1 through 5 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

SECTION 7. If a majority of the votes cast on the question are in favor of the amendment set out in Sections 1 through 5 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective upon certification and applies to vacancies occurring on or after the date of the general election.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28th day of June, 2018.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT C

GENERAL ASSEMBLY OF NORTH CAROLINA
FIRST EXTRA SESSION 2018

SESSION LAW 2018-131
HOUSE BILL 3

AN ACT TO CLARIFY THE DESIGNATIONS TO APPEAR ON THE BALLOT FOR CONSTITUTIONAL AMENDMENTS AND OTHER REFERENDA.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 163A-1114(h) reads as rewritten:

"(h) Order of Precedence for Referenda. – ~~The~~Without referencing a numerical order or other reference of order by category or within a category, the referendum questions to be voted on shall be arranged on the official ballot in the following order:

(1) Proposed amendments to the North Carolina Constitution, in the chronological order in which the proposals were approved by the General Assembly. Proposed amendments shall be designated by only the ~~short caption provided by the Constitutional Amendments Publication Commission under Article 4A of Chapter 147 of the General Statutes.~~phrase "Constitutional Amendment" prior to setting forth the referendum question.

(2) Other referenda to be voted on by all voters in the State, in the chronological order in which the proposals were approved by the General Assembly.

(3) Referenda to be voted on by fewer than all the voters in the State, in the chronological order of the acts by which the referenda were properly authorized."

SECTION 1.(b) This section is effective when it becomes law and applies to ballots used in the 2018 general election and thereafter. No numerical order or other reference of order for referenda, by category or within a category, shall appear on the 2018 general election ballot. Any captions adopted by the Constitutional Amendments Publication Commission pursuant to G.S. 147-54.10(a) prior to this bill becoming law are null and void and shall not appear on the ballot used in the 2018 general election.

SECTION 2. G.S. 147-54.10(a) reads as rewritten:

"(a) At least 75 days before an election in which a proposed amendment to the Constitution, or a revised or new Constitution, is to be voted on, the Commission shall prepare an explanation of the amendment, revision, or new Constitution in simple and commonly used language. ~~The explanation shall include a short caption reflecting the contents,that shall not include a numerical or other reference of order, to be used on the ballot and the printed summary.~~"

SECTION 3. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 24th day of July, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 11:55 a.m. this 4th day of August, 2018.

s/ Sarah Lang Holland
Senate Principal Clerk

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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 ;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

Answer and Crossclaims of Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony (Andy) Penry, in his official capacity as Chair of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement

Defendants the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the Board) and Chairman J. Anthony (Andy) Penry, in his official capacity as Chair of the Board, through undersigned counsel, answer Plaintiff Roy A. Cooper, III's, Complaint as follows and state the following crossclaims against Defendants Philip E. Berger and Timothy K. Moore, both in their official capacities.

Answer

The Board and Chairman Penry (collectively the Board Defendants) respond to the allegations in Governor Cooper's Complaint as follows:

Response to Numbered Paragraphs of the Complaint

1. The Board Defendants admit that the General Assembly has proposed two amendments to the North Carolina Constitution that rewrite the Separation of Powers Clause of the Constitution, overrule recent decisions of the North Carolina Supreme Court, and strip the Governor of the authority to appoint thousands of officials to boards and commissions that execute the laws of our State. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations. Paragraph 1 of the Complaint also states legal conclusions to which a response is not required.

2. The Board Defendants admit that the General Assembly has adopted false and misleading ballot language that conceals the true nature of these proposed amendments. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

3. The Board Defendants admit that the Court should declare the false and misleading ballot language written by the General Assembly to be unconstitutional and should immediately enjoin the inclusion of that language on the November 2018 ballot. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

4. The Board Defendants admit the allegations in this paragraph.

5. The Board Defendants admit the allegations in this paragraph.

6. The Board Defendants admit the allegations in this paragraph.

7. The Board Defendants admit the allegations in this paragraph.

8. The Board Defendants admit the allegations in this paragraph.

9. This paragraph states legal conclusions to which a response is not required.

10. The Board Defendants admit that Governor Cooper is seeking the relief named in this paragraph.

11. The Board Defendants admit that Governor Cooper is seeking the relief named in this paragraph.

12. The Board Defendants admit the allegations in this paragraph.

13. The Board Defendants admit the allegations in this paragraph.

14. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

15. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

16. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

17. The Board Defendants admit that in December 2016, the General Assembly merged the State Board of Elections with the State Ethics Commission and provided that the combined board would have eight members: four appointed by the General Assembly and four

appointed by the Governor. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

18. The Board Defendants admit the allegations in this paragraph.

19. The Board Defendants admit that the General Assembly merged the State Board of Elections with the State Ethics Commission to form the State Elections and Ethics Board, to consist of four Democrats and four Republicans appointed by the Governor. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

20. The Board Defendants admit the allegations in this paragraph.

21. The Board Defendants admit that the General Assembly added a ninth member to the Board who was unaffiliated with the two major parties and who was chosen by the other eight Board members. The Board Defendants also admit that Governor Cooper brought suit to challenge this action and that this challenge is pending in this Court. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

22. The Board Defendants admit the allegations in this paragraph.

23. The Board Defendants admit that the General Assembly has crafted ballot language that will mislead voters. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining

allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

24. The Board Defendants admit the allegations in this paragraph.

25. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

26. The Board Defendants admit the allegations in this paragraph.

27. The Board Defendants admit that the first proposed amendment would consolidate the appointment power for boards and commissions in the General Assembly and overrule the North Carolina Supreme Court's affirmation, in *McCrory v. Berger* and *Cooper v. Berger*, of the Governor's constitutional authority to appoint the majority of members of executive boards and commissions. The Board Defendants also admit that sections 1 through 4 of Session Law 2018-117 contain this proposed amendment. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

28. The Board Defendants admit the allegations in this paragraph.

29. The Board Defendants admit that the second proposed amendment would repeal the provision of the North Carolina Constitution that grants the Governor the authority to fill judicial vacancies and replace it to reduce the Governor's role to selecting between two nominees the General Assembly has chosen for the bench. The Board Defendants also admit that sections 1 through 5 of Session Law 2018-118 contain this proposed amendment. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to

form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

30. The Board Defendants admit the allegations in this paragraph.

31. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

32. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

33. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

34. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

35. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

36. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

37. The Board Defendants admit the allegations in this paragraph.

38. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

39. The Board Defendants admit the allegations in this paragraph.

40. The Board Defendants admit the allegations in this paragraph.

41. The Board Defendants admit the allegations in this paragraph.

42. The Board Defendants admit the allegations in this paragraph.

43. The Board Defendants admit the allegations in this paragraph.

44. The Board Defendants admit the allegations in this paragraph.

45. The Board Defendants admit the allegations in this paragraph.

46. The Board Defendants admit the allegations in this paragraph.

47. The Board Defendants admit the allegations in this paragraph.

48. The Board Defendants admit the allegations in this paragraph.

49. The Board Defendants admit that the ballot questions as applied are neither fair nor accurate. The Board Defendants also admit that the ballot questions are false, misleading, and incomplete. The Board Defendants also admit that the ballot questions do not advise the voters of what is at stake or facilitate an informed decision on the proposed amendments. The Board Defendants further admit that the ballot questions at issue are therefore unconstitutional and should not be included on the November 2018 ballot. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

50. The Board Defendants admit that the ballot question on the separation of powers conceals the true magnitude of the proposed amendment from the voters. The Board Defendants further admit that this ballot question violates the North Carolina Constitution. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

51. The Board Defendants admit the allegations in this paragraph.

52. The paragraph states legal conclusions to which a response is not required.

53. The Board Defendants admit the allegations in this paragraph.

54. The Board Defendants admit the allegations in this paragraph.

55. The Board Defendants admit the allegations in this paragraph.

56. The Board Defendants admit the allegations in this paragraph.

57. The Board Defendants admit that the proposed amendment on the separation of powers would reallocate power from the Governor to the General Assembly, would rewrite the Separation of Powers Clause and the Take Care Clause of the North Carolina Constitution, and would overrule *Cooper v. Berger* and *McCrory v. Berger*. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

58. The Board Defendants admit the allegations in this paragraph.

59. The Board Defendants admit the allegations in this paragraph.

60. The Board Defendants admit the allegations in this paragraph.

61. The Board Defendants admit the allegations in this paragraph.

62. The Board Defendants admit the allegations in this paragraph.

63. The Board Defendants admit that the Separation of Powers proposal would also grant the General Assembly control over the powers, duties, responsibilities, and terms of office of boards and commissions in all three branches. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph. The paragraph also states legal conclusions to which a response is not required.

64. The Board Defendants admit that the ballot question on the separation of powers does not make clear that the proposal intends to transfer substantial constitutional authority from

the Governor to the General Assembly. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

65. The Board Defendants admit the allegations in this paragraph.

66. The Board Defendants admit that the ballot question on the separation of powers does not fairly and accurately represent the amendment. The Board Defendants also admit that the ballot question conceals that the proposal would grant the General Assembly substantial authority over boards and commissions in all three branches of North Carolina State government. The Board Defendants further admit that the ballot question, as applied, violates article XIII of the North Carolina Constitution and should not appear on the November 2018 ballot. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

67. The Board Defendants admit that the ballot question on the separation of powers is unfair and inaccurate in multiple ways, including in its statement that the amendment would "clarify the appointment authority of the Legislative and the Judicial Branches." Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

68. The Board Defendants admit the allegations in this paragraph.

69. The Board Defendants admit the allegations in this paragraph.

70. The Board Defendants admit the allegations in this paragraph.

71. The Board Defendants admit the allegations in this paragraph.

72. The Board Defendants admit the allegations in this paragraph.

73. The Board Defendants admit the allegations in this paragraph.

74. The Board Defendants admit that the ballot question on the separation of powers is misleading because it suggests that the Board will act in a bipartisan manner, but the proposed amendment does not and cannot guarantee such a result. The Board Defendants also admit that the proposed amendment would permit the General Assembly to appoint four Republicans but to appoint fewer than four Democrats to the board, and thereby achieve partisan control. The Board Defendants further admit that the ballot question should not contain references to the amendment as requiring a "bipartisan" Board. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

75. The Board Defendants admit the allegations in this paragraph.

76. The Board Defendants admit the allegations in this paragraph.

77. The Board Defendants admit that the ballot question on the separation of powers does not contain the words "separation of powers" and therefore fails to inform voters that they are voting on whether or not to amend the Separation of Powers Clause in the North Carolina Constitution. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

78. The Board Defendants admit the allegations in this paragraph.

79. The Board Defendants admit the allegations in this paragraph.

80. The Board Defendants admit the allegations in this paragraph.

81. The Board Defendants admit the allegations in this paragraph.

82. The Board Defendants admit that the only qualification described in article IV, section 22 of the North Carolina Constitution is that a judge or justice must be an attorney

licensed to practice law in North Carolina. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

83. The Board Defendants admit the allegations in this paragraph.

84. The Board Defendants admit the allegations in this paragraph.

85. The Board Defendants admit that the judicial vacancies proposal would amend the list of legislative actions not subject to veto by the Governor in section 22 of article II of the Constitution to include bills enacted by the General Assembly as part of its proposed new role in judicial appointments. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

86. The Board Defendants admit the allegations in this paragraph.

87. The Board Defendants admit that the role of the nonpartisan commissions would be solely to receive nominations from "the people" through a process the proposed amendment does not specify or describe. The Board Defendants also admit that these commissions would evaluate whether the potential nominees were qualified or not, as prescribed by law. The Board Defendants further admit that the qualification required for a justice or judge under article IV, section 22 of the North Carolina Constitution is that a judge or justice must be an attorney licensed to practice law in North Carolina. Moreover, the Board Defendants admit that the proposed amendment would not require the nonpartisan commissions to evaluate and select nominees on the basis of any other professional qualification or standard. Finally, the Board Defendants admit that the proposed amendment prescribes a selection process that is unconnected to an evaluation of merit of candidates for the bench. Except for these express

admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

88. The Board Defendants admit the allegations in this paragraph.

89. The Board Defendants admit the allegations in this paragraph.

90. The Board Defendants admit the allegations in this paragraph.

91. The Board Defendants admit the allegations in this paragraph.

92. The Board Defendants admit that the Judicial Vacancies ballot question also fails to advise the voters that the General Assembly's acts to put forth its nominees or to elect judges in certain instances are not subject to the Governor's veto power. The Board Defendants also admit that, unlike the existing exceptions from the veto power in the Constitution, the proposed veto exception for judicial vacancy bills is not expressly limited to bills on that subject and "containing no other matter." The Board Defendants further admit that the text of the proposed amendment could give the General Assembly the ability to circumvent the veto power by placing unrelated legislation inside a judicial-vacancy bill. Finally, the Board Defendants admit that the possibility of the amendment granting the General Assembly this power exacerbates the ballot question's failure to mention the veto power. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

93. The Board Defendants admit the allegations in this paragraph.

94. The Board Defendants admit that the ballot question's representation that the amendment will implement a nonpartisan merit-based system that relies on professional qualifications falsely implies that merit-based professional qualifications will determine who is selected for judicial appointment. The Board Defendants also admit that under the proposed

amendment, the only role of the nonpartisan commissions is to determine whether nominees are qualified or not, as prescribed by law. The Board Defendants further admit that the qualification required for a justice or judge under article IV, section 22 of the North Carolina Constitution is that a judge or justice must be an attorney licensed to practice law in North Carolina. Finally, the Board Defendants admit that under the proposed amendment, the General Assembly's identification of nominees to be submitted to the Governor is not subject to any further standard of merit, and instead is determined by a simple majority vote of the General Assembly. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

95. The Board Defendants admit the allegations in this paragraph.

96. The Board Defendants admit the allegations in this paragraph.

97. The Board Defendants admit the allegations in this paragraph.

98. The Board Defendants admit the allegations in this paragraph.

99. The Board Defendants admit the allegations in this paragraph.

100. The Board Defendants admit the allegations in this paragraph.

101. The Board Defendants admit the allegations in this paragraph.

102. The Board Defendants admit the allegations in this paragraph.

103. The Board Defendants admit that including the ballot questions at issue on the November 2018 ballot threatens to inflict immediate and irreparable harm on the people whom Governor Cooper was elected to serve. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

104. The Board Defendants admit the allegations in this paragraph.

105. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

106. The Board Defendants admit the allegations in this paragraph.

107. The Board Defendants repeat their responses contained in the preceding paragraphs as if those responses were fully stated here.

108. The Board Defendants admit the allegations in this paragraph.

109. The Board Defendants admit that the ballot question on the separation of powers violates section 4 of article XIII and sections 2, 3, 19, and 35 of article I of the North Carolina Constitution as applied because the ballot question does not fairly and accurately reflect the text of the amendment. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

110. The Board Defendants admit that the ballot question on the separation of powers is unconstitutional. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

111. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

112. The Board Defendants admit the allegations in this paragraph.

113. The Board Defendants admit that including the ballot question on the separation of powers threatens immediate and irreparable harm to the people whom Governor Cooper was elected to serve. Except for these express admissions, the Board Defendants lack knowledge or

information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

114. The Board Defendants admit the allegations in this paragraph.

115. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

116. The Board Defendants admit the allegations in this paragraph.

117. The Board Defendants repeat their responses contained in the preceding paragraphs as if those responses were fully stated here.

118. The Board Defendants admit the allegations in this paragraph.

119. The Board Defendants admit that the ballot question on judicial vacancies violates section 4 of article XIII and sections 2, 3, 19, and 35 of article I of the North Carolina Constitution as applied because the ballot question does not fairly and accurately reflect the text of the amendment. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

120. The Board Defendants admit that the ballot question on judicial vacancies is unconstitutional. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

121. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

122. The Board Defendants admit the allegations in this paragraph.

123. The Board Defendants admit that including the ballot question on judicial vacancies threatens immediate and irreparable harm to the people whom Governor Cooper was elected to serve. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

124. The Board Defendants admit the allegations in this paragraph.

125. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

126. The Board Defendants admit the allegations in this paragraph.

127. The Board Defendants repeat their responses contained in the preceding paragraphs as if those responses were fully stated here.

128. The Board Defendants admit that the ballot questions at issue in the Governor's Complaint violate article XIII, section 4, and article I, sections 2, 3, 19, and 35 of the North Carolina Constitution as applied.

129. The Board Defendants admit the allegations in this paragraph.

130. The Board Defendants admit that the facts alleged establish irreparable harm to the people of North Carolina if the ballot questions at issue in the Governor's Complaint are included on the ballot for the November 2018 general election. Except for these express admissions, the Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

131. The Board Defendants admit the allegations in this paragraph.

132. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

133. The Board Defendants admit the allegations in this paragraph.

134. The Board Defendants admit the allegations in this paragraph.

135. The Board Defendants lack knowledge or information sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

In response to the prayer for relief in the Complaint, the Board Defendants admit that the Governor is seeking the relief described in the prayer.

Crossclaims

The North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the Board) and Chairman J. Anthony (Andy) Penry, in his official capacity as Chair of the Board, crossclaiming against 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, hereby allege:

Introduction

The Board is responsible for supervising elections in this State. The Board's duties include preparing the official ballots for each of this State's elections. As part of the Board's duties in preparing the official ballots, the Board must ensure that ballots presented to voters in this State are readily understandable by voters and present all questions in a fair and nondiscriminatory manner.

In passing Session Laws 2018-117 and 2018-118, the General Assembly has included provisions that require the Board to present certain ballot questions to the voters of this State as the voters consider the amendments' ratification or rejection. These ballot questions, however, are misleading, difficult to understand accurately, unfair, and discriminatory. The ballot questions contain incorrect statements about the text of the amendments. The ballot questions are also misleading, unfair, and incomplete because they withhold from voters key information about the text of the amendments. These ballot questions advocate in favor of ratifying the amendment, rather than fairly describing the amendment to voters. These problems make the ballot questions difficult to understand accurately, unfair, and discriminatory.

In addition to their misleading nature, these ballot questions also violate article XIII and article I of the North Carolina Constitution because they do not accurately describe the text of the amendments that voters of the State are being asked to ratify or reject.

Requiring the Board and Chairman Penry to print these ballot questions and present them to voters in this State would force the Board and Chairman Penry to violate their statutory obligations under North Carolina law to ensure that ballots are readily understandable and present questions in a fair and nondiscriminatory manner. In addition, requiring the Board and Chairman Penry to present these ballot questions to the voters of this State would also force the Board and Chairman Penry to participate in violating article XIII and article I of the North Carolina Constitution.

Absentee ballots for uniformed and overseas citizens are expected to be made available by September 7 of this year. In light of this and other fast-approaching deadlines, as well as the constitutional and statutory harm to the Board, to Chairman Penry, and to the voters of North Carolina if the Board is required to present misleading ballot questions, the Board and Chairman Penry crossclaim against the remaining defendants and seek expedited relief. The Board and Chairman Penry respectfully request that this Court enter a temporary restraining order, preliminary injunction, and permanent injunction against presenting these ballot questions to the voters of this State.

Parties and Jurisdiction

1. Defendant and Crossclaimant, the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the Board), is an agency of the State of North Carolina and is located in Wake County, North Carolina.

2. Defendant and Crossclaimant J. Anthony (Andy) Penry is the Chair of the Board and is a resident of Wake County, North Carolina.

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

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

5. The Board and Chairman Penry seek a declaratory judgment that the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 are unconstitutional as applied. They also seek a declaratory judgment that requiring them to present the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to North Carolina voters in the November 2018 general election requires the Board and Chairman Penry to violate their duties under N.C. Gen. Stat. § 163A-1108.

6. The Board and Chairman Penry also seek to enjoin the enforcement of any requirement that they put the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 on the ballot for the November 2018 general election.

7. A real and present controversy exists between the parties regarding the constitutionality of the ballot questions stated in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118.

8. The Crossclaim Defendants lack sovereign immunity with respect to the claims asserted here. In addition, by defining themselves as parties who must be joined as defendants in civil actions challenging the validity of a North Carolina statute, Crossclaim Defendants have waived any sovereign immunity that they otherwise might have had.

9. This Court has jurisdiction over the crossclaim parties and subject matter of this crossclaim. Likewise, under N.C. Gen. Stat. § 1-82, Wake County is the proper venue for this lawsuit.

Factual Allegations

The Composition and Duties of the Board

10. The Board is charged with the administration of elections and enforcement of North Carolina's laws on campaign finance, ethics, and lobbying disclosure and compliance. The Board also works in conjunction with the 100 County Boards of Elections offices to ensure that elections are conducted lawfully and fairly.

11. The composition of the Board has been the subject of recent litigation. In April 2017, the General Assembly enacted Session Law 2017-6, which merged the body that was then named the State Board of Elections with the body that was then named the State Ethics Commission, forming the Bipartisan State Board of Elections. Through Session Law 2017-6, the General Assembly provided that the Board would consist of eight members, four of whom are registered Republicans and four of whom are registered Democrats. The session law called for the Governor to appoint all eight members from lists of nominees submitted by the respective chairs of the North Carolina Republican and Democratic parties.

12. Governor Cooper challenged the constitutionality of Session Law 2017-6, alleging that the statute violated the separation-of-powers clause and the take care clause of the North Carolina Constitution. *See Cooper v. Berger*, 370 N.C. 392, 400, 809 S.E.2d 98, 102-103 (2018). The North Carolina Supreme Court held that Session Law 2017-6 was unconstitutional because it prevented the Governor from exercising executive control over the Board. *Id.* at 413-18, 110-14.

13. In February 2018, the General Assembly enacted Session Law 2018-2. Through this statute, the General Assembly revised the composition of the Board to require that the Governor choose four members of the Republican Party and four members of the Democratic Party from a list of nominees submitted by the party chairs of each party. N.C. Gen. Stat. § 163A-2. In addition, the statute allows the Governor to appoint a ninth member, not registered with either the Democratic or Republican Party, from a list of two nominees selected by the other eight members of the Board. *Id.*

14. In March 2018, Governor Cooper appointed all nine members to the Board. They are J. Anthony (Andy) Penry (who was later named Chair of the Board), Joshua Malcolm (later named Vice-Chair), Ken Raymond (later named Secretary), and Stella Anderson, Damon Circosta, Stacy "Four" Eggers IV, Jay Hemphill, Valerie Johnson, and John Lewis.

15. The Board is responsible for supervising elections in North Carolina. N.C. Gen. Stat. § 163A-741(a). As part of this charge, the Board is empowered to make rules and regulations for the conduct of primaries and elections. *Id.*

16. The Board is also charged with determining the form and content of ballots, instruction sheets, pollbooks, tally sheets, abstract and return forms, certificates of election, and other forms to be used in primaries and general elections. *Id.* § 163A-741(e).

17. The Board must also prepare, print, and distribute to the county and municipal boards of elections all required ballots for use in any primary or election held in the State. *Id.* § 163A-741(f). The Board then instructs the county boards of elections on the printing of county and local ballots. *Id.*

18. The Board also has responsibility over mailing absentee ballots. *Id.* § 163A-741(k).

19. The Board also has responsibility for preparing official ballots. The Board certifies the official ballots and voter instructions to be used in every statewide and county election. As part of this certification, the Board must certify that the content and arrangement of the official ballot are in substantial compliance with North Carolina law and with standards adopted by the Board. *Id.* § 163A-1107.

20. State law requires that the Board ensure that official ballots throughout the state are readily understandable by voters and present all candidates and questions in a fair and nondiscriminatory manner. *Id.* § 163A-1108(1), (2).

Timeline to Produce Ballots for Elections in November 2018

21. North Carolina law requires that absentee ballots be made available 60 days in advance of a general election. *Id.* § 163A-1305. For the November 2018 general election, the 60-day requirement calls for ballots to be made available to voters by September 7.

Constitutional Amendment Proposed by Session Law 2018-117

22. On June 28, the General Assembly ratified Session Law 2018-117, entitled "An Act to Amend the Constitution of North Carolina to Establish a Bipartisan Board of Ethics and Elections Enforcement and to Clarify Board Appointments." In substantial part:

- The session law proposes to amend article VI of the North Carolina Constitution to restructure the Board through express constitutional language. The proposed amendment would change the composition of the current Board by removing one member, creating an eight-member board. In addition, the amendment proposes to give the General Assembly the authority to appoint all eight members, four on the recommendation of the President Pro Tempore of the Senate and four on the recommendation of the Speaker of the House of Representatives.

- The session law proposes to amend section 6 of article I of the North Carolina Constitution. That constitutional provision currently requires that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." The statute proposes amending this provision, adding language stating that the "legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission" and that the "executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission."
- The session law proposes to amend section 5 of article III of the North Carolina Constitution. The Constitution currently requires the Governor to "take care that the laws be faithfully executed." The statute proposes amending this section to add that in executing any general law on boards or commissions, the Governor must "implement that general law as enacted and the legislative delegation provided for in section 6 of article I of this Constitution shall control." In addition, the statute proposes to amend the Governor's appointment power by allowing the legislative delegation "provided for in section 6 of article I of this Constitution [to] control any executive, legislative, or judicial appointment."

The Misleading Ballot Question in Section 5 of Session Law 2018-117

23. Section 5 of Session Law 2018-117 requires that the ballots for the November 2018 general election describe the proposed constitutional amendment as follows: "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial

Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

24. This ballot question describes the proposed amendment in Session Law 2018-117 in an unfair, discriminatory, and non-understandable way. In the following ways, among others, the ballot question would mislead voters about the proposed amendment and its effects:

25. First, the ballot question states that the proposed amendment seeks to "establish a bipartisan Board of Ethics and Elections." But the proposed amendment would not *establish* such a board. The General Assembly codified the existence of a Bipartisan Board of Elections and Ethics Enforcement as early as 2016, through N.C. Gen. Stat. § 163A-1. By saying that the proposed amendment would *establish* the Board, the ballot question would give voters the false impression that the Board does not currently exist and that the amendment proposes a new ethics initiative and election-regulation initiative.

26. Second, the ballot question states that the proposed amendment seeks to "clarify the appointment authority of the Legislative and Judicial Branches." But the text of the proposed amendment transfers the power to appoint the members of boards and commissions from the Governor to the General Assembly. That is not a clarification. Instead, it would mark a fundamental change in the separation of powers in this State, as interpreted by the North Carolina Supreme Court. The ballot question does not tell the voters that the amendment would overrule recent separation-of-powers decisions by the Supreme Court. Indeed, it does not tell the voters that the amendment would change the Governor's appointment authority at all.

27. Third, the ballot question states that the proposed amendment seeks to "prohibit legislators from serving on boards and commissions exercising executive or judicial authority." But that prohibition already exists. Thirty-six years ago, the North Carolina Supreme Court held

that legislators may not serve on boards exercising executive or quasi-judicial authority. *Advisory Opinion in re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982); *Wallace v. Bone*, 304 N.C. 591, 608-609, 286 S.E.2d 79, 88 (1982). The ballot question would give the voters the false impression that the amendment would impose new limits on the powers of legislators.

28. Fourth, the ballot question states that the proposed amendment would clarify the appointment authority of the judicial branch of government. But the text of the amendment does not address the appointment authority of the judiciary at all. The ballot question would give the voters the false impression that the proposed amendment is a neutral, government-wide adjustment of appointment authority.

29. Aside from the misleading affirmative statements in the ballot question, the question also omits any mention of an important change that the proposed amendment would cause. Section 4 of Session Law 2018-117 states that the "legislative delegation" shall control "any executive, legislative, or judicial appointment." This text could be construed as giving the General Assembly the same control over Cabinet members that (under the proposed amendment) the General Assembly would have over boards and commissions. The proposed ballot question makes no mention of this possible effect. Unless the voters are told that the text of the amendment threatens this outcome (whether the drafters of the amendment subjectively intended the outcome or not), the ballot question is misleading.

30. In sum, Session Law 2018-117 calls for the Board to present a ballot question that is misleading, difficult to understand accurately, unfair, and discriminatory. Requiring the Board to present such an amendment to the voters would require the Board to violate its duties under

N.C. Gen. Stat. § 163A-1108. It would also make the Board a party to a violation of section 4 of article XIII and sections 2, 3, 19, and 35 of article I of the North Carolina Constitution.

The Constitutional Amendments Proposed by Session Law 2018-118

31. On June 28, the General Assembly also ratified Session Law 2018-118, entitled "An Act to Amend the Constitution of North Carolina to Provide for Nonpartisan Judicial Merit Commissions for the Nomination and Recommendation of Nominees When Filling Vacancies in the Office of Justice or Judge of the General Court of Justice and to Make Other Conforming Changes to the Constitution." In substantial part:

- The statute proposes the creation of a "Nonpartisan Judicial Merit Commission" that consists of no more than nine members, who will be appointed by the Chief Justice of the Supreme Court, the Governor, and the General Assembly. Neither the Chief Justice, the Governor, nor the General Assembly may allocate a majority of the appointments.
- The statute proposes that, when filling any vacancy in the office of Justice or Judge of the General Court of Justice, the Nonpartisan Judicial Merit Commission will evaluate nominees received from "the people of the State," considering "whether [each] nominee is qualified or not qualified to fill the vacant office."
- The statute proposes that, after the Nonpartisan Judicial Merit Commission has evaluated whether each nominee is qualified, the General Assembly will recommend to the Governor, for each vacancy, at least two of the qualified nominees. Under the proposed amendment, the Governor must, within 10 days after the nominees are presented by the General Assembly, appoint a nominee to

fill the vacancy. If the Governor does not do so, the General Assembly is to elect an appointee to fill the vacancy.

- The statute proposes to amend section 22 of article II of the North Carolina Constitution. The Constitution currently requires that most bills are subject to veto by the Governor, but creates certain exceptions to the veto. Each of the existing exceptions applies only when a bill covers the excepted content and no other matter. The proposed amendment adds two other categories of bills that are not subject to the Governor's veto. These categories include every bill that recommends a nominee to fill a vacancy in the office of Justice and Judge of the General Court of Justice and every bill that elects a nominee to fill a vacancy in the office of Justice or Judge of the General Court of Justice. These two new proposed veto exceptions are not limited to bills that contain no other matter.

The Misleading Ballot Question in Section 6 of Session Law 2018-118

32. Section 6 of Session Law 2018-118 requires that the ballots for the November 2018 general election describe the proposed constitutional amendment as follows: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

33. This ballot question describes the proposed amendment in Session Law 2018-118 in an unfair, discriminatory, and non-understandable way. In the following ways, among others, the ballot question would mislead voters about the proposed amendment and its effects:

34. First, the ballot question states that the proposed amendment seeks to implement a "nonpartisan merit-based system" for filling judicial vacancies. But the text of the amendment

would not create a nonpartisan system for filling these vacancies. The text of the amendment requires that a commission submit a list of qualified judicial nominees to the General Assembly. The General Assembly would then recommend at least two nominees to the Governor, who would be required to select from the General Assembly's list. Given that the General Assembly is a body composed through partisan elections, it would use partisan processes to vote on judicial nominees to send to the Governor.

35. Second, the ballot question states that the proposed amendment seeks to implement a "merit-based system" to fill judicial vacancies. But the text of the amendment does not create a merit-based system. The text of the amendment does not require that the commission, the General Assembly, or the Governor fill judicial vacancies by comparing nominees' merit.

36. Third, the ballot question states that the proposed amendment seeks to fill judicial vacancies through a system "that relies on professional qualifications." But the process that the proposed amendment would rely on professional qualifications in only the narrowest, most formalistic sense. The only aspect of the process that would be required to address qualifications is the commission's process, and even then, the commission would consider only whether a nominee meets the minimal qualifications "prescribed by law"—that is, the qualifications for judicial office that other sections of the North Carolina Constitution establish. Under those constitutional provisions, to be qualified to serve as a judge, a person need only (1) be registered to vote in the operative district, (2) be of at least 21 years of age, and (3) be licensed to practice law in North Carolina. N.C. Const. art. IV, §§ 8, 22; *id.* art. VI, § 8. A system that addresses only those qualifications—and even then at only one stage—is not a system that *relies on* nominees' professional qualifications in any meaningful way.

37. Fourth, the ballot question states that the amendment seeks to implement a system that does not rely on "political influence" to fill judicial vacancies. But the text of the amendment does not remove political influence. Because the commission would be required to advance all nominees who clear the relatively low barrier imposed on judicial candidates by the North Carolina Constitution, the amendment would give the General Assembly the authority to complete the vast majority of the evaluation of candidates. The text of the amendment does not require that the General Assembly avoid considering the political influence of nominees or their supporters. The text of the proposed amendment requires that the *commission* avoid considering *one particular* political factor—partisan affiliation—but even that minimal restriction would not apply to the main decision-maker under the proposed amendment, the General Assembly.

38. The ballot question also omits any mention of important changes to the Constitution that the proposed amendment would cause. For example, the ballot question makes no mention of how the proposed amendment would restrict the Governor's veto power. Section 5 of Session Law 2018-118 would specifically disable the Governor from vetoing any bill that recommends or elects a nominee to fill a judicial vacancy. The text of the amendment puts this exemption in article II, section 22(5), among other categories of bills that are exempted from the Governor's veto power. All of the current veto exceptions in that section are limited to bills that contain specified content "and no other matter." The text of the amendment, however, creates a new exception to the Governor's veto power that is not limited to bills containing "no other matter." The Legislative Analysis Division of the General Assembly, a nonpartisan group, recently acknowledged that "[b]ecause there is no restriction on adding other matters to these judicial vacancy bills, a court could reasonably interpret that a judicial vacancy bill and legislation on other matters is not subject to the Governor's veto." The proposed ballot question

tells voters nothing about this potential effect on the separation of powers under the North Carolina Constitution. Unless the voters are told that the text of the amendment threatens this outcome (whether the drafters of the amendment subjectively intended the outcome or not), the ballot question is misleading.

39. In sum, Session Law 2018-118 calls for the Board to present a ballot question that is misleading, difficult to understand accurately, unfair, and discriminatory. Requiring the Board to present such an amendment to the voters would require the Board to violate its duties under N.C. Gen. Stat. § 163A-1108. It would also make the Board a party to a violation of section 4 of article XIII and sections 2, 3, 19, and 35 of article I of the North Carolina Constitution.

Claims for Relief

First Claim for Relief: Declaratory Judgment That the Ballot Questions in Session Laws 2018-117 and 2018-118 Violate N.C. Gen. Stat. § 163A-1108; Permanent Injunction

40. Crossclaimants the Board and Chairman Penry incorporate and restate by reference all of the allegations stated above in their crossclaims.

41. Because section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 require the Board to present to voters ballot questions that are misleading, difficult to understand accurately, unfair, and discriminatory, the session laws call for the Board and Chairman Penry to violate their obligations under N.C. Gen. Stat. § 163A-1108. The session laws would put the Board and Chairman Penry in a dilemma over which of two conflicting sets of statutes they should follow.

42. This dilemma creates a real and substantial controversy between the litigants on these crossclaims—indeed, a controversy that needs immediate resolution by this Court.

43. For these reasons, the Board and Chairman Penry are entitled to a declaratory judgment that section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 are inconsistent with the statutory obligations in N.C. Gen. Stat. § 163A-1108.

44. For the same reasons, the Board and Chairman Penry are entitled to a declaratory judgment that they are not required to present section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to the voters.

45. For the same reasons, the Board and Chairman Penry are entitled to a permanent injunction that relieves them from presenting section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to the voters.

Second Claim for Relief: The Ballot Questions in Session Laws 2018-117 and 2018-118 Violate Articles XIII and I of the North Carolina Constitution; Permanent Injunction

46. Crossclaimants the Board and Chairman Penry incorporate and restate by reference all of the allegations stated above in their crossclaims.

47. Because section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 propose constitutional amendments through ballot questions that are misleading, difficult to understand accurately, unfair, and discriminatory, they deprive the voters of the opportunity to make a meaningful decision on whether to amend the North Carolina Constitution. Depriving the voters of that opportunity would violate section 4 of article XIII and sections 2, 3, 19, and 35 of article I of the North Carolina Constitution.

48. The session laws would make the Board and Chairman Penry parties to these constitutional violations. The session laws would also put the Board and Chairman Penry in conflict with their oath to support, maintain, and defend the Constitution of North Carolina.

49. For these reasons, the Board and Chairman Penry are entitled to a declaratory judgment that section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118, as applied under the circumstances of this case, violate the North Carolina Constitution.

50. For the same reasons, the Board and Chairman Penry are entitled to a declaratory judgment that they are not required to present section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to the voters.

51. For the same reasons, the Board and Chairman Penry are entitled to a permanent injunction that relieves them from presenting section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 to the voters.

Motion for Temporary Restraining Order and Motion for Preliminary Injunction

1. The Board and Chairman Penry incorporate and restate by reference the allegations stated above.

2. Requiring the Board and Chairman Penry to present to the voters the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 would require them to violate their obligations under N.C. Gen. Stat. § 163A-1108.

3. Requiring the Board and Chairman Penry to present to the voters the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 would make the Board and Chairman Penry parties to violations of section 4 of article XIII and sections 2, 3, 19, 35 of article I of the North Carolina Constitution. The session laws would also put the Board and Chairman Penry in conflict with their oath to support, maintain, and defend the Constitution of North Carolina.

4. Constitutional violations amount to irreparable harm as a matter of law.

5. In addition, by threatening to make the Board and Chairman Penry parties to constitutional violations, the session laws threaten immediate and irreparable harm to the Board and Chairman Penry.

6. For the reasons stated above, the Board and Chairman Penry are likely to succeed on the merits of their crossclaims.

7. Providing the Board and Chairman Penry with the injunctive relief they seek is necessary to protect their rights during the course of this litigation.

8. Especially in view of the Board's need to finalize the November 2018 ballot in the near term, a temporary restraining order and a preliminary injunction are necessary to preserve the status quo while the Court adjudicates the constitutionality of the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118.

9. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by the Board and Chairman Penry.

Accordingly, pursuant to Rule 65, the Board and Chairman Penry respectfully move for a temporary restraining order and preliminary injunction that relieve them, during the pendency of this litigation, from any duty to present to the voters in the November 2018 general election the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118.

Prayer for Relief

WHEREFORE, the Counterclaimants pray that the Court grant them the following relief:

1. A temporary restraining order and preliminary injunction that relieve the Board and Chairman Penry from any duty to present to the voters in the November 2018 general election the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 during the pendency of this litigation;

2. A declaratory judgment that section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 impermissibly require that the Board and Chairman Penry violate their obligations under N.C. Gen. Stat. § 163A-1108;

3. A declaratory judgment that section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118 are unconstitutional as applied;

4. A permanent injunction against requiring the Board and Chairman Penry to present to the voters for the November 2018 general election the ballot questions in section 5 of Session Law 2018-117 and section 6 of Session Law 2018-118;

5. Costs and expenses pursuant to applicable law; and

6. Any other relief that the Court deems just and proper.

This 6th day of August, 2018.

JOSHUA H. STEIN
Attorney General

Matthew W. Sawchak
Solicitor General
N.C. State Bar No. 17059
msawchak@ncdoj.gov

Amar Majmundar
Special Deputy Attorney General
N.C. State Bar No. 24668
amajmundar@ncdoj.gov

Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. State Bar No. 31846
ovysotskaya@ncdoj.gov

North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Phone: (919) 716-6400

Fax: (919) 716-0185

Attorneys for Defendants-Crossclaimants the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony (Andy) Penry, in his official capacity as Chair of the Board

Certificate of Service

I certify that today, I served the attached answer and crossclaims on counsel for all parties to this lawsuit, using email and first-class mail, addressed as follows:

John R. Wester, Esq.
Robinson, Bradshaw & Hinson, P.A.
101 N. Tryon St., Suite 1900
Charlotte, NC 28246
jwester@rbh.com

Martin E. Warf, Esq.
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

This 6th day of August, 2018.

Matthew W. Sawchak

NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18 CVS 9805

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER

This matter, before the Court upon the Plaintiff's Complaint, requires transfer for hearing to a three-judge panel of the Wake County Superior Court as herein indicated.

Under the provisions of N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4), because Plaintiff has asserted facial challenges to the constitutionality of acts of the North Carolina General Assembly, the challenges must be heard and determined by a three-judge panel of the Wake County Superior Court.

It is therefore ORDERED that the portions of this action challenging such acts are transferred to a three-judge panel of the Wake County Superior Court, to be appointed by the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 1-267.1 and N.C. Gen. Stat. § 1-1A, Rule 42(b)(4).

This the 7th day of August, 2018.

The Honorable Paul C. Ridgeway
Senior Resident Superior Court Judge
Tenth Judicial District

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
ROBINSON BRADSHAW & HINSON, PA
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Noah H. Huffstetler
Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

Alexander McC. Peters
Matthew W. Sawchak
Office of the Attorney General
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
msawchak@ncdoj.gov

This the 7th day of August, 2018.

Kellie Z. Myers
Trial Court Administrator, 10th Judicial District
kellie.z.myers@nccourts.org

Supreme Court
State of North Carolina
Raleigh

CHAMBERS OF
CHIEF JUSTICE MARK D. MARTIN

BOX 1841
ZIP CODE 27602
TEL. (919) 831-5712

Office of the
Chief Justice of the Supreme Court
of North Carolina

ORDER

To the Honorables **Forrest Donald Bridges, Thomas H. Lock, and Jeffery K. Carpenter,** Judges of the Superior Court of North Carolina, Greetings:

As Chief Justice of the Supreme Court of North Carolina, by virtue of authority vested in me by the Constitution of North Carolina, and in accordance with the laws of North Carolina, specifically N.C.G.S. § 1-267.1, I hereby assign you to serve on a Three-Judge Panel in Wake County to hear constitutional challenges raised in the case of Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina 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; North Carolina Bipartisan State Board of Elections and Ethics Enforcement; and James A. ("Andy") Penry, in his official capacity as Chair of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement, 18 CVS 9805 (Wake County).

In Witness Whereof, I have hereunto signed my name as Chief Justice of the Supreme Court of North Carolina, on this day, August 7, 2018.

Mark Martin

Mark Martin, Chief Justice
Supreme Court of North Carolina

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

MOTION TO SHORTEN TIME FOR FILING AND SERVICE OF AFFIDAVIT IN SUPPORT OF GOVERNOR COOPER'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rules 6(d) and 7(b) of the North Carolina Rules of Civil Procedure, Plaintiff Roy A. Cooper, III ("Governor Cooper") respectfully moves that this Court waive any Rule 6(d) requirements that would otherwise apply to the August 15, 2018 hearing in this case. In support of this motion, Governor Cooper states as follows:

1. On the afternoon of Saturday, August 4, just hours after the General Assembly had overridden the Governor's veto of House Bill 3 and adjourned, Governor Cooper served counsel for Defendants with courtesy copies of a Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction that he intended to file in this Court on Monday, August 6.

2. Governor Cooper filed his Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction in this Court when it opened on the morning of Monday, August 6.

3. On the afternoon of August 6, Defendants the North Carolina Bipartisan State Board of Elections and Ethics Enforcement (the "Board") and its Chair (together, the "Board Defendants") filed their responsive papers. In those papers, the Board Defendants answered the Complaint, crossclaimed against the Legislative Defendants in their official capacities, and moved for a temporary restraining order and a preliminary injunction.

4. In light of impending deadlines for finalizing the ballot for the November 2018 general election, the parties need the issues in this matter to be resolved as soon as possible.

5. On Tuesday, August 7, Judge Ridgeway held a hearing on the motions for temporary restraining order filed by Governor Cooper and the Board Defendants. That afternoon, Judge Ridgeway referred the case and the pending motions for injunctive relief to a three-judge panel of this Court.

6. The Court subsequently scheduled a hearing on the pending motions for injunctive relief for Wednesday, August 15.

7. On Thursday, August 9, the Legislative Defendants served their response to the pending motions for injunctive relief.

8. Since receiving the Legislative Defendants' response, counsel for Governor Cooper have continued to investigate matters relevant to the pending motions, including the Legislative Defendants' argument that "there is no reason to assume that North Carolina voters will be misled by the ballot questions" because the full text of the proposed amendments is available elsewhere. Legislative Defs. Opp. 23. Counsel for Governor Cooper have worked with Craig M. Burnett, Ph.D., who has performed extensive academic research in this field, to obtain an affidavit refuting this argument. Counsel are filing and serving Dr. Burnett's affidavit on Monday, August 13, the first business day after its execution.

9. Because it responds to arguments in the Legislative Defendants' response, Dr. Burnett's affidavit is properly considered an "opposing affidavit" under Rule 6(d), and thus has been properly filed and served two days prior to the August 15 hearing on the pending motions for injunctive relief.

10. However, out of an abundance of caution, Governor Cooper respectfully requests that this Court waive any requirements under Rule 6(d) that might otherwise preclude consideration of Dr. Burnett's affidavit in connection with the pending motions for injunctive relief. Due to the swift-moving nature of this case and the need for additional factual investigation, and because Dr. Burnett's

affidavit responds to arguments that the Legislative Defendants raised in their August 9 response to Governor Cooper's motions for injunctive relief, Governor Cooper was unable to file and serve the affidavit with those motions on August 6. In light of the exceptional importance and urgency of the issues presented by this action, Governor Cooper respectfully submits that it is nevertheless appropriate for the Court to consider Dr. Burnett's affidavit in connection with the parties' motions for injunctive relief.

WHEREFORE, Governor Cooper respectfully requests that the Court waive any notice requirements under Rule 6(d) that might otherwise preclude consideration of Dr. Burnett's affidavit in connection with the pending motions for injunctive relief.

Respectfully submitted this 13th day of August, 2018.

John R Wester w/permission by ERZ

John R. Wester
North Carolina Bar No. 4660
jwester@robinsonbradshaw.com
J. Dickson Phillips, III
North Carolina Bar No. 8941
dphillips@robinsonbradshaw.com
Adam K. Doerr
North Carolina Bar No. 37807
adoerr@robinsonbradshaw.com
Erik R. Zimmerman
North Carolina Bar No. 50247
ezimmerman@robinsonbradshaw.com
Morgan P. Abbott
N.C. Bar No. 50546
mabbott@robinsonbradshaw.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 N. Tryon St., Ste. 1900
Charlotte, North Carolina 28246
Telephone: 704.377.2536
Facsimile: 704.378.4000

Attorneys for Plaintiff Roy A. Cooper, III, Governor of the State of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon each of the parties to this action by email and U.S. Mail to the addresses below on August 13, 2018:

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matthew W. Sawchak
Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

This 13th day of August, 2018.

Erik R. Zimmerman

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

AFFIDAVIT OF CRAIG M. BURNETT, Ph.D.

I, Craig M. Burnett, Ph.D., having been duly sworn by an officer authorized to administer oaths, depose and state as follows:

1. I am over twenty-one (21) years of age and am competent to testify to the matters contained herein.

2. I am an Assistant Professor in the Department of Political Science at Hofstra University in Hempstead, New York. I was previously an Assistant Professor of Political

Science at the University of North Carolina at Wilmington, and prior to that at Appalachian State University. My complete Curriculum Vitae is attached as Exhibit A.

3. As reflected in my CV, my academic research focuses on electoral institutions, elections practices, and behavioral influences on voters, including the influence of ballot language. I have conducted extensive research in the field and published widely in peer reviewed journals. My research examines how voters acquire and process political information, and, in turn, how they use that information to make decisions. My research has examined voting behavior on dozens of ballot measures, including numerous constitutional amendments. Indeed, I have dedicated much of my academic career toward studying how voters make decisions in a variety of informational contexts, but I have focused especially on lower information electoral events, that is, those in which voter interest and campaign spending are typically at low levels — namely local elections and ballot measures.

4. While a professor in North Carolina, my research included surveys of North Carolina voters concerning the constitutional amendment to define marriage during the 2012 primary elections. I have also studied how voters in North Carolina evaluated candidates for judicial office during the 2012 election, paying specific attention to how the absence of party labels influenced their votes. In addition to studying voters in North Carolina, I have studied voters in several states by collecting my own data, including Arkansas, California, Florida, Minnesota, and Washington. Through my research, I have developed extensive expertise on voters across the United States and can speak with specific knowledge of North Carolina voters and provide comparative analysis on the matter.

5. Attorneys for Governor Roy Cooper have asked me to provide an opinion regarding several questions that I understand are pertinent to pending litigation Governor Cooper has brought against the North Carolina legislative leaders and the Board of Elections challenging

ballot question language prescribed by the legislature pertinent to two proposed constitutional amendments. For purposes of providing context and understanding of the questions, I have reviewed the North Carolina Session Laws in issue, 2018-117 and 2018-118, affected sections of the North Carolina Constitution, and documents filed in the action, including the Complaint, the brief filed by the Governor in support of injunctive relief, and the brief in response filed by the legislative defendants.

6. I have no personal interest in the lawsuit, nor does Hofstra University, my employer.

7. The questions to which I have been asked to provide my opinions, and my responses, are below:

i. Whether the language chosen on a ballot to state the question for voter approval or disapproval of a proposition, such as a constitutional amendment, may influence voters in determining whether to vote for or against a proposal independent of the substance of the proposal.

Response: The answer to this question, in my opinion, is an unequivocal yes. In the fields of psychology and political science, there is an extensive body of peer-reviewed published research that explores the impact of language on how individuals arrive at a variety of decisions, including consumer choices and voting. The study of the impact of language on decision-making in these fields—which the literature has named "framing effects"—demonstrates with exceptional consistency that changing even just a few words in a description can induce widely different responses. Indeed, in my own research (Burnett and Kogan, 2015, "When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment" *Political Communication*, 31(1): 109-126), my coauthor and I examined the effect of real-world ballot measure texts of proposed constitutional amendments to see whether slightly different

descriptions produced divergent results at a statistically significant rate. For example, we tested the different responses to ballot titles and descriptions for the same proposition banning same sex marriage based on actual ballots used in California: the first, "Limit on Marriage. Constitutional Amendment" and the second, "Eliminates Right of Same Sex Couples to Marry. Constitutional Amendment," with corresponding variations in the ballot descriptions of the measure. [1] The results clearly showed that the way in which the ballot text described a measure mattered a great deal, and, in a live election, could push an election result in one direction or another depending on which text voters saw. In the experiment, support for the amendment dropped six percentage points when the ballot language indicated the measure would "eliminate the right to marry." Using an experimental research design allowed us to isolate the causal effect to be the description of the measure without any possible outside effect interfering with the results. Put another way, we used the "gold standard" of academic research to identify the cause of our observed outcome. It is important to note that our study used ballot language that varied only to a limited degree. If we had opted for more significant differences in the description, we would have predicted even more divergent responses to the texts.

ii. Whether ballot language is important in conveying to most voters the meaning of the proposal on which they are asked to vote.

Response:

a. Ballot text is a very important part of the electoral process. Understanding why this is true requires some background information. Voters can gather information about an upcoming election in a variety of ways. For instance, voters can gather information by duly researching each candidate and ballot question in advance of Election Day. Voters could, for

[1] The corresponding descriptions on the ballot were, first, "provide that only marriage between a man and a woman is valid or recognized in this state" and the second, "changes [the] state constitution to eliminate the right of same-sex couples to marry."

example, attend campaign rallies, follow various news sources, read candidates' websites, and download the proposed text of a constitutional amendment. In a normative sense, this is the democratic ideal: Voters gather their own information and make informed decisions about how to cast their votes. Another way a voter can gather information is from conversations or interactions with other members of the electorate. An individual voter, for example, may consult with their religious leader, a noted member of their community, or perhaps friends and family.

b. The degree to which individuals gather information about political contests is a function of several variables, two of which I focus on here. First, voter interest varies substantially by contest. Voters tend to care a great deal about the presidency, the governor, and their state's two senators. They tend to be somewhat interested in congressional elections and perhaps their mayor if they live in a populous city. As political offices become more local, the average voter has very little interest in the outcome (despite the fact that local representatives often have a larger impact on their constituents). When it comes to ballot measures, interest varies as well. Constitutional amendments that deal with social issues—such as abortion or gay rights—tend to attract the interest of voters. Ballot measures that deal with issues of governance—for example, the structure of government—are not especially interesting to most voters, save those who follow politics closely. Even ballot measures that propose to raise funds through the issuance of bonds—which usually equates to higher taxes—do not capture the attention of most voters. Second, the information environment associated with political contests varies significantly. Whereas presidential campaigns now seem to spend over a billion dollars and both senate and congressional campaigns spend in the tens of millions, spending on ballot measures varies depending on the type of measure. Ballot measures that deal with social issues or that have the potential to shape the fortunes of a large business enterprise (e.g., car insurance providers, pharmaceutical companies) tend to attract tens of millions of

dollars in campaign expenditures on both sides of the issue. Ballot measures concerning the details of governance often see limited campaign expenditures and sometimes no expenditures.

c Taking the previous two subsections together implies one logical conclusion: a strong majority of voters will learn very little about ballot measures that deal with the structure of government. Voters are busy and in their free time choose to seek out entertainment. Most voters do not follow politics for the sake of entertainment. Unfortunately, this means they do not research each and every political contest carefully. It also means that they often do not seek out informed opinions from thought leaders in their community and social circles. While most voters tend to follow presidential, gubernatorial, and senatorial elections, many of the remaining contests fail to register on their radars. Interest is finite, and most voters focus on the major offices—not unlike individuals who fail to watch most games during the National Football League season but tune in during the Super Bowl. Voters' limited amount of interest in ballot measures that deal with governance coupled with the often limited spending to support or oppose such measures means that voters are living in an environment where, come Election Day, they will need to cast a vote on a constitutional question for which they have had limited, if any, exposure before seeing that question on the ballot. It is not the case that voters who are seeing the constitutional amendment questions for the first time simply choose to not vote on the issue—while some voters will abstain, the majority will not. Thus, what we know is that for many voters, the ballot text constitutes the first and only piece of information they will encounter before making a decision and marking their ballots. Voters can make informed decisions with limited information. For example, voters can rely on heuristics such as partisan identification to evaluate candidates they may have had limited or no information about. Ballot measures, however, are different. There are no easy-to-interpret heuristics to rely on. They will therefore rely on the ballot text to inform their choices. The defendants in this case cite

Donaldson v. Dep't of Transp., 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992), choosing to add emphasis to the following line: "We must presume that the voters are informed on the issues and have expressed their convictions in the ballot box." This is a naïve conclusion, detached from the reality of our representative democracy. Voters are not fools, but they can be fooled. Voters have delegated the sacred responsibility of governance—including the right to propose changes to the constitution that governs all citizens—to elected officials. As delegates of voters, it is incumbent on elected officials to be as precise and clear as possible when crafting ballot text, especially when it concerns a constitutional change that will govern all citizens.

iii. Whether, assuming ballot language is misleading concerning the true nature of the proposal, the availability of officially prepared summaries of the actual proposal external to the ballot is likely to counteract the misleading information on the ballot in voters' minds.

Response: Voters rarely go beyond what is immediately accessible. The degree to which states attempt to provide additional information about ballot measures varies, as one would expect. California, for example, sends to each voter's home a state-issued voter information guide that contains detailed information about the ballot measures that will appear on the ballot, including statements for and against each measure provided by interested parties. It also includes endorsements from prominent political groups and elected officials. Other states, such as Arkansas, provide very little information about the ballot measures that will appear (though it is worth noting that the ballots in Arkansas print the entirety of each proposed law). The question at hand, however, is whether an official summary will counteract any potential misinformation. Under the California model, there is the potential to help counteract misinformation as information literally arrives at their front door. Thus, it is easy for voters to access and consume the information. If a state does not mail the information to voters directly,

only a small percentage of voters will seek out additional information, including official summaries. In my research (see endnote 14 on page 123 of Burnett and Kogan (2015)), only six percent of our subjects accessed the actual legal language of the ballot measure, despite the fact that a link to the information was prominently located just under the title and summary on the ballot in the experiment. While this result is not at all surprising given the reasoning I outlined in previous sections, it should be a sobering statistic for those interested in learning how humans acquire information. The short answer is we often do not acquire additional information for a variety of decisions, including voting. Therefore, while an official summary can help improve voters' level of information, it will go largely unnoticed by the overwhelming majority of voters.

iv. Whether the use of words "merit-based" and "non-partisan" and "bipartisan" in the ballot questions in S.L. 2018-117 and 118 would tend to cause voters to vote for these questions more than if the questions were the same but lacked those words.

Response: Each of the words "merit-based," "non-partisan," and "bipartisan" will cause voters to view the constitutional amendments in a more positive way. One could empirically test the degree to which these words increase support amongst voters through an experimental framing study, but the general result is easy to predict. "Merit-based" implies that someone has earned their position fairly and correlates with the concept of the "American Dream"—an idea that enjoys widespread support in the United States. The positive framing effect of "merit-based" will be especially amplified in the proposed ballot text of S.L. 2018-118, as it immediately references "professional qualifications" at the expense of "political influence." Voters will undoubtedly read this description as a reform-minded amendment, as the text implies that the current process of choosing individuals to fill judicial vacancies is one wrought with "political influence." These positive terms and phrases in these ballot questions will cause voters to be more likely to support this measure.

Likewise, "non-partisan" and "bipartisan" are both positively charged words that will increase support for a proposed ballot measure. Both words are the antonyms of "partisan" and either imply cooperation ("bipartisan") or impartiality ("non-partisan"). As is the case with "merit-based," the presence of "professional qualifications" and "political influence" will amplify the framing potential of "non-partisan."

v. Whether the use of the word "clarify" with regard to the "appointment authority" in S.L. 2018-117 would be more likely to cause voters to vote for the proposal than if language were used that explicitly conveyed that appointment authority currently possessed by the Governor was being taken away from the Governor and granted to the General Assembly.

Response: In this context, the word "clarify" implies a minor change or a slight restructuring of a process. Most voters will interpret this to mean the measure is merely a bit of legislative housekeeping. Research demonstrates that voters will give greater support to a measure that is described in positive terms such as "clarifying" than one that is described as "removing" or "eliminating" an aspect of the status quo.

This ends the affidavit.

Craig M. Burnett, Ph.D.

STATE OF CALIFORNIA
COUNTY OF San Mateo

Subscribed and sworn to (or affirmed) before me on this 10 day of August, 2018, by Craig M Burnett, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Notary Public Signature

ANJELO OCAMPO
COMM. # 2247325
NOTARY PUBLIC - CALIFORNIA
SAN MATEO COUNTY
MY COMM EXP. JUNE 23, 2022

Notary Public Seal

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon each of the parties to this action by email and U.S. Mail to the addresses below on August 13, 2018:

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matthew W. Sawchak
Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

This 13th day of August, 2018.

J. Dickson Phillips

EXHIBIT A

Craig M. Burnett

Department of Political Science
Hofstra University
Hempstead, NY 11549
805-252-7540 (Cellular)
516-463-4791 (Office)
516-463-6519 (Fax)
Email: Craig.Burnett@hofstra.edu

Curriculum Vitae

Academic Appointments

Assistant Professor of Political Science, Hofstra University, 2016-present.

Assistant Professor of Political Science, University of North Carolina at Wilmington, 2013-2015

Assistant Professor of Political Science, Appalachian State University, 2010-2013

Education

Ph.D., Political Science, University of California, San Diego, 2010

M.A., Political Science, University of California, San Diego, 2006

B.A., Political Science and History, honors, University of California, Santa Barbara, 2003

Peer-Reviewed Publications

[19] "Parties as an Organizational Force on Nonpartisan City Councils." Forthcoming at *Party Politics*.

[18] "Is Political Knowledge Unique?," with Mathew D. McCubbins. Forthcoming at *Political Science Research and Methods*.

[17] "An Exploration of How Partisanship Impacts Council-Manager Systems," with Christopher R. Prentice. *Politics and Policy*, Volume 46, No. 3 (2018): 392-415.

[16] "The Politics of Potholes: Service Quality and Retrospective Voting in Local Elections," with Vladimir Kogan. *Journal of Politics*, Volume 79, No. 1 (2017): 302-314.

[15] "Reconsidering the Construct Validity of Political Knowledge." *Critical Review*, Volume 28, No. 3-4 (2016): 265-286.

[14] "Exploring the Difference in Participants' Factual Knowledge between Online and In-person Survey Modes." *Research and Politics*, Volume 3, No. 2 (2016): 1-7.

[13] "The Personal Politics of Same-Sex Marriage," with Aaron King. *Politics and Policy*, Volume 43, No. 4 (2015): 586-610.

[12] "Voter Knowledge and Candidates' Judicial Philosophies," with Lydia Tiede. *Justice System Journal*, Volume 36, No. 1 (2015): 49-62.

[11] "Party Labels and Vote Choice in Judicial Elections," with Lydia Tiede. *American Politics Research*, Volume 42, No. 2 (2015): 232-254.

[10] "When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment" with Vladimir Kogan. *Political Communication*, Volume 32, No. 1 (2015): 109-126.

[9] "Ballot (and Voter) 'Exhaustion' Under Instant Runoff Voting: An Examination of Four Ranked-Choice Elections," with Vladimir Kogan. *Electoral Studies*, Volume 37, No. 1 (2015): 41-49.

[8] "Local Logrolling? Examining the Impact of District Elections on Distributive Politics," with Vladimir Kogan. *Urban Affairs Review,* Volume 50, No. 5 (2014): 648-671.

[7] "Gubernatorial Endorsements and Ballot Measure Approval," with Janine A. Parry. *State Politics and Policy Quarterly*, Volume 14, No. 2 (2014) 178-195.

[6] "Sex and the Ballot Box: Perception of Ballot Measures Regarding Same-Sex Marriage and Abortion in California," with Mathew D. McCubbins. *Journal of Public Policy*, Volume 34, No. 1 (2014), 3-33.

[5] "Gaming Direct Democracy: How Voters' Views of Job Performance Interact with Elite Endorsements of Ballot Measures," with Mathew D. McCubbins. *California Journal of Politics and Policy*, Volume 5, No. 4 (2013), 627-643.

[4] "Does Campaign Spending Help Voters Learn About Ballot Measures?" *Electoral Studies*, Volume 31, No. 1 (2013), 78-89.

[3] "Familiar Choices: Reconsidering the Institutional Effects of the Direct Initiative," with Vladimir Kogan. *State Politics and Policy Quarterly*, Volume 12, No. 2 (2012), 204-224.

[2] "Do Blacks and Whites See Obama through Race-Tinted Glasses? A Comparison of Obama's and Clinton's Approval Ratings," with Marisa A. Abrajano. *Presidential Studies Quarterly*, Volume 42, No. 2 (2012), 363-75.

[1] "The Dilemma of Direct Democracy," with Elizabeth Garrett and Mathew D. McCubbins. *Election Law Journal: Rules, Politics, and Policy*, Volume 9, No. 4 (2010), 305-24.

Other Publications

[3] "Government and Politics in New York State." Custom Edition for CQ Press/Sage Publications, Thousand Oaks, CA. 2017.

[2] "Marriage on the Ballot: An Analysis of Same-Sex Marriage Referendums in North Carolina, Minnesota, and Washington During the 2012 Elections," with Mathew D. McCubbins. *Chapman Law Review*, Volume 16, No. 1 (2016): 1-34.

[1] "When Common Wisdom is Neither Common Nor Wisdom: Exploring Voters' Limited Use of Endorsements on three Ballot Measures," with Mathew D. McCubbins. *Minnesota Law Review*, Volume 97, No. 5 (2013), 1557-1595.

Working Papers

"What Do Voters Know About Ballot Measures?" Revise and resubmit at *Electoral Studies*.

"Direct Democracy's Educative Effects? The (Mis)Measurement of Ballot Measure Knowledge" with Jay Barth and Janine A. Parry. Revise and resubmit at *Political Behavior*.

"Do Nonpartisan Ballots Racialize Candidates Evaluations in Low-Information Elections?" with Vladimir Kogan. Under review

"The Limits of Statehouse Endorsements on Opinions toward Referendums," with Janine A. Parry.

"Direct Democracy and Individual Level Educative Effects," with Janine Parry and Jay Barth.

Courses

Hofstra University
- Undergraduate Courses
  - Political Science 001 - American Government
  - Political Science 111 - Racial and Ethnic Politics
  - Political Science 115 - State and Local Government
  - Political Science 147 - Public Opinion and Political Communication
  - Political Science 148 - Scope and Methods
  - Political Science 149 - Political Analysis and Statistics

University of North Carolina at Wilmington
- Undergraduate Courses
  - Political Science 101 - American National Government
  - Political Science 201 - Intro to Political Science Methods
  - Political Science 206 - State Government and Politics
  - Political Science 208 - Politics and the Entertainment Media
  - Political Science 303 - Political Behavior and Participation
  - Political Science 401 - Senior Seminar
  - Political Science 403 - Public Opinion
- Graduate Courses
  - Political Science 592 - Bargaining, Decision-making, and Political Economy

Appalachian State University
Undergraduate Courses
Political Science 1100 - American National Government and Politics
Political Science 3115 - Research Methods
Political Science 3500 - Law and Politics
Political Science 3530 - Campaigns and Elections
Political Science 3535 - Washington at Work
Political Science 4175 - Public Opinion
Graduate Courses
Political Science 5030 - Pro-seminar in American Government and Politics
Political Science 5110 - Campaigns and Elections
Political Science 5135 - State Politics
Political Science 5530 - Political Economy

University of California, San Diego
Undergraduate Courses
Political Science 10 - Introduction to American Politics
Political Science 102F - Mass Media and Politics
Political Science 162 - Environmental Policy and Policymaking

Grants and Awards

Faculty Research and Development Grant, Hofstra University, $1,600, 2018

Diversity Research and Development Grant, Hofstra University, $2,500, 2017

Faculty Research and Development Grant, Hofstra University, $1,350, 2017

Global Citizenship Grant, University of North Carolina Wilmington, $6,000, 2015-2016.

Charles L. Cahill Award, University of North Carolina Wilmington, $2,000, 2014-2015.

Appalachian State University Undergraduate Research Grant, $1,000, 2012-2013.

Survey Experiment on Ballot Framing and Information Shortcuts, Time-sharing Experiments for the Social Sciences (TESS), 2010, NSF Grant 0818839

Mark Twain Fellowship, University of California, San Diego, 2004-2008

Conferences

Annual Meeting of the American Political Science Association (2008, 2010, 2012, 2013, 2014, 2015, 2016, 2017, 2018)
- Presenter (9x), Discussant (5x), Chair (4x)

Annual Conference on State Politics and Policy (2009, 2011, 2012, 2014, 2015, 2016, 2017, 2018)

- Presenter (8x), Discussant (5x), Chair (2x)

Duke-Oxford Conference on Cognition, Law, and Social Science (2015, 2017), Presenter

Annual Meeting of the North Carolina Political Science Association (2014, 2015)
- Presenter (2x), Discussant, Chair (2x)

Annual Meeting of the Midwest Political Science Association (2009, 2010, 2011, 2012, 2013)
- Presenter (5x), Discussant (2x)

Initiatives and Referendums in the Elections of 2012, University of Southern California, Los Angeles, CA, November 16, 2012
- Presenter

Annual Meeting of the Society for Political Methodology (2012)
- Presenter

World Congress of Political Science (2012)
- Presenter

Annual Conference on Empirical Legal Studies (2009, 2011)
- Presenter (1x), Discussant (2x)

The Past, Present, and Future of Election Law: A Symposium Honoring the Work of Daniel Hays Lowenstein, UCLA School of Law, Los Angeles, CA, January 29, 2010
- Presenter

University and Department Service

Hofstra University
- Senator, 2018-present
- Senator-at-large, 2016-2018
- Member, University Planning and Budget Committee, 2016-2018
- Chair, Ad-Hoc Committee to Develop Academic Calendar Religious Observance Policy, 2017-present
- Member, Ad-Hoc Committee on Graduate Program Evaluation, 2018-present
- Political Science Webmaster, 2016-present
- Director of the Albany Internship Program, 2016-present
- Honors Advisor: Anthony Iafrate (2017), Rita Cinquemani (2018)

University of North Carolina at Wilmington
- Faculty Review Committee, 2013-2015
- Political Science Days Committee, 2013-2015, Chair 2014-2015
- Co-coordinator for Campaign Management Minor, 2014-2015

Appalachian State University
- Judicial Politics Search Committee Member, 2011-2012

Public Administration Search Committee Member, 2011-2012
Department Personnel Committee, 2010-2011, 2012-2013
Honors Advisor: Melissa Witte (2012)
General Education Assessment Faculty Reviewer, 2010-2011
Lecturer, Appalachian Lifelong Learning, 2011

Service to the Discipline

Reviewer for *American Political Science Review*, *American Journal of Political Science*, *American Politics Research, California Journal of Politics and Policy, Election Law Journal, Electoral Studies, Local Government Studies, Journal of Politics, Journal of Political Science, Journal of Public Policy, Political Behavior, Political Research Quarterly, Public Opinion Quarterly, Revista Internacional de Sociología, State Politics and Policy Quarterly, Journal of Urban Affairs, Public Works Management and Policy, Publius: The Journal of Federalism, Policy Studies Journal*, *Politics*, *Society and Natural Resources*.

State Politics and Policy Section, American Political Science Association
- Secretary, 2018-present
- Council Member, 2014-present
- Newsletter Editor, 2016-2018

North Carolina Political Science Association
- Secretary, 2015-2016
- At Large Executive Board Member, 2014-2015

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

vs.

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

DEFENDANTS BERGER AND MOORE'S AMENDED MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

COME NOW 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, "Defendants"), and hereby move this Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule

12(b)(1),[1] to dismiss Plaintiff's Complaint due to lack of subject matter jurisdiction. Plaintiff's claims constitute non-justiciable political questions.

Respectfully submitted this the 14th day of August, 2018.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982

By: _____
D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 329-3800
Facsimile: (919) 329.3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ATTORNEYS FOR 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

[1] Defendants do not waive the right to assert additional defenses and grounds for dismissal by the filing of this motion.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the persons indicated below via first class mail and electronic mail addressed as follows:

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

This the 14th day of August, 2018.

D. Martin Warf

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON TEMPORARY MEASURES

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR DIVISION
18 CVS 9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; and CLEAN AIR CAROLINA,

Plaintiffs,

v.

TIM MOORE, in his official capacity; PHILIP BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; ANDREW PENRY, in his official capacity; JOSHUA MALCOLM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in his official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; JOHN LEWIS, in his official capacity, Defendants.	**ORDER ON TEMPORARY MEASURES**

THIS MATTER came on for hearing on August 15, 2018, before the undersigned three-judge panel on the Motion for Temporary Restraining Order and Preliminary Injunction of Plaintiff Governor Roy A. Cooper, III and the Motion for Temporary Restraining Order and Preliminary Injunction of Defendants-Crossclaimants the North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony (Andy) Penry (collectively the Board), regarding the inclusion on the November 2018 general election ballot of two ballot questions concerning proposed amendments to the North Carolina Constitution. Also before the Court are the Motion for Temporary Restraining Order and Preliminary Injunction and Request for an Expedited Hearing of the North Carolina State Conference of the National Association for the Advancement of Colored People and Clean Air Carolina regarding the inclusion on the November 2018 general election ballot of four ballot questions concerning proposed amendments to the

North Carolina Constitution. Also before the Court are Governor Cooper's and the Board's Unopposed Joint Notice and Request for Hearing on Motions for Preliminary Injunction, as well as Governor Cooper's Motion to Shorten Time for Filing and Service of Affidavit in Support of Governor Cooper's Motion for Temporary Restraining Order and Preliminary Injunction. All parties had notice and were represented at the hearing. The Court has considered all matters of record, including the pleadings and motions, the parties' briefs, the affidavits on file, and the arguments of counsel. The Court FINDS and CONCLUDES as follows:

1. Under North Carolina law, for a general election in an even-numbered year, the Board must make absentee ballots available to voters 60 days before the election—here, September 7. *See* N.C. Gen. Stat. § 163A-1305(a) (2017). Before these ballots can be made available, the Board must prepare and print the ballots and conduct testing on them. The Board has represented to the Court that this preparation, printing, and testing takes at least 21 days. Thus, under the circumstances of this year's election, in the absence of a court order to the contrary, the Board would expect to begin preparing, printing, and testing ballots on August 17.

2. The Court intends to enter its ultimate order on the parties' motions as soon as possible, but in view of the complexity of these cases and the shortness of time, the Court might not enter an order by August 17.

3. It would not serve the public interest for the Board to begin preparing, printing, and testing the ballots before this Court enters its ultimate order on the parties' motions. If the Board began preparing the ballots, then the Court later entered an order

that affected the content of the ballot, the Board would be required to restart its process, wasting the public resources that had been spent on the process before that time.

4. After the Court enters its ultimate order on the parties' motions, it would serve the public interest for the present order to remain in effect for three business days after the entry of the ultimate order. That short continuation of the present order would prevent confusion and a possible waste of public resources while any appellants from the ultimate order seek a stay of the ultimate order from the appellate courts.

5. The Court concludes that the parties have satisfied any requirement to ask this Court to stay, pending any appeal, the Court's ultimate order on the parties' motions. *See* N.C. Gen. Stat. § 1A-1, Rule 62(c); N.C. R. App. P. 8(a), 23(a)(1).

In view of the above findings and conclusions, the Court, in the exercise of its discretion and for good cause shown, hereby ORDERS as follows:

A. While this order is in effect, the Board, its officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, shall not take any action to authorize or approve any language to be placed on the official ballot for the November 2018 general election.

B. While this order is in effect, the Board, its officers, agents, servants, employees, and attorneys, and any persons in active concert or participation with them, shall not prepare ballots, print ballots, or authorize any person or entity to prepare or print ballots for the November 2018 general election.

C. The relief provided by decretal paragraphs A and B of this order automatically expires on whichever of the following dates and events occurs first:

1. 11:59 p.m. Eastern Daylight Time on Friday, August 31, 2018.

2. 11:59 p.m. Eastern Daylight Time on the third non-weekend day after the entry of the Court's ultimate order on the parties' motions for preliminary injunction. For purposes of calculating this expiration date, the day of entry of the Court's ultimate order does not count as the first of the three business days allowed.

3. Any other expiration date that is explicitly stated in a later order of this Court or in an order of an appellate court.

SO ORDERED, this the 17th day of August 2018 at 5:30 p.m.

Forrest D. Bridges
Superior Court Judge Presiding

Signed on Behalf of and with Consent of:
Thomas H. Lock, *Superior Court Judge Presiding*
Jeffrey K. Carpenter, *Superior Court Judge Presiding*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
ROBINSON BRADSHAW & HINSON, PA
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Kimberly Hunter
Derb Carter
SOUTHERN ENVIRONMENTAL LAW CENTER
601 W. Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
khunter@selcnc.org
derbc@selcnc.org

Noah H. Huffstetler
Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

Irving Joyner
PO Box 374
Cary, NC 27512
ijoyner@nccu.edu

Alexander McC. Peters
Matthew W. Sawchak
Office of the Attorney General
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
msawchak@ncdoj.gov

Daryl V. Atkinson
Leah J. Kang
FORWARD JUSTICE
400 W. Main Street, Suite 203
Durham, NC 27701
daryl@forwardjustice.org
lkang@forwardjustice.org

This the 20th day of August, 2018.

Kellie Z. Myers
Trial Court Administrator, 10th Judicial District
kellie.z.myers@nccourts.org

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

2018 AUG 21 P 5:19

18-CVS-9805

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 the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER ON INJUNCTIVE RELIEF

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

18-CVS-9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

v.

TIMOTHY K. MOORE, in his official capacity; PHILIP E. BERGER, in his official capacity; THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; JAMES A. ("ANDY") PENRY, in his official capacity; JOSHUA MALCOM, in his official capacity; KEN RAYMOND, in his official capacity; STELLA ANDERSON, in her official capacity; DAMON CIRCOSTA, in his official capacity; STACY EGGERS IV, in her official capacity; JAY HEMPHILL, in his official capacity; VALERIE JOHNSON, in her official capacity; and, JOHN LEWIS, in his official capacity, Defendants.	)	**ORDER ON INJUNCTIVE RELIEF**

THESE MATTERS CAME ON TO BE HEARD before the undersigned three-judge panel on August 15, 2018. All adverse parties to these actions received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, briefs and arguments of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following findings of fact and conclusions of law:

1. As an initial matter, in order to promote judicial efficiency and expediency, this court has exercised its discretion, pursuant to Rule 42 of the North Carolina Rules of Civil Procedure, to consolidate these two cases for purposes of consideration of the arguments and entry of this Order, due to this court's conclusion that the two cases involve common questions of fact and issues of law. Because the claims do not completely overlap, the various claims of the parties will be addressed separately within this order.

STANDING OF PLAINTIFFS

2. 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, (hereinafter "Legislative Defendants") do not contend, nor do we otherwise conclude, that Plaintiff Governor Roy A. Cooper (hereinafter "Governor Cooper") lacks standing to bring a separation of powers challenge in this case. Indeed, "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).

3. Legislative Defendants have, however, filed a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure asserting that Plaintiff North Carolina State Conference of the National Association for the Advancement of Colored People (hereinafter "NC NAACP") and Plaintiff Clean Air Carolina (hereinafter "CAC") lack standing to bring a challenge to the Session Laws at issue in this matter.

4. NC NAACP contends that it has standing to bring its claims on behalf of its members, citing the core mission of the organization to advance and improve the political, educational, social, and economic status of minority groups; the elimination of racial prejudice and discrimination; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias and discrimination. (Plaintiffs' Amended Complaint ¶ 8). In order for NC NAACP to have standing to challenge the proposed amendments on behalf of its individual members, each individual member must have standing to sue in his or her own right. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159 (2001)

(citing *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). This showing has not been made here. NC NAACP has not demonstrated that each individual member is a registered voter in North Carolina, or that each individual member is a member of a minority group.

5. NC NAACP does, however, have standing to bring its claims on behalf of the organization itself. "The gist of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (quoting *Stanley v. Dep't of Conservation & Dev.,* 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). The claims asserted by NC NAACP with respect to the language of the proposed amendments directly impact the ability of the organization to educate its members of the likely effect of the proposed legislation, which is pertinent to the organization's purpose. The undersigned three-judge panel therefore concludes that NC NAACP does have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

6. CAC has not asserted the right to bring its claim on behalf of its members. In order to have standing on its own behalf, CAC must demonstrate that the legally protected injury at stake is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The requirement of particularity has not been met here. The general challenge of informing its members of the effects of the proposed legislation is not an injury particularized to CAC, whose stated mission is

"to ensure cleaner air quality for all by educating the community about how air quality affects health, advocating for stronger clean air policies, and partnering with other organizations committed to cleaner air and sustainable practices." (Plaintiffs' Amended Complaint ¶ 17).

7. The specific injuries put forth by CAC concern the merit of the proposed amendments, rather than the manner in which the amendments will appear on the ballot. The courts are not postured to consider questions which involve "textually demonstrable constitutional commitment of the issue to a coordinate political department." *Cooper v. Berger*, 370 N.C. 393, 809 S.E. 2d 98 (2018) (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). Article XIII, Section 4 of the North Carolina Constitution expressly grants the North Carolina General Assembly (hereinafter "General Assembly") the authority to initiate the proposal of a constitutional amendment. This authority exists notwithstanding the position of the courts on the wisdom or public policy implications of the proposal. The undersigned three-judge panel therefore concludes that CAC does not have standing to bring this action and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is granted as to CAC.

POLITICAL QUESTION DOCTRINE

8. Governor Cooper, cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "State Board of Elections"), and NC NAACP have asserted facial challenges to the constitutionality of acts of the General Assembly. The portions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Legislative Defendants have filed a motion under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure in both cases, asserting that the undersigned three-judge panel lacks subject matter jurisdiction on the theory that the claims constitute non-justiciable political questions. A majority of the three-judge panel has concluded that Governor Cooper's facial constitutional challenges, as expressed, present a justiciable issue as distinguished from "a non-justiciable political question arising from nothing more than a policy dispute," *Cooper*, 370 N.C. at 412, 809 S.E.2d at 110, and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) is denied as to Governor Cooper.

10. Likewise, a majority of this panel has concluded that NC NAACP's facial constitutional challenges, as expressed, present a justiciable issue, as distinguished from a non-justiciable political question and, for that reason, Legislative Defendants' motion under Rule 12(b)(1) on these grounds is denied as to NC NAACP.

NC NAACP "USURPER LEGISLATIVE BODY" CLAIM

11. NC NAACP has also asserted a claim that the General Assembly, as presently constituted, is a "usurper" legislative body whose actions are invalid. While this panel acknowledges the determinations made in this regard in *Covington v. North Carolina*, 270 F. Supp. 3d 881 (2017), we conclude that this claim by NC NAACP in this action constitutes a collateral attack on acts of the General Assembly and, as a result, is not within the jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1. We therefore decline to consider NC NAACP's claim that the General Assembly, as presently constituted, is a "usurper" legislative body.

12. Furthermore, even if NC NAACP's claim on this point was within this three-judge panel's jurisdiction, the undersigned do not at this stage accept the argument that the General Assembly is a "usurper" legislative body. And even if assuming NC NAACP is correct,

a conclusion by the undersigned three-judge panel that the General Assembly is a "usurper" legislative body would result only in causing chaos and confusion in government; in considering the equities, such a result must be avoided. See *Dawson v. Bomar*, 322 F.2d 445 (6th Cir. 1963). For the reasons stated above, we decline to invalidate any acts of this General Assembly as a "usurper" legislative body.

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE[1]

13. On June 28, 2018, the General Assembly enacted Session Law 2018-117 (hereinafter the "Board Appointments Proposed Amendment"), Session Law 2018-118 (hereinafter the "Judicial Vacancies Proposed Amendment"), Session Law 2018-119 (hereinafter the "Maximum Tax Rate Proposed Amendment") and Session Law 2018-128 (hereinafter "Photo Identification for Voting Proposed Amendment"). Each Session Law contains the text of proposed amendments to the North Carolina Constitution. *See* 2018 N.C. Sess. Laws 117 §§ 1-4; 2018 N.C. Sess. Laws 118 §§ 1-5; 2018 N.C. Sess. Laws 119 § 1; 2018 N.C. Sess. Laws 128 §§ 1-2. Each Session Law also contains the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 117 § 5; 2018 N.C. Sess. Laws 118 § 6; 2018 N.C. Sess. Laws 119 § 2; 2018 N.C. Sess. Laws 128 § 3.

14. Governor Cooper and State Board of Elections have asserted claims that the sections containing the ballot language in S.L. 2018-117 and S.L. 2018-118 are facially in violation of the North Carolina Constitution. NC NAACP also has asserted claims that these

[1] In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~strikethrough~~ text in the proposed amendments represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

same sections containing the ballot language, as well as in S.L. 2018-119 and S.L. 2018-128, are facially in violation of the North Carolina Constitution.

15. Section 1 of S.L. 2018-117 proposes to amend Article VI of the North Carolina Constitution by adding a new section to read:

> **Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**
> (1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.
> (2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:
>
> (a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.
>
> (b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader.

2018 N.C. Sess. Laws 117, § 1.

16. Section 2 of S.L. 2018-117 proposes to amend Article I, Section 6 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 6. Separation of powers.**
> (1) The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.
> (2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission.

2018 N.C. Sess. Laws 117, § 2.

17. Section 3 of S.L. 2018-117 proposes to amend Article II, Section 20 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 20. Powers of the General Assembly.**
> (1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.
> (2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers.

2018 N.C. Sess. Laws 117, § 3.

18. Section 4 of S.L. 2018-117 proposes to amend Article III, Section 5 of the North Carolina Constitution by rewriting the section to read as follows:

> **Sec. 5. Duties of Governor.**
> ...
> (4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.
> ...
> (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. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative, or judicial appointment and shall be faithfully executed as enacted.
> ....

2018 N.C. Sess. Laws 117, § 4.

19. Section 5 of S.L. 2018-117 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-4 of S.L. 2018-117 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-117 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority..

2018 N.C. Sess. Laws 117, § 5.

20. Section 1 of S.L. 2018-118 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect,

in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law.

2018 N.C. Sess. Laws 118, § 1.

21. Section 2 of S.L. 2018-118 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 118, § 2.

22. Section 3 of S.L. 2018-118 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 118, § 3.

23. Section 4 of S.L. 2018-118 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:[2]

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 118, § 4.

[2] For the sake of clarity, this section is not displayed as ~~struck through~~ despite the proposed amendment fully removing the language from the North Carolina Constitution.

24. Section 5 of S.L. 2018-118 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

> (5) Other exceptions. Every bill:
> (a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;
> (b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;
> (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter;~~-or~~
> (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;
> (e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or
> (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,
>
> shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 118, § 5.

25. Section 6 of S.L. 2018-118 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-118 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-118 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

2018 N.C. Sess. Laws 118, § 6.

26. Section 1 of S.L. 2018-119 proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 2. State and local taxation.

...

(6) Income tax. The rate of tax on incomes shall not in any case exceed ~~ten~~ seven percent, and there shall be allowed personal exemptions and deductions so that only net incomes are taxed.

....

2018 N.C. Sess. Laws 119, § 1.

27. Section 2 of S.L. 2018-119 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-119 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-119 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to reduce the income tax rate in North Carolina to a maximum allowable rate of seven percent (7%).

2018 N.C. Sess. Laws 119, § 2.

28. Section 1 of S.L. 2018-128 proposes to amend Article VI, Section 2 of the North Carolina Constitution by adding a new subsection to read:

(4) Photo identification for voting in person. Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 1.

29. Section 2 of S.L. 2018-128 proposes to amend Article VI, Section 3 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 3. ~~Registration.~~Registration; Voting in Person.

(1) Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters.

(2) Voters offering to vote in person shall present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions.

2018 N.C. Sess. Laws 128, § 2.

30. Section 3 of S.L. 2018-128 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-2 of S.L. 2018-128 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-128 to read as follows:

> [ ] FOR [ ] AGAINST
> Constitutional amendment to require voters to provide photo identification before voting in person.

2018 N.C. Sess. Laws 128, § 3.

Guiding Legal Principles

31. The analytical framework for reviewing a facial constitutional challenge is well-established. *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016). Acts of the General Assembly are presumed constitutional, and courts will declare them unconstitutional only when "it [is] plainly and clearly the case." *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Glenn v. Bd. Of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). The party alleging the unconstitutionality of a statute has the burden of proving beyond a reasonable doubt that the statute is unconstitutional. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E. 2d 887, 889 (1991). "This is a rule of law which binds us in deciding this case." *Id.*

32. In considering these facial constitutional challenges, this panel understands and applies the following principles of law to the analysis: We presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt. The constitutional violation must be plain and clear. To determine whether the violation is plain and clear, we look to the text of the

constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents.

33. Article I of the North Carolina Constitution declares that "[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." N.C. Const. art. I, § 2. Article I also declares that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States." N.C. Const. art. I, § 3. Article I also preserves the right to due process of law, declaring that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Finally, Article I declares that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

34. Article XIII of the North Carolina Constitution provides that "[t]he people of this State reserve the power to amend this Constitution and to adopt a new or revised Constitution. This power may be exercised by either of the methods set out hereinafter in this Article, but in no other way." N.C. Const. art. XIII, § 2. The two permitted methods to amend the Constitution require an amendment to be proposed by a "Convention of the People of this State," or by the General Assembly. N.C. Const. art. XIII, §§ 3, 4.

35. An amendment to the Constitution "may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the

proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly." N.C. Const. art. XIII, § 4.

36. These provisions of the North Carolina Constitution make plain and clear a number of points: first, the power to govern in this State, including the power to write, revise, or abolish the Constitution is vested in the **people** of this State, founded upon the **will of the people**; second, the General Assembly may initiate a proposal for one or more amendments to the Constitution, by adopting an act submitting the proposal to the voters. The General Assembly has exclusive authority to determine the time and manner in which the proposal is submitted to the voters, but ultimately the issue must be submitted to the voters for ratification or rejection, whereupon the will of the people, expressed through their votes, will determine whether or not the proposal becomes law.

37. Finally, while not a Constitutional provision, or standard for interpretation of the North Carolina Constitution, the State Board of Elections is required by our State's general statutes to "ensure that official ballots throughout the State have all the following characteristics: (1) Are readily understandable by voters. (2) Present all candidates and questions in a fair and nondiscriminatory manner." N.C.G.S. § 163A-1108. We note that while the State Board of Elections has asserted a cross-claim based upon these statutory requirements in N.C.G.S. § 163A-1108, such a claim is not within the jurisdiction of a three-judge panel constituted under N.C.G.S. § 1-267.1. The undersigned three-judge panel has therefore not considered this statutorily-based claim.

Issue Presented

38. The ultimate question presented to this three-judge panel by the facial constitutional challenges requires this panel to decide whether or not the language contained in the ballot questions adopted by the General Assembly satisfies the constitutional mandate that proposed amendments be submitted to the voters for ratification or rejection.

39. In addressing this issue, the Legislative Defendants have argued that the issue might better be decided after the November election rather than before and that the issue might even become moot, depending upon the outcome of the vote. We are compelled, however, in conducting our analysis, to do so through a neutral lens and to do so without considering the wisdom or lack thereof of the proposed amendments. The question is not whether the voters *should* vote for or against the measures, but whether the voters in this State have had a fair opportunity to declare themselves upon this question. *Hill,* 176 N.C. at 584, 97 S.E. at 503.

Applicable Legal Standards When Examining Ballot Language

40. We are aware that our courts have not previously addressed a situation exactly like the one presented here. As a result, this panel must rely on principals of constitutional interpretation established by our courts, including the text of the Constitution and accepted canons of construction, as well as the historical jurisprudence of our courts on similar issues. Other courts provide persuasive, but not authoritative guidance in analysis of challenged ballot proposal language.

41. Since 1776 our constitutions have recognized that all political power resides in the people. N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § 1. Presently, our constitutional jurisprudence provides that "the General Assembly is checked and balanced by its structure and *its accountability to the people*." *State ex rel. McCrory*

v. Berger, 368 N.C. 533, 653, 781 S.E.2d 248, 261 (2016) (Newby, J. concurring in part and dissenting in part) (emphasis added). In order to amend the constitution, the amendment must "be submitted to the qualified voters of this State," N.C. Const. art. II, § 22. Notably, "the object of all elections is to ascertain, fairly and truthfully, the will of the people," *Wilmington, O. & E.C.R. Co. v. Onslow Cty. Comm'rs*, 116 N.C. 563, 568, 21 S.E. 205, 207 (1895).

42. Legislative Defendants submit that this panel should apply a substantive due process standard in determining whether or not the language of the Ballot Questions satisfies constitutional requirements, *i.e.*, "When the ballot language purports to identify the proposed amendment by briefly summarizing the text, then substantive due process is satisfied and the election is not patently and fundamentally unfair so long as the summary does not so plainly mislead voters about the text of the amendment that they do not know what they are voting for or against, that is, they do not know which amendment is before them." *Sprague v. Cortes,* 223 F.Supp. 3d 248, 295 (M.D. Pa. 2016). A majority of this panel concludes that this standard, though relevant, is not determinative to an issue decided by state courts under our state constitution.

43. A majority of this panel instead concludes that the requirements of our state constitution are more appropriately gleaned from the decisions of state courts, and in particular our own Supreme Court. In *Hill v. Lenoir County,* 176 NC 572, 97 SE 498 (1918), our Supreme Court said: "In elections of this character great particularity should be required in the notice in order that the voters may be *fully informed of the question they are called upon to decide*. There is high authority for the principle that even where there is no direction as to the form in which the question is submitted to the voters, it is essential that it be stated in such manner to enable

them *intelligently to express their opinion upon it*[.]" *Id.* at 578, 97 S.E. at 500-01 (emphasis added).

44. Drawing from the requirements expressed in *Hill*, as well as analyses from other jurisdictions, a majority of this panel find that relevant considerations include 1) whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon, 2) whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment, and 3) whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment. See *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 208, 34 A.3d 1164, 1191 (2012) (noting that ballot questions need to be determined on what would put an "average voter" on notice of "the purpose and effect of the amendment"); *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992) (establishing that the courts must "presume that the voters are informed" but the legislature should still "strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each . . . amendment"); *Fla. Dep't of State v. Fla. State Conf. of NAACP Branches,* 43 So. 3d 662, 668 (Fl. 2010) (noting that lawmakers, as well as the voting public, "must be able to comprehend the sweep of each proposal from a fair notification in the proposition itself that is neither less nor more extensive than it appears to be"); *State ex rel. Voters First v. Ohio Ballot Bd.*, 133 Ohio St. 3d 257, 978 N.E.2d 119 (2012) (finding that material omissions in the ballot language of a proposed amendment to the Ohio constitution deprived the voters of the right to know what they were voting upon).[3]

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[3] One of the cases cited by Legislative Defendants was *Sears v. State*, 232 Ga. 547, 208 S.E.2d 93 (1974), which included the following language:

"Though we hold that the ballot language is not a proper subject for more than this minimal judicial review we must note that to the extent to which the legislature describes proposed amendments in any way other than through the most objective and brief of terms...it exposes itself to the temptation—yielded to here, we think—to interject its own value judgments concerning the amendments into the ballot language and thus to propagandize the voters in the very voting booth in denigration of the integrity of the ballot." 232 Ga. at 556, 208 S.E.2d at 100.

45. In the present case, as in *Hill,* there can be no doubt that our General Assembly has the exclusive power and authority to initiate a proposal for a constitutional amendment and to specify the time and manner in which voters of the State are presented with the proposal. But the proposal must be "**submitted**" to the voters. According to the Merriam-Webster Dictionary, "submit" means "to present or propose to another for consideration" or "to submit oneself to the authority or will of another." In order for the proposals to be submitted to the will of the people, the ballot language must comply with the constitutional requirements as expressed in *Hill.*

46. With those legal principles in mind, we now turn our attention to the particular issues presented by the present litigation.

INJUNCTIVE RELIEF

47. This panel is presented with two lawsuits, one filed by Governor Cooper, along with a cross-claim filed by the State Board of Elections, and a second filed by NC NAACP. Although the Governor contests only two of the proposed measures, it is helpful to our analysis to discuss all four of the measures in each lawsuit, as we find the application of the aforementioned legal principles to be substantially different with respect to each of the four proposed amendments and, specifically, the proposed Ballot Question pertaining to each.

48. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits. Its issuance is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities." *State ex rel. Edmisten v. Fayetteville Street Christian School*, 299 N.C. 351, 357, 261 S.E.2d 908, 913 (1980). A preliminary injunction is an "extraordinary remedy" and will issue "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is

necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983) (emphasis in original); see also N.C.G.S. § 1A-1, Rule 65(b). When assessing the preliminary injunction factors, the trial judge "should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability." *Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978).

The Tax Rate Proposed Amendment

49. S.L. 2018-119, as shown above, proposes to amend Article V, Section 2 of the North Carolina Constitution by rewriting the section. NC NAACP contend that the proposed Ballot Language in S.L. 2018-119 is misleading, suggesting that the currently-applicable tax rate will be reduced. We conclude otherwise. The language of the Ballot Question may not be perfect, but it is virtually identical to the wording of the amendment itself, referring clearly to "a maximum allowable rate." NC NAACP would prefer that the Ballot Question use the term "maximum tax rate cap," but the word "cap" appears nowhere in the amendment itself and we do not consider it necessary for the Ballot Question to explain all potential legal ramifications of the amendment, but only its purpose and effect.

The Photo Identification for Voting Proposed Amendment

50. S.L. 2018-128, as shown above, proposes an amendment requiring photo identification in order to vote in person. The proposed amendment would amend Article VI, Sections 2 and 3 of the North Carolina Constitution by adding identical language to each section, the pertinent provisions of which read as follows: "Voters offering to vote in person shall

present photographic identification before voting. The General Assembly shall enact general laws governing the requirements of such photographic identification, which may include exceptions." The language of the Ballot Question adopted by the General Assembly reads: "Constitutional Amendment to require voters to provide photo identification before voting in person."

51. NC NAACP contends that the ballot language is misleading by failing to define "photo identification" and failing to make clear that implementing legislation will be needed to establish which photo IDs would suffice. Again, we conclude otherwise. There can be little doubt whether or not the voters will be able to identify the issue on which they will be voting with respect to this proposed amendment. This panel takes judicial notice that Voter ID laws currently comprise a significant political issue in this country, on which an overwhelming majority of voters have strong feelings, one way or the other. The General Assembly has the exclusive authority to determine the details of any implementing legislation and it would be entirely inappropriate for this panel to speculate as to whether or not that legislation will comport with state and federal constitutional requirements. We have already noted that there is a presumption of constitutional validity afforded to every act of the General Assembly, and we must afford that same presumption to acts that may be enacted in the future.

52. In making the aforementioned observations, we are mindful of the fact that there has been ongoing litigation in the federal courts concerning similar legislation previously passed by this General Assembly. Indeed, NC NAACP has devoted much of its argument on this amendment to the reasons for their philosophical opposition to the Voter ID amendment itself. These arguments go well beyond the function of this three-judge panel in these cases. In determining facial constitutional challenges, this court should not concern itself with the wisdom

of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-128, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

The Board Appointments Proposed Amendment

53. S.L. 2018-117, as shown above, proposes to amend Article VI of the North Carolina Constitution by adding a new section, amend Article I, Section 6 by rewriting the section, amend Article II, Section 20 by rewriting the section, and amend Article III, Section 5 by rewriting the section. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

54. Governor Cooper, the State Board of Elections, and the NC NAACP complain that this ballot language is misleading in saying that the amendment "establishes" a bipartisan Board of Ethics and Elections, and will "prohibit" legislators from serving on boards and commissions exercising executive or judicial authority. While the language may not be the most accurate or articulate description of the effect of these provisions, we do not find that the language in these two parts of the Ballot Question is so misleading, standing alone, so as to violate constitutional requirements; although each of these provisions already exists under law, neither has previously been addressed specifically by our state constitution.

55. In addition to the two points described above, the Ballot Question says only: "to clarify the appointment authority of the Legislative and the Judicial Branches[.]" The Merriam-Webster Dictionary defines "clarify" as "to make understandable" or "to free of confusion." The concern here with this particular language in the Ballot Question is whether it describes the remaining portions of the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that this portion of the ballot language in the Board Appointments Proposed Amendment does not sufficiently inform the voters and is not stated in such manner as to enable them intelligently to express their opinion upon it. In particular:

a. The proposed amendment substantially realigns appointment authority as allocated previously between the Legislative and Executive branches, but makes no mention of how the Amendment affects the Executive branch.

b. The ballot language mentions clarification of appointment authority of the Judicial Branch, but the Amendment makes no mention of any changes to appointment authority of the Judiciary.

c. The Amendment makes significant changes of the duties of the Governor in exercising his powers pursuant to the Separation of Powers clause, but no mention is made of that change in the ballot language.

The Judicial Vacancies Proposed Amendment

56. S.L. 2018-118, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section, amend Article IV, Section 10 by rewriting the section, amend Article IV, Section 18 by adding a new subsection, repeal in its entirety Article

IV, Section 19, and amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

57. Governor Cooper, the State Board of Elections, and NC NAACP complain that this ballot language is misleading in saying that the amendment implements a "nonpartisan merit-based system" that instead of relying on "political influence" relies on "professional qualifications." A majority of this panel agrees and finds that the language in this Ballot Question misleads and does not sufficiently inform the voters. The concern here with the Ballot Question, again, is whether it describes the proposed amendment with sufficient particularity in order that the voters may be fully informed of the question they are called upon to decide. In this regard, a majority of this panel concludes beyond a reasonable doubt that the ballot language in S.L. 2018-118 does not sufficiently inform the voters and is not stated in such manner to enable them intelligently to express their opinion upon it. In particular:

a. The ballot language indicates that the nonpartisan merit-based system will rely on "professional qualifications" rather than "political influence." The Amendment requires only that the commission screen and valuate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified, as prescribed by law. Aside from partisan affiliation, there is no limitation or control on political influence; the nominees are categorized only as qualified or not qualified rather than being rated or ranked in any order of qualification and

the General Assembly is not required to consider any criteria other than choosing nominees found "qualified" by the Commission. (As pointed out by Plaintiffs, current qualifications by law for holding judicial office in this state only require that the person be 21 years of age or more, hold a law license and, in some instances, be a resident of the District.)

b. The Amendment makes substantial changes to appointment powers of the Governor in filling judicial vacancies, but no mention is made of the Governor in the ballot language.

c. Perhaps most significantly, the ballot language makes no mention of the provisions of Section 5 of S.L. 2018-118, which adds two new provisions to Article II, Section 22, Subsection (5) of the North Carolina Constitution

    i. Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice in accordance with Section 23 of Article IV of this Constitution, or

    ii. Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution.

Each of these provisions omits the words "and containing no other matter" included in each of the other enumerated exceptions in Section 5, meaning that proposed Bills coupled with judicial appointments would be immune to a veto by the Governor. The ballot language makes no mention of any effect of the Amendment upon veto powers of the Governor.

58. We therefore find that there is a substantial likelihood that Governor Cooper, the State Board of Elections, and NC NAACP will prevail on the merits of these actions with respect to the constitutionality of the Ballot Question language pertaining to the Board Appointments Proposed Amendment and the Judicial Vacancies Proposed Amendment. We do not find that there is a substantial likelihood that NC NAACP will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Tax Rate Proposed Amendment and the Photo Identification for Voting Proposed Amendment.

59. We find that irreparable harm will result to Governor Cooper, the State Board of Elections, and NC NAACP if the Ballot Language included in S.L. 2018-117 and S.L. 2018-118 is used in placing these respective proposed constitutional amendments on a ballot, in that we conclude beyond a reasonable doubt that such language does not meet the requirements under the North Carolina Constitution for submission of the issues to the will of the people by providing sufficient notice so that the voters may be fully informed of the question they are called upon to decide and in a manner to enable them intelligently to express their opinion upon it.

60. Under these circumstances, the Court, in its discretion and after a careful balancing of the equities, concludes that the requested injunctive relief shall issue in regards to S.L. 2018-117 and S.L. 2018-118. The requested injunctive relief is denied in regards to S.L. 2018-119 and S.L. 2018-128. This court concludes that no security should be required of the Governor, as an officer of the State, but that security in an amount of $1,000 should be required of the NC NAACP pursuant to Rule 65 to secure the payment of costs and damages in the event that it is later determined that this relief has been improvidently granted.

61. This three-judge panel recognizes the significance and the urgency of the questions presented by this litigation. This panel also is mindful of its responsibility not to

disturb an act of the law-making body unless it clearly and beyond a reasonable doubt runs counter to a constitutional limitation or prohibition. For that reason, this Order is being expedited so that (1) the parties may proceed with requests for appellate review, if any, or (2) the General Assembly may act immediately to correct the problems in the language of the Ballot Questions so that these proposed amendments, properly identified and described, may yet appear on the November 2018 general election ballot. This panel likewise does not seek to retain jurisdiction to "supervise" or otherwise be involved in re-drafting of any Ballot Question language. That process rests in the hands of the General Assembly, subject only to constitutional limitations.

62. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

63. The Honorable Jeffrey K. Carpenter dissents from portions of this Order and will file a separate Opinion detailing his positions on each of the issues herein addressed.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Governor Cooper's motion for a preliminary injunction is hereby GRANTED as follows:
    a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.

b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

2. Cross-claimant State Board of Elections' motion for a preliminary injunction is hereby GRANTED as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

3. Plaintiff NC NAACP's motion for preliminary injunction is hereby GRANTED IN PART AND DENIED IN PART, as follows:
   a. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 5 of Session Law 2018-117.
   b. The Legislative Defendants and the State Board of Elections, their officers, agents, servants, employees and attorneys and any person in active concert or participation with them are hereby enjoined from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language currently contained in Section 6 of Session Law 2018-118.

4. Except as hereinbefore described, all requests for injunctive relief are hereby DENIED.

5. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff Governor Cooper's claims is hereby DENIED.

6. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff NC NAACP's claims is hereby DENIED.

7. Legislative Defendants' Rule 12(b)(1) motion as to Plaintiff CAC's claims is hereby GRANTED.

8. The Motions for realignment of the Defendant Board of Elections is hereby remanded to the Wake County Superior Court for determination.

SO ORDERED, this 21st day of August, 2018.

Forrest D. Bridges, Superior Court Judge

Thomas H. Lock, Superior Court Judge

as a majority of this Three Judge Panel

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

vs.

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

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WAKE COUNTY, C.S.C.
BY

NOTICE OF APPEAL

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

vs.

TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, ANDREW PENRY, in his official capacity, JOSHUA MALCOLM, in his official capacity, KEN RAYMOND, in his official capacity, STELLA ANDERSON, in her official capacity, DAMON CIRCOSTA, in his official capacity, STACY EGGERS IV, in his official capacity, JAY HEMPHILL, in his official capacity, VALERIE JOHNSON, in her official capacity, JOHN LEWIS, in his official capacity,

Defendants.

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

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, "Defendants"), hereby give notice of appeal to the North Carolina Court of Appeals from the Order on Injunctive Relief[1] of the three-judge panel composed of the Honorable Forrest D. Bridges, the Honorable Thomas H. Lock, and the Honorable Jeffery K. Carpenter, entered in the above-captioned causes in the General Court of Justice, Superior Court Division of Wake County on 21 August 2018.

[1] The Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 42, consolidated the 18 CVS 9805 and 9806 matters for, among other things, "entry of this Order." Therefore, for purposes of appeal from that same Order, Defendants have followed the Court's consolidation of the matters.

Respectfully submitted this the 22nd day of August, 2018.

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982

By: _____
D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ATTORNEYS FOR 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Appeal was served upon the persons indicated below via electronic mail and by United States Mail, postage prepaid, addressed as follows:

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Attorneys for Plaintiff Governor Roy A. Cooper, III

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

Attorneys for North Carolina Bipartisan State Board of Elections and Ethics Enforcement

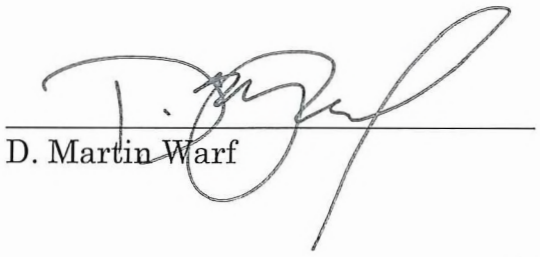
Derb Carter
Kimberley Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
derbc@selcnc.org
khunter@selcnc.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
lkang@forwardjustice.org

Attorneys for Plaintiffs North Carolina State Conference of the National Association for the Advancement of Colored People and Clean Air Carolina

This the 22nd day of August, 2018.



D. Martin Warf

NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18-CVS-9805

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 the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

MEMORANDUM

of Dissent to Majority Order

on Injunctive Relief

THIS MATTER CAME ON TO BE HEARD before the undersigned as part of a three-judge panel on August 15, 2018, upon Plaintiff's motion for a preliminary injunction. All adverse

parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, briefs and arguments of the parties, supplemental affidavits, and the record established thus far, as well as submissions of counsel in attendance.

My colleagues on this three Judge panel and I agree on several of the issues raised in these matters, however we differ on several issues as well. Therefore, in the exercise of my discretion, I have elected to enter a separate memorandum whereby I explain the difference in my analysis of the issues upon which we disagree. I hold each of my panel colleagues in very high regard and have the utmost respect for them both, however, our analysis of the issues upon which we disagree is so different that I believe the entry of this memorandum is necessary.

Governor Cooper has not brought a separation-of-powers claim and his standing in this action should not be addressed as such. The claims raised by all Plaintiffs are facial constitutional challenges. I would find that Governor Cooper, as the directly elected head of the Executive Branch of State Government, has a sufficient interest in this matter to have standing to bring the action on behalf of the voters who elected him.

These actions present a facial constitutional challenge to the legislative acts passed in Session Law 2018-117 and Session Law 2018-118 brought by Governor Roy Cooper in his official capacity as governor and a challenge to Session Law 2018-117, Session Law 2018-118, Session Law 2018-119, and Session Law 2018-128 brought by the North Carolina State Conference of the National Association for the Advancement of Colored People ("NAACP") and Clean Air Carolina ("CAC") challenging the constitutionality of the above Session Laws regarding the manner in which the proposed amendments will be presented on the ballot.

POLITICAL QUESTON DOCTRINE

I would respectfully disagree with my panel colleagues in regard to the outcome they reach regarding the political question doctrine in Paragraph 9. of the Order entered by the majority. I

would find that the matters presented by all Plaintiffs in both cases at bar are non-justiciable political questions as the presentation of proposed constitutional amendments by legislative act is placed squarely and solely with the General Assembly. See N.C. Const. art. XIII, § 4.

To determine whether an issue is non-justiciable under the political question doctrine, "the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Cooper v. Berger, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018) (quoting Baker v. Carr, 269 U.S. 186, 210 (1962)) (internal quotations omitted). The "doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." Id. (quoting Bacon v. Lee, 353 N.C. 696, 716, 549 S.E.2d 840, 853 (2001) (internal quotations omitted).

An amendment to the Constitution "may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal *shall* be submitted *at the time and in the manner prescribed by the General Assembly.*" N.C. Const. art. XIII, § 4 (emphasis added). "If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly." Hart v. State, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

The cases before the Court are distinguishable from Cooper, 370 N.C. at 408, 809 S.E.2d at 107 and McCrory v. Berger, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016). Both Cooper and McCrory were properly situated to analyze and inspect the challenged legislation after it had been enacted. Here, the Court is being asked to preclude the possibility of these acts from being presented to the approximately 6.9 million voters in North Carolina for ratification in the manner

and time prescribed by the General Assembly. It is this Court's duty to "avoid premature adjudication," and "entangling itself in abstract disagreements . . ." Nat'l Park Hosp. Ass'n v. Dep't of Interior, 538 U.S. 803, 807, 123 S. Ct. 2026, 2030 (2003).

Applying the standard from Cooper, it is not appropriate for this Court to determine the finality of the action of the political departments at this stage. The qualified voters of North Carolina are the proper body to determine the finality of this legislative act as to whether it is ratified or not. Furthermore, the courts lack satisfactory criteria for a judicial determination at this stage in the case, as the matters in question have not been approved and may well never be approved. If, once the proposed amendments have been voted on, there are still grievances involving the ballot text then it will be the courts who should step in to correct and undo the wrong.

In the cases at bar, the constitutionality of the General Assembly's exercise of its power in presenting the proposed amendments to the voters for ratification involves an issue that has been expressly committed to the sole discretion of the General Assembly. The Plaintiffs seek to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly in Article XIII, Section 4 of the North Carolina Constitution.

Based upon the analysis set forth herein regarding the Political Question Doctrine, I would find that the matters presented by all Plaintiffs and Cross Claimant Board of Elections in both cases at bar are non-justiciable political questions.

I would find that all issues raised by all Plaintiffs in both actions are facial constitutional challenges to the Session Laws referenced herein.

> A facial challenge to the constitutionality of an act, as plaintiffs have presented here, is the most difficult challenge to mount successfully. Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (citations omitted). "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable

compromise among them." Id. (citation omitted); see also Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008) (discussing why facial challenges are disfavored). Accordingly, we require the party making the facial challenge to meet the high bar of showing "that there are no circumstances under which the statute might be constitutional." Beaufort Cty. Bd. of Educ., 363 N.C. at 502, 681 S.E.2d at 280 (citation omitted); see also United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987) ("[T]he challenger must establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the [act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid . . . ."). Hart v. State, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015).

ISSUE PRESENTED

In my view the ultimate question presented to this three-judge panel by the facial constitutional challenges requires this panel to decide whether or not the Act submitting the proposals to the voters which include the proposed amendments and ballot language are constitutional and may be submitted to the voter for ratification or rejection. Stated another way, the challenges to the proposals presenting ballot question language is properly a challenge to the Acts as a whole and is an issue of whether the General Assembly has subverted substantive due process in its choice of ballot question language considering the Acts as a whole. N.C. Const. art. I, § 19. My colleagues on the panel approach these matters as challenges to a portion of the Session Laws proposing the amendments in question.

This Court should consider the Acts in question as a whole in determining their constitutionality and not severe parts of the Acts to be considered in isolation. I know of no logical methodology recognized in the law that would allow the State Executive or any litigate positioned as the Plaintiffs are in these actions that would allow a "facial constitutional challenge" to a portion of one or more Session Laws before they become the law of the land, independent of remainder of the Act. At the pre-enactment or pre-ratification stage the Court must consider the questioned legislative Act as a whole in determining the constitutionality of the Act, if it were otherwise, the Judicial Branch would be actively engaged in the legislative process. The Courts

cannot take a "blue pencil rule" approach to the legislative acts in question and strike parts of the act while leaving other parts intact. If it did so the Court would be changing the Acts of the Legislature; in regard to proposed constitutional amendments. Only the Legislature is constitutionally permitted to make changes to its Acts before they become the law of the land.

In considering the Sessions Laws as a whole at this pre-enactment stage the only viable analysis to be applied in my view is a Substantive Due Process analysis. The Supreme Court of North Carolina has established and solidified that the law of the land clause in N.C. Const. art I, § 19 "is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." State v. Ballance, 229 N.C. 764, 769 (1949).

I believe at this point in the amendment process, assuming that the issues are not non-justiciable political questions, that this Court has the jurisdiction and authority to strike down an entire Act as unconstitutional or uphold the entire Act, but only if the Act fails to meet the threshold substantive due process requirement. In my view the Court lacks authority and jurisdiction under a facial constitutional challenge to go through the proposed act line by line to determine the constitutionality of each line. If the Court were to take this approach, and modify any portion of the act in any way, the result would be that of the Judicial Branch would be assuming a role in the legislative process.

The North Carolina Constitution expressly grants the Legislative Branch authority to bring proposed constitutional amendments to the people, further the plain language of our Constitution provides for no role whatsoever of the Judicial or Executive Branches in that process. In summary, it is my view that at this early stage of the amendment process the only role the Judicial Branch could possibly have is ensuring Substantive Due Process.

In my view, the Judicial Branch should not intervene in these matters before the proposals are presented to the voters, not because I favor or disfavor the contents of the amendments, or that

I believe the proposals are wise or unwise, or that both the actions at bar may well become moot. Instead it is my belief that once each house of the Legislature has cast a three-fifths vote in favor of a proposed amendment, and the Legislative Branch has adopted an act submitting the proposal to the qualified voters, absent the Act as a whole failing to meet Substantive Due Process requirements, the qualified voters of North Carolina have an unqualified right to vote on the proposals, in fact our Constitution mandates it. The Judicial Branch simply cannot divest the approximately 6.9 million registered North Carolina voters of there North Carolina Constitutional right to address the proposed amendments absent providing due process of law.

Applicable Legal Standards When Examining Proposed Constitutional Amendments

This panel is in an unprecedented, and I believe profound, position in that this Court is being asked to intervene and prevent the qualified voters of this State from the opportunity to vote on whether they wish to amend their State Constitution before the voters themselves may be allow to speak for themselves. In my view the role of the judiciary in the three-branch system of government is by design reactive in nature to the acts of the other two branches of state government, and not proactive or prophylactic. Specifically, this Court must adhere to "the prohibition against advisory opinions[,]" North Carolina Dep't of Correction v. N. Carolina Med. Bd., 363 N.C. 189, 211, 675 S.E.2d 641, 655 (2009), and must review acts taken rather than speculate to how hypothetical acts may impact the complaining parties.

I agree generally with my colleague's findings in Paragraph 41 of the order entered by the majority. However the quote that was taken from *Wilmington, O. & E.C.R Co. v. Onslow Cty. Comm'rs*, 116 NC 563, 21 S.E. 205 (1895), is better understood with more context from that case; with the full context revealed, it appears that the Court ultimately applied a substantive due process analysis:

> We think the object of all elections is to ascertain, fairly and truthfully the will of the people--the qualified voters. That registration, notice of elections, poll-holders, judges, etc., are all parts of the machinery provided by law to aid in attaining the main object--the will of the voters; and should not be used to defeat the object which they were intended to aid. This being so, it is held that a substantial compliance with the provisions of the statute, under which the election is held, is sufficient.
>
> ...
>
> And, not to be misunderstood by this observation, we again repeat what we have heretofore said,--that defendants had no power to submit the question of subscription to the voters of Onslow County, outside of the powers given by the Legislature. And they have no power to issue the bonds demanded by plaintiff, unless a majority of the qualified voters voted for the subscription. But, having the power to submit the question, a substantial compliance with the formalities of the statute in submitting the question to the people, *if there was no fraud practiced, and no design in doing so to impose on the people and get them to do what they would not have done if there had been a literal compliance with the terms of the statute in submitting the question is sufficient*. And if a majority of the qualified voters of the county voted for the subscription, it is the duty of defendant to issue bonds. *Wilmington, O. & E.C.R Co. v. Onslow Cty. Comm'rs*, 116 NC 563, 21 S.E. 205 (1895).

Again, I believe that the appropriate standard to apply here is one of substantive due process as to the questioned Acts as a whole. Assuming arguendo, that the Plaintiffs may wage a facial constitutional challenge to portions of an Act and not the Act as a whole before the Act becomes the law of the land, there is no clear test to determine whether substantive due process is subverted by proposed ballot language in North Carolina's jurisprudence, but there is some language and analyses from North Carolina case law and other jurisdictions that is instructive in formulating an analytical framework. Riddle v. Cumberland County, 180 N.C. 321, 104 S.E. 662 (1920) (holding that "the wording of a ballot is to be read and considered in the light of all the facts and circumstances connected with the election . . .").

Holding that in order to be found unconstitutional "it must be demonstrated that the state's choice of ballot language so upset the evenhandedness of the referendum that it worked a patent

and fundamental unfairness on the voters." Burton v. State of Georgia, 953 F.2d 1266, 1269 (1 1th Cir. 1992). The Eleventh Circuit held that the state's ballot language did not violate substantive due process. Id. The court further explained that it was not the court's role "to decide whether the state General Assembly could have selected some other language, or some other approach, that might have better informed the voters of [the ballot's] content. '[I]t is, by now, absolutely clear that the Due Process Clause does not empower the judiciary 'to sit as a superlegislature to weigh the wisdom of legislation.'" Id. at 1271 (quoting Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124, 98 S. Ct. 2207, 2213 (1978)). "When the ballot language purports to identify the proposed amendment by briefly summarizing the text, then substantive due process is satisfied and the election is not patently and fundamentally unfair so long as the summary does not so plainly mislead voters about the text of the amendment that they do not know what they are voting for or against, that is, they do not know which amendment is before them." *Sprague v. Cortes,* 223 F.Supp. 3d 248, 295 (M.D. Pa. 2016).

In short, the General Assembly's duty regarding ballot language is to provide constitutionally sufficient information for the voters to be able to identify the amendment that is being voted on, and to be careful not to supply any language that would work a patent and fundamental unfairness on the voters. In my view the ballot language in each proposed amendment Act meets this minimal standard of constitutionality.

Hill v. Lenoir County

I disagree with the standards and principles applied by my colleagues in their analysis that were "gleaned" from *Hill v. Lenoir County*, 176 NC 572, 97 SE 498 (1918).
The citations picked from the case and strung together do not give a complete understanding of the issues addressed and the standards actually applied in *Hill*. The facts and circumstances in *Hill*

were far different than the facts in the cases currently before this Court as were the issues the *Hill* Court was tasked with deciding. The *Hill* Court addressed a local government school tax issue and did not have to concern itself with a precarious navigation of the separation of powers between the Judicial and Legislative Branches that are at the forefront in the matters before this Court. In the *Hill* case there was no constitutional mandate that required the school tax measures be put to a vote of the people as is present in the case at bar. The issue in the *Hill* case was whether two separate and distinct ballot issues may be merged into one ballot question so as to require or compel a vote for both propositions or against both propositions without the ability of the voter to freely choose to vote for one proposition and against the other. *Hill* had very little if anything to do with ballot language and largely focused on ballot form. In the case at bar, unlike *Hill*, all proposals are separate and distinct from the other and each proposed amendment will have its own ballot question for the voter to accept or reject. I believe that he analysis conducted by the *Hill* Court is largely inapplicable to the facts and circumstances of the cases before this Court. A close read of the *Hill* case reveals that the Court applied a substantive due process type analysis. In *Hill* in the Court held that combining two issues into one ballot question was unfair to the voters, the combination did not properly distinguish the two separate, distinct and unrelated issues presented by combining them in one ballot question, and putting the two separate and distinct issues into one question on the ballot was insufficient to let the voters know what measure they were voting on – a standard substantive due process analysis. Importantly, the action in *Hill* was not brought to the Courts attention until after the voters cast their ballots, and the Court performed its role in the posture of a review. The *Hill* court after review issued an injunction post election.

My colleagues and I differ in our understanding of what "submit" means in the context of our Constitution. Based on my reading of the NC Constitution it is my belief that "submitting" as contemplated in Article XIII, Section 4 and my substantive due process approach, is a process that

consists of basically two parts. The first part being the adopting of an act submitting the proposal, which is published for public viewing on the General Assembly website and other places, which is part of the time and manner prescribed by the General Assembly; and the second and concluding part of "submitting" being putting the matter before the voters by ballot for their consideration regarding ratification or rejection at which time the process of "submitting" the proposals is complete. My colleagues take the approach that "submit" as contemplated in Article XIII, Section 4 is the final act of the ballot being placed in the hands of the voters.

INJUNCTIVE RELIEF

I would deny all injunctive relief pre-election in regard to all claims and all Plaintiffs. The Plaintiffs cannot show a substantial likelihood of immediate and substantial irreparable harm as their claim of irreparable harm is moot if the proposals are not ratified. The claimed irreparable harm is hypothetical and speculative until the outcome of the vote is determined.

"It is well-established that courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter rise, or give abstract opinions." In re Accutane Litig., 233 N.C. App. 319, 326, 758 S.E.2d 13, 19 (2014) (quoting Baxter v. Jones, 283 N.C. 327, 332, 196 S.E.2d 193, 196 (1973)) (internal quotations omitted).

Because I believe that applicable standard for each claim is that the submitting proposal Acts as a whole in each matter challenged must meet substantive due process requirements and nothing more at this stage; and that the Acts submitting the proposals all meet that threshold I would find that there is not a likelihood of success on the merits as to any Plaintiff or claimant.

In my view, this Court should "trust the people and the political process to determine the contents of the Constitution. . . [and] presume that the voters are informed on the issues and have

expressed their convictions in the ballot box." Donaldson v. Dep't of Transp., 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992).

CONCLUSION

The NC Constitution places responsibility for the amendment proposal process squarely with the General Assembly so long as substantive due process requirements are met. In my view if substantive due process requirements have been met as to each of the amendment proposal Acts there would be violation of the Separation of Powers Clause by the Judicial Branch of the power and authority assigned specifically to the Legislative Branch should the Court grant injunctive relief and the this pre-vote stage of the process.

THEREFORE, the undersigned would conclude as a Matter of Law that all the issues presented are within the political question doctrine and are non-justiciable, therefore this court lacks subject matter jurisdiction and the cases should be dismissed. That Clean Air Carolina lacks standing and there for its actions should be dismissed. That the Plaintiffs do not have a substantial likelihood of success on the merits under the analytical frame worked proposed herein therefore injunctive relief should be denied. That there is no substantial risk of immediate irreparable in light real possibility that all issues raised in these actions may well become moot in 90 days or less if presented to the voters harm therefore injunctive relief should be denied. That any harm that may arise should the qualified voters of this State choose to ratify one or more of the proposed amendments may be adequately addressed post election if necessary therefore injunctive relief should be denied. That no preliminary injunction should issue as to any of the Plaintiffs, or Cross Claimant, Board of Elections or as to any of the issues raised.

THEREFORE the undersigned would: Dismiss the above captioned actions as non-justiciable political questions for lack of subject matter jurisdiction; Dismiss the action filed by

Clean Air Carolina for lacks standing; Deny the all Plaintiffs prayer for injunctive relief; Deny Cross Claimant Board of Elections prayer for injunctive relief.

This the 23 August, 2018

Jeffery K. Carpenter
Resident Superior Court Judge

Certificate of Service

I, D. Martin Warf, certify that on this date I served a copy of **Notice of Judge Carpenter's Dissent from the 21 August 2018 Preliminary Injunction Order**, by electronic mail, by agreement of the parties, to the Email addresses as set forth below:

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Alexander McC. Peters
Senior Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
apeters@ncdoj.gov

Derb Carter
Kimberley Hunter
David Neal
Mary Maclean Asbill
Brooks Pearson
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
derbc@selcnc.org
khunter@selcnc.org
dneal@selcnc.org
mmasbill@selcnc.org
bpearson@selcnc.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
lkang@forwardjustice.org

This the 24th day of August, 2018.

[Signature on following page]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ D. Martin Warf
D. Martin Warf
N.C. State Bar No. 32982
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
martin.warf@nelsonmullins.com

Attorneys for 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

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA,

Plaintiff,

vs.

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

NOTICE OF WITHDRAWAL OF APPEAL

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9806

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and CLEAN AIR CAROLINA,

Plaintiffs,

vs.

TIM MOORE, in his official capacity, PHILIP BERGER, in his official capacity, THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, ANDREW PENRY, in his official capacity, JOSHUA MALCOLM, in his official capacity, KEN RAYMOND, in his official capacity, STELLA ANDERSON, in her official capacity, DAMON CIRCOSTA, in his official capacity, STACY EGGERS IV, in his official capacity, JAY HEMPHILL, in his official capacity, VALERIE JOHNSON, in her official capacity, JOHN LEWIS, in his official capacity,

Defendants.

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

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, "Defendants"), hereby give notice that, pursuant to Appellate Rule 37(e) and the 28 August 2018 Order of the North Carolina Court of Appeals (the "Order"), Defendants withdraw their 22 August 2018 Notice of Appeal from the Order on Injunctive Relief[1] of the three-judge panel composed of the Honorable Forrest D. Bridges, the Honorable Thomas H. Lock, and the Honorable Jeffery K. Carpenter,

[1] The Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 42, consolidated the 18 CVS 9805 and 9806 matters for, among other things, "entry of this Order." Therefore, for purposes of appeal from that same Order, Defendants have followed the Court's consolidation of the matters.

entered in the above-captioned causes in the General Court of Justice, Superior Court Division of Wake County on 21 August 2018. It is Defendants' intent that, pursuant to the Order and upon withdrawal of the Notice of Appeal, the 21 August 2018 Order on Injunctive Relief that preliminarily enjoins the ballot language associated with Session Laws 2018-117 and 2018-118 from appearing on the November 2018 ballot shall be in effect, and the parties to the above-captioned causes may litigate Plaintiffs' claims on the merits in the trial court.

Respectfully submitted this the 28th day of August, 2018.

NELSON MULLINS RILEY &
SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982

By: _____
D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 877-3800
Facsimile: (919) 877-3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ATTORNEYS FOR 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Notice of Withdrawal of Appeal was served upon the persons indicated below via electronic mail only, by agreement of the parties, addressed as follows:

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Attorneys for Plaintiff Governor Roy A. Cooper, III

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

Attorneys for North Carolina Bipartisan State Board of Elections and Ethics Enforcement

Derb Carter
Kimberley Hunter
Southern Environmental Law Center
601 West Rosemary Street, Suite 220
Chapel Hill, NC 27516-2356
derbc@selcnc.org
khunter@selcnc.org

Irving Joyner
P.O. Box 374
Cary, NC 27512
ijoyner@nccu.edu

Daryl Atkinson
Leah Kang
Forward Justice
400 W. Main Street, Suite 203
Durham, NC 27701
lkang@forwardjustice.org

Attorneys for Plaintiffs North Carolina State Conference of the National Association for the Advancement of Colored People and Clean Air Carolina

This the 28th day of August, 2018.

D. Martin Warf

Supreme Court of North Carolina

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

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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. (ANDY) PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT

From N.C. Court of Appeals
(P18-584)
From Wake
(18CVS9805)

O R D E R

Upon consideration of the petition filed by Plaintiff on the 22nd of August 2018 in this matter for discretionary review under G.S. 7A-31 prior to a determination by the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed as moot by order of the Court in conference, this the 29th of August 2018."

s/ Morgan, J.
For the Court

The following order has been entered on the motion filed on the 22nd of August 2018 by Plaintiff to Suspend Appellate Rules:

"Motion Dismissed as moot by order of the Court in conference, this the 29th of August 2018."

s/ Morgan, J.
For the Court

The following order has been entered on the motion filed on the 28th of August 2018 by Plaintiff for Temporary Stay:

"Motion Dismissed without prejudice to seek relief in the Superior Court by order of the Court in conference, this the 29th of August 2018."

s/ Morgan, J.
For the Court

Upon consideration of the petition filed by Plaintiff on the 28th of August 2018 for Writ of Supersedeas, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed without prejudice to seek relief in the Superior Court by order of the Court in conference, this

the 29th of August 2018."

s/ Morgan, J.
For the Court

Upon consideration of the petition filed on the 28th of August 2018 by Plaintiff in this matter for Writ of Prohibition, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Dismissed without prejudice to seek relief in the Superior Court by order of the Court in conference, this the 29th of August 2018."

s/ Morgan, J.
For the Court

The following order has been entered on the motion filed on the 28th of August 2018 by Plaintiff to Suspend Appellate Rules:

"Motion Dismissed as moot by order of the Court in conference, this the 29th of August 2018."

s/ Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of August 2018.

Amy L. Funderburk
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. John R. Wester, Attorney at Law, For Cooper, Roy A. - (By Email)
Mr. J. Dickson Phillips, III, Attorney at Law, For Cooper, Roy A. - (By Email)
Mr. Adam K. Doerr, Attorney at Law, For Cooper, Roy A. - (By Email)
Mr. Erik R. Zimmerman, Attorney at Law, For Cooper, Roy A. - (By Email)
Ms. Morgan P. Abbott, Attorney at Law, For Cooper, Roy A. - (By Email)
Mr. D. Martin Warf, Attorney at Law, For Berger, Philip E., et al. - (By Email)
Mr. Matthew W. Sawchak, Solicitor General, For North Carolina Bipartisan Board of Elections and Ethics Enforcement, et al. - (By Email)
Mr. Andrew H. Erteschik, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina - (By Email)
Ms. Caroline P. Mackie, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina - (By Email)
Mr. John Michael Durnovich, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina - (By Email)
Ms. Wendy R. Weiser, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina
Mr. Daniel I. Weiner, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina
Mr. Douglas E. Keith, Attorney at Law, For Brennan Center for Justice at NYU School of Law and Democracy North Carolina
Mr. Daniel F.E. Smith, Attorney at Law, For Hon. James G. Martin, et al. - (By Email)
Mr. Jim W. Phillips, Jr., Attorney at Law, For Hon. James G. Martin, et al. - (By Email)
Mr. Charles E. Coble, Attorney at Law, For Hon. James G. Martin, et al. - (By Email)
Mr. Robert F. Orr, Attorney at Law, For NC Professors of Constitutional Law - (By Email)
West Publishing - (By Email)
Lexis-Nexis - (By Email)

No. 261P18 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE	)	FILED AUG 29 2018 SUPREME COURT OF NORTH CAROLINA
v.	)	
TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY, THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, ANDREW PENRY, IN HIS OFFICIAL CAPACITY, JOSHUA MALCOLM, IN HIS OFFICIAL CAPACITY, KEN RAYMOND, IN HIS OFFICIAL CAPACITY, STELLA ANDERSON, IN HER OFFICIAL CAPACITY, DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY, STACY EGGERS IV, IN HIS OFFICIAL CAPACITY, JAY HEMPHILL, IN HIS OFFICIAL CAPACITY, VALERIE JOHNSON, IN HER OFFICIAL CAPACITY, JOHN LEWIS, IN HIS OFFICIAL CAPACITY	)	Wake County

****

ORDER

The Court on its own motion temporarily stays the North Carolina Bipartisan State Board of Elections and Ethics Enforcement's preparation of ballots for the November 2018 general election until further order of the Court.

By order of the Court in Conference, this the 29th day of August, 2018.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21 day of August, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Ms. Kimberley Hunter, Attorney at Law, For NC NAACP - (By Email)
Mr. David L. Neal, Attorney at Law, For NC NAACP - (By Email)
Ms. Mary MacLean Asbill, Attorney at Law, For NC NAACP - (By Email)
Brooks Rainey Pearson, Attorney at Law, For NC NAACP - (By Email)
Mr. Irving Joyner, Attorney at Law, For NC NAACP - (By Email)
Mr. Daryl V. Atkinson, Attorney at Law, For NC NAACP - (By Email)
Ms. Leah J. Kang, Attorney at Law, For NC NAACP - (By Email)
Mr. D. Martin Warf, Attorney at Law, For Moore, Tim, et al. - (By Email)
Mr. Matthew W. Sawchak, Solicitor General, For Moore, Tim, et al. - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, For Moore, Tim, et al. - (By Email)
Mrs. Olga Vysotskaya de Brito, Special Deputy Attorney General, For Moore, Tim, et al. - (By Email)
Mr. Noah H. Huffstetler, III, Attorney at Law, For Moore, Tim, et al. - (By Email)
Mr. Robert F. Orr, Attorney at Law, For North Carolina Professors of Constitutional Law - (By Email)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

AMENDED
COMPLAINT

Plaintiff Roy Cooper ("Governor Cooper" or "the Governor"), for his Amended Complaint in this action, hereby alleges as follows:

ORIGINAL COMPLAINT[1]

INTRODUCTION

1. The General Assembly has proposed two amendments to the North Carolina Constitution that would take a wrecking ball to the separation of powers. These proposed amendments would rewrite bedrock constitutional provisions—including the Separation of Powers Clause itself. They would overrule recent decisions of the North Carolina Supreme Court. They would strip the Governor of his authority to appoint thousands of officials to hundreds of boards and commissions that execute the laws of our State. They would confer exclusive authority on the General Assembly to choose those whom the Governor can consider to fill judicial vacancies. And they ultimately threaten to consolidate control over all three branches of government in the General Assembly.

2. When the people of North Carolina vote on these proposed amendments, however, the ballot will inform them of precisely none of this. Rather than allow the voters to make an intelligent decision whether to restructure their own state government, the General Assembly has adopted false and misleading ballot language that conceals the true—and truly extraordinary—nature of these

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[1] The allegations in the Governor's original Complaint appear at paragraphs 1-135 herein. The Governor has not made any changes to these allegations in his Amended Complaint. This is because, as alleged in more detail below, the General Assembly failed to repeal the proposals to amend the Constitution challenged in the Complaint when it reconvened and passed new proposals earlier this week. Without this Court's Order on Injunctive Relief, both the old and the new proposals to amend the Constitution could appear on the ballot for the 2018 General Election. Accordingly, the Governor has not made any changes to the allegations in the original Complaint. The new allegations appear beginning at paragraph 136, following the Prayer for Relief in the original Complaint.

proposed amendments. The General Assembly has therefore violated its duty to the people—imposed by the North Carolina Constitution in Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I—to describe these proposed amendments on the ballot in fair and accurate terms.

3. The separation of powers is grounded in the "inalterable truth" that "freedom is 'political power divided into small fragments.'" Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108 (Winter 1970) (quoting Thomas Hobbes). The Governor brings this action to preserve the separation of powers, prevent the wholesale transfer of constitutional authority from his Office to the General Assembly, fulfill his duty to take care that the laws be faithfully executed, discharge his oath to support the North Carolina Constitution, and stop the General Assembly from perpetrating a deceitful scheme on the people of North Carolina. This Court should declare the false and misleading ballot language written by the General Assembly to be unconstitutional, and should immediately enjoin the inclusion of that language on the November 2018 ballot.

PARTIES AND JURISDICTION

4. On November 8, 2016, the voters of the State of North Carolina elected Plaintiff Governor Cooper to be their governor for a four-year term commencing on January 1, 2017. Governor Cooper is a resident of Wake County, North Carolina.

5. Defendant Philip E. Berger ("Berger") is the President Pro Tempore of the North Carolina Senate and, upon information and belief, is a resident of Rockingham County, North Carolina. Defendant Berger is sued in his official capacity.

6. Defendant Timothy K. Moore ("Moore") is the Speaker of the North Carolina House of Representatives and, upon information and belief, is a resident of Cleveland County, North Carolina. Defendant Moore is sued in his official capacity.

7. Defendant North Carolina Bipartisan State Board of Elections and Ethics Enforcement ("State Elections and Ethics Board" or "Board") is an executive agency of the State of North Carolina that is headquartered in Wake County, North Carolina.

8. Defendant James A. ("Andy") Penry is the Chair of the State Elections and Ethics Board and, upon information and belief, is a resident of Wake County, North Carolina. Defendant Penry is sued in his official capacity.

9. Defendants lack sovereign immunity with respect to the claims asserted herein because Governor Cooper seeks declaratory relief and injunctive relief directly under the North Carolina Constitution, and no other adequate remedy at law is available or appropriate, and because the claims in this case 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.

10. Governor Cooper seeks a declaration that (1) the ballot question in Section 5 of Session Law 2018-117 violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the proposed constitutional amendment in Sections 1 through 4 of Session Law 2018-117 (a true and correct copy of which is attached as **Exhibit A**), and (2) the ballot question in Section 6 of Session Law 2018-118 violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of

the North Carolina Constitution as applied to the proposed constitutional amendment in Sections 1 through 5 of Session Law 2018-118 (a true and correct copy of which is attached as **Exhibit B**).

11. Governor Cooper also seeks to enjoin the ballot questions in Section 5 of Session Law 2018-117 and Section 6 of Session Law 2018-118 from appearing on the ballot for the general election in November 2018.

12. This Court has jurisdiction over the parties and subject matter of this lawsuit.

13. Venue is proper in Wake County Superior Court pursuant to N.C. Gen. Stat. §§ 1-77(2) and 1-82 because this lawsuit is an as-applied constitutional challenge to ballot questions adopted by the General Assembly in Wake County.

HISTORICAL BACKGROUND

14. This action concerns proposed constitutional amendments that the General Assembly has recently adopted. But it arises in a broader historical context in which the General Assembly has repeatedly sought to trample upon the principle of separation of powers in our state government. That historical context is critical to understanding and resolving this case.

15. In 2014, the General Assembly created three state commissions (the Oil and Gas Commission, the Mining Commission, and the Coal Ash Management Commission) that performed executive functions, and granted itself—rather than the Governor—the power to appoint a majority of the voting members of each commission. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 636-38, 781 S.E.2d 248, 250-51 (2016).

16. Then-Governor Patrick L. McCrory brought suit. In January 2016, the North Carolina Supreme Court ruled that the General Assembly had violated the Separation of Powers Clause (Article I, § 6) and the Take Care Clause (Article III, § 5(4)) of the North Carolina Constitution by giving itself the power to appoint a majority of the voting members of the commissions at issue. *McCrory*, 368 N.C. at 647-49, 781 S.E.2d at 257-58.

17. In December 2016, prior to Governor-elect Cooper's taking office, the leadership of the General Assembly convened a special session to enact hastily drawn legislation curtailing the Governor's powers. Among other things, the General Assembly merged the State Board of Elections with the State Ethics Commission and provided that the combined board would have eight members—four appointed by the General Assembly, and four appointed by the Governor.

18. Governor Cooper challenged this legislation. In March 2017, a three-judge panel unanimously ruled that the configuration of the new board violated the separation of powers. *See Cooper v. Berger*, Wake County Case No. 16-CVS-15636, Order on Cross-Motions for Summary Judgment (March 17, 2017).

19. The General Assembly was undeterred. In April 2017, it again merged the State Board of Elections with the State Ethics Commission to form the State Elections and Ethics Board—consisting this time of four Democrats and four Republicans appointed by the Governor.

20. Governor Cooper brought suit. In January 2018, the North Carolina Supreme Court ruled that the General Assembly had again violated the Separation

of Powers Clause and the Take Care Clause of the North Carolina Constitution by preventing the Governor from appointing a majority of members to the Board who share his views on policy. *Cooper v. Berger*, 370 N.C. 392, 413-18, 809 S.E.2d 98, 110-14 (2018).

21. The General Assembly remained undeterred. In February 2018, it enacted another configuration of the Board, adding a ninth member unaffiliated with the two major parties and chosen by the other eight board members. Because this new configuration does not cure the separation of powers violation identified by the Supreme Court, Governor Cooper brought suit to challenge it. That challenge is pending in this Court before a three-judge panel. *See Cooper v. Berger*, Wake County Case No. 18-CVS-3348.

22. In addition to repeatedly infringing the constitutional authority of the Governor, the General Assembly has also engaged in a pattern of actions and threatened actions over the last several years to politicize the courts and undermine the independence of the judiciary. For example, the General Assembly has reduced the number of judges on the Court of Appeals from 15 to 12, required partisan elections yet eliminated primaries for all judicial offices, and redrawn judicial districts in Mecklenburg and Wake Counties to partisan ends. The General Assembly has also threatened—but not yet acted—to reduce all judicial terms to two years, eliminate all emergency special superior court judgeships, and redraw the judicial districts for the entire State.

THE PROPOSED CONSTITUTIONAL AMENDMENTS: WOLVES IN SHEEP'S CLOTHING

23. The General Assembly has now devised a scheme to achieve by constitutional amendment what it has been unable to accomplish by statute or in litigation over the past several years: eliminate the separation of powers, usurp the Governor's executive authority, and seize control of the appointment of every member of virtually every board and commission in all three branches of state government—including the State Elections and Ethics Board and hundreds of other boards and commissions that perform executive (or judicial) functions. In furtherance of its repeated efforts to politicize and delegitimize the judiciary, the General Assembly also seeks to usurp control over appointments to fill judicial vacancies. And, as an integral part of its scheme, the General Assembly has crafted ballot language that will mislead voters into ratifying its determination to grab all of this power for itself.

24. Over five days, from June 25 to June 29, 2018, the General Assembly adopted six proposed amendments to the North Carolina Constitution.

25. Contrary to typical practice, the General Assembly has not enacted enabling legislation for any of these proposed amendments that would assist the public in understanding how the proposals will be implemented.

26. This action concerns two of the currently proposed amendments, both of which the General Assembly adopted on June 28.

27. The first proposed amendment at issue would dismantle the two foundational provisions of the Constitution against which the General Assembly has

repeatedly expressed its hostility in recent years (the Separation of Powers Clause and the Take Care Clause), overrule the Supreme Court's affirmation (in *McCrory v. Berger* and *Cooper v. Berger*) of the Governor's constitutional authority to appoint the majority of members of executive boards and commissions, and consolidate the appointment power for boards and commissions (legislative, executive, and judicial) in the General Assembly. Sections 1 through 4 of Session Law 2018-117 contain this proposed amendment (hereinafter the "Separation of Powers Proposal").

28. Section 5 of Session Law 2018-117 provides that the Separation of Powers Proposal shall be submitted to the voters in the November 2018 general election, and that the following question shall appear on the ballot (hereinafter the "Separation of Powers Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority.

Session Law 2018-117, § 5.

29. The second proposed amendment at issue would repeal the provision of the North Carolina Constitution that grants the Governor the authority to fill judicial vacancies (Article IV, § 19), and replace it with a new provision that would make the General Assembly the gatekeeper for filling vacancies in judicial offices at all levels of the court system and reduce the Governor's role to selecting between two nominees the General Assembly has chosen for the bench.Sections 1 through 5

of Session Law 2018-118 contain this proposed amendment (hereinafter the "Judicial Vacancies Proposal").

30. Section 6 of Session Law 2018-118 provides that the Judicial Vacancies Proposal shall be submitted to the voters in the November 2018 general election, and that the following question shall appear on the ballot (hereinafter the "Judicial Vacancies Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections.

Session Law 2018-118, § 6.

31. The consequences of these proposed amendments, and the reasons why the ballot questions adopted by the General Assembly are misleading and unconstitutional, are reviewed below.

THE CONSTITUTIONAL AMENDMENTS PUBLICATION COMMISSION

32. After the General Assembly adopted the currently proposed constitutional amendments, the North Carolina Constitutional Amendments Publication Commission (the "Commission") scheduled a meeting for July 31 to carry out its statutory duty to prepare short ballot captions for the proposed amendments. *See* N.C. Gen. Stat. § 147-54.10(a).

33. On July 23, the General Assembly issued a joint proclamation to convene a special session "to consider bills concerning any matters the General Assembly elects to consider."On July 24, the General Assembly convened and

passed House Bill 3 (a true and correct copy of which is attached as **Exhibit C**). That bill prevented the Commission from writing captions for the proposed constitutional amendments.

34. On July 29, Governor Cooper vetoed House Bill 3.

35. At the July 31 Commission meeting, the Secretary of State and the Attorney General expressed concern that the Separation of Powers Proposal and the Judicial Vacancies Proposal threaten the separation of powers in our state government.

36. At the same meeting, the Secretary of State and the Attorney General expressed concern that the Separation of Powers Ballot Question and Judicial Vacancies Ballot Question are misleading and disingenuous.

37. On Saturday, August 4, the General Assembly convened to continue its extra session, listing an open-ended agenda, including votes to override the Governor's veto of House Bill 3. A sufficient number of legislators were present (three-fifths of the Senate and of the House) to propose a constitutional amendment, or to revise the currently proposed amendments. A bill was filed (Senate Bill 7) to amend the Judicial Vacancies Proposal. The General Assembly overrode the Governor's veto of House Bill 3. It adjourned *sine die*.

38. Under current law, the language presented to voters on the November 2018 ballot concerning the proposed amendments at issue here will be the language quoted above in paragraphs 28 and 30, preceded by the caption "Constitutional Amendment."

39. On information and belief, the State Board of Elections and Ethics may finalize the November 2018 ballot as soon as August 8.

GOVERNING LEGAL PRINCIPLES

40. Article XIII of the North Carolina Constitution permits the General Assembly to propose constitutional amendments, "but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection." N.C. Const. art. XIII, § 4.

41. Article XIII requires that a proposed amendment be fairly and accurately reflected on the ballot. Otherwise, the General Assembly has not truly "submitt[ed] the proposal to the qualified voters of the State for their ratification or rejection."N.C. Const. art. XIII, § 4.

42. The requirement that a proposed constitutional amendment be fairly and accurately reflected on the ballot also follows from provisions of Article I of the North Carolina Constitution.

43. Section 2 of Article I provides that "all government of right originates from the people [and] is founded upon their will only." N.C. Const. art. I, § 2. Constitutional amendments that are adopted through a ballot that does not fairly and accurately present the proposed amendment to the people cannot be a valid expression of the will of the people.

44. Section 3 of Article I likewise provides that "[t]he people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness." N.C.

Const. art. I, § 3. This provision affirms that the right to amend the Constitution belongs solely and exclusively to the people—one corollary of which is that the people must be fairly and accurately informed of proposed amendments to the Constitution.

45. Section 19 of Article I preserves the right to due process of law, which encompasses a right to an ordered and lawful process for amending the Constitution. To satisfy due process, therefore, the General Assembly must adopt fair and accurate ballot language concerning proposed amendments.

46. Finally, Section 35 of Article I provides that "frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Few principles, if any, are more fundamental to our system of government than the separation of powers. It would therefore violate Section 35—and compromise "the blessings of liberty"—to abolish the separation of powers through ballot language that fails even to acknowledge that consequence.

47. Both the General Assembly and the North Carolina Supreme Court have confirmed that North Carolina law requires ballot language to be fair and accurate. For example, by statute, the State Elections and Ethics Board must ensure that official ballots, among other things, are "readily understandable by voters" and "[p]resent all candidates and questions in a fair and nondiscriminatory manner." N.C. Gen. Stat. § 163A-1108(1)-(2).And the North Carolina Supreme Court has recognized that a referendum can be invalid if the official ballot contains

a "misleading statement or misrepresentation." *Sykes v. Belk*, 278 N.C. 106, 119, 179 S.E.2d 439, 447 (1971).

48. The requirement that ballot questions be fair and accurate embodies multiple overlapping concepts. For example, ballot language is not fair and accurate if it is false, misleading, incomplete, or argumentative. At bottom, the Constitution mandates that the General Assembly fairly advise the voters of what is at stake and facilitate their intelligent, independent decision on the proposed amendment.

AS-APPLIED CHALLENGES TO BALLOT QUESTIONS

49. As applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal—and particularly within the historical context in which those proposals have arisen—the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question violate the North Carolina Constitution. These ballot questions are neither fair nor accurate. They are false. They are misleading. They are incomplete. And they are argumentative. Ultimately, these ballot questions do not fairly advise the voters of what is at stake or facilitate an intelligent, independent decision on the proposed amendments. The Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are therefore unconstitutional and should not be included on the November 2018 ballot.

I. The Separation of Powers Ballot Question violates the North Carolina Constitution as applied to the Separation of Powers Proposal.

50. The Separation of Powers Proposal would produce a tectonic shift in the balance of powers in our state government. But the Separation of Powers Ballot

Question will conceal the true magnitude of this proposal from the voters. The Separation of Powers Ballot Question therefore violates the North Carolina Constitution.

A. The Separation of Powers Proposal would fundamentally alter the structural protections embedded in the North Carolina Constitution.

51. "Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty." *McCrory v. Berger*, 368 N.C. at 635, 781 S.E.2d at 250.

52. The North Carolina Constitution enshrines the separation of powers—and thereby preserves liberty—through two provisions that are at issue here.

53. The Separation of Powers Clause provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

54. The Take Care Clause provides that "[t]he Governor shall take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

55. In *Cooper v. Berger* and *McCrory v. Berger*, the North Carolina Supreme Court ruled that these foundational provisions assign constitutional authority to the Governor to appoint the members of boards and commissions that perform executive functions. *See Cooper v. Berger*, 370 N.C. at 413-18, 809 S.E.2d at 110-14; *McCrory v. Berger*, 368 N.C. at 644-49, 781 S.E.2d at 255-58.

56. In particular, in *Cooper v. Berger*, the North Carolina Supreme Court ruled that the Governor has the constitutional power to appoint a majority of

members to the State Elections and Ethics Board who share his policy preferences. 370 N.C. at 413-18, 809 S.E.2d at 110-14.

57. The Separation of Powers Proposal would transform all of this. It would rewrite, and reduce, the Separation of Powers Clause and the Take Care Clause. It would overrule *Cooper v. Berger* and *McCrory v. Berger*. It would reallocate power from the Governor to the General Assembly. And it would ultimately undo, for short-sighted, partisan reasons, the separation of powers that our founders so carefully and deliberately sought to preserve in our Constitution.

58. The Separation of Powers Proposal would amend the Separation of Powers Clause by adding this provision:

> The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of *any board or commission* prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission.

Session Law 2018-117, § 2 (emphasis added).

59. The Separation of Powers Proposal, in a companion passage, would amend the Take Care Clause by adding this sentence:

> In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of *any board or commission*, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.

Session Law 2018-117, § 4 (emphasis added).

60. Finally, the Separation of Powers Proposal would amend the Appointments Clause (Article III, § 5(8)) by adding this statement:

> The legislative delegation provided for in Section 6 of Article I of this Constitution *shall control any executive, legislative, or judicial appointment* and shall be faithfully executed as enacted.

Session Law 2018-117, § 4 (emphasis added).

61. The effect of blue-penciling the Constitution in this manner would be, at minimum, to overrule the North Carolina Supreme Court's decisions in *Cooper v. Berger* and *McCrory v. Berger*. Whereas those decisions held that the Separation of Powers Clause and the Take Care Clause grant the Governor constitutional authority over the appointment of members of executive boards and commissions, the Separation of Powers Proposal would give the General Assembly the power to appoint every member of virtually every state board and commission in state government—including boards and commissions that perform executive or judicial functions.

62. The Separation of Powers Proposal would also overrule *Cooper v. Berger*'s more particular holding that the Governor has the constitutional authority to appoint a majority of members of the State Elections and Ethics Board who share his policy views. The proposal would convert the State Elections and Ethics Board from a statutory body to a constitutional one, and it would grant the General Assembly the authority to appoint all eight members of the Board. Session Law 2018-117, § 1. The Separation of Powers Proposal would thus strip the Governor of his appointment authority with respect to the Board, even though it would continue to perform executive functions.

63. The General Assembly's newfound authority over boards and commissions would not end, however, with the appointment power. The Separation

of Powers Proposal would also grant the General Assembly control over the "powers," "duties," "responsibilities," and "terms of office" of boards and commissions in all three branches. Session Law 2018-117, §§ 2, 4. The General Assembly would therefore exercise absolute authority not only over the membership of hundreds of boards and commissions throughout state government, but also over everything they do. The consequence would be that, rather than continuing to "separate[e] the legislative, executive, and judicial powers of state government," *McCrory v. Berger*, 368 N.C. at 635, 781 S.E.2d at 250, our Constitution would combine those powers in a single branch: the General Assembly.

B. The Separation of Powers Ballot Question does not fairly and accurately reflect the General Assembly's seizure of power over all three branches of government.

64. Although the Separation of Powers Proposal would dissolve the separation of powers in our state government and transfer massive amounts of constitutional authority from the Governor to the General Assembly, one could never know it from reading the ballot question the General Assembly has crafted.

65. The Separation of Powers Ballot Question describes the Separation of Powers Proposal as a "[c]onstitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority." Session Law 2018-117, § 5.

66. This ballot question does not fairly and accurately represent the Separation of Powers Proposal. Far from fairly advising the voters and facilitating

an intelligent decision on the Separation of Powers Proposal, the ballot question conceals that the proposal would grant the General Assembly unbridled authority over boards and commissions in all three branches of our state government. As applied to the Separation of Powers Proposal, therefore, the Separation of Powers Ballot Question violates Article XIII of the North Carolina Constitution and should not appear on the November 2018 ballot.

67. Although the Separation of Powers Ballot Question is rotten from root to branch, it is at its worst in asserting that the Separation of Powers Proposal would "clarify the appointment authority of the Legislative and the Judicial Branches." Session Law 2018-117, § 5. This statement is unfair and inaccurate in multiple ways.

68. First and foremost, it is false and misleading to state that the Separation of Powers Proposal would "clarify" the General Assembly's appointment authority. Session Law 2018-117, § 5. This proposal would *transform* and *expand* the General Assembly's authority.The North Carolina Supreme Court held, in *Cooper v. Berger* and *McCrory v. Berger*, that the General Assembly does not have unfettered control over appointments to state boards and commissions. The Separation of Powers Proposal would overrule those decisions and rewrite the Constitution to state the opposite: that the General Assembly does have unfettered control over such appointments. *Id.*, §§ 2, 4. It would also extend this control to appointments within all three branches of government. *See id.*, § 4 (providing that the General Assembly's appointment power would control "any executive,

legislative, or judicial appointment").The General Assembly's choice of "clarify" therefore misrepresents the extraordinary impact of the proposed amendment. It also hides the ball from voters by concealing the context that gave rise to the proposed amendment and failing to alert them that the proposal would overrule existing, recent Supreme Court decisions. And the word "clarify" is ultimately inappropriate argumentation that voters should ratify the proposed amendment. After all, as a voter confronted with the ballot question would be led to think, how could anyone reasonably oppose "clarifying" the law?

69. Second, it is deceptive and incomplete to state that the Separation of Powers Proposal would clarify the "appointment authority" of the General Assembly. Session Law 2018-117, § 5. The Separation of Powers Proposal addresses far more than the General Assembly's "appointment authority." The proposal would add language to the Separation of Powers Clause and the Take Care Clause stating not only that the General Assembly shall control the "appointments" of boards and commissions, but also that the General Assembly shall control the "powers," "duties," "responsibilities," and "terms of office" of boards and commissions. *Id.*, §§ 2, 4.The proposed rewriting of these core provisions of the North Carolina Constitution is therefore far more sweeping than the ballot question lets on.

70. Third, it is false to state that the Separation of Powers Proposal would clarify the appointment authority of "the Legislative and Judicial Branches."

Session Law 2018-117, § 5. The Separation of Powers Proposal has nothing whatever to do with the appointment authority of the judicial branch.

71. The Separation of Powers Ballot Question's statement that the Separation of Powers Proposal would "establish a bipartisan Board of Ethics and Elections to administer ethics and election laws," Session Law 2018-117, § 5, is also unfair and inaccurate in multiple ways.

72. First, it is false, misleading, and incomplete for the ballot question to state that the Separation of Powers Proposal would "establish" the State Elections and Ethics Board. Session Law 2018-117, § 5. That Board already exists. Indeed, it is a Defendant in this case. The General Assembly's use of the word "establish" falsely and deceptively suggests—with the aim of fooling voters into ratifying the proposal—that the voters need a constitutional amendment to create a board to administer our ethics and elections laws.

73. Second, it is incomplete to state that the Separation of Powers Proposal would establish the State Elections and Ethics Board without providing any information about the manner in which the proposal would do so. In particular, the ballot question fails to convey that the General Assembly would appoint every member of the Board, and that the proposed amendment would therefore nullify the Governor's constitutional authority to appoint those members. Again, the context is critical: The Separation of Powers Proposal would overrule *Cooper v. Berger* and declare victory for the General Assembly in the years-long constitutional struggle over appointments to the State Elections and Ethics Board. By failing to mention

these matters, the ballot question not only fails to advise the voters fairly, but also actively discourages them from making an informed, intelligent decision.

74. Third, it is misleading and argumentative to state that the Separation of Powers Proposal would make the State Board of Elections and Ethics "bipartisan." Session Law 2018-117, § 5. Nothing in the proposed amendment ensures that the Board would be bipartisan. Although the proposed amendment provides that the Board would have eight members and that no more than four members could be from the same political party, the proposed amendment does not require that the General Assembly actually appoint eight members to the Board. *See id.*, § 1. The proposed amendment would thus permit the General Assembly to appoint four Republicans, but to appoint fewer than four Democrats—and thereby achieve partisan control of the Board. In any event, even if the Board as constituted would have four members from each major party, it is still misleading to describe the board as "bipartisan." "Bipartisan" suggests that the Board will *act* in a bipartisan manner. But the proposed amendment does not and cannot guarantee such a result. Indeed, having four members from each party could just as easily produce partisan gridlock—precisely why the Supreme Court invalidated this same structure in *Cooper v. Berger*. *See* 370 N.C. at 415-16, 809 S.E.2d at 112-113 & n.12. Ultimately, therefore, characterizing the Board as "bipartisan" is nothing more than argument—which has no place on a fair ballot.

75. The statement that the Separation of Powers Proposal would "prohibit legislators from serving on boards and commissions exercising executive or judicial

authority," Session Law 2018-117, § 5, compounds the unfairness and inaccuracy of the Separation of Powers Ballot Question. Although the Separation of Powers Proposal contains such a prohibition, *id.*, § 3, the ballot question fails to mention that legislators are *already* prohibited—by the separation of powers provision in the present Constitution—from serving on boards and commissions exercising executive or judicial authority. Indeed, the North Carolina Supreme Court held as much more than three decades ago. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982). Thus, the proposal's prohibition on appointing legislators to such boards and commissions is superfluous—another illustration of how the ballot question is misleading. By failing to inform voters of existing law, the ballot question suggests that legislators can currently receive appointments to executive or judicial boards and commissions, and that the proposed amendment is necessary to stop such appointments.Yet Supreme Court precedent stops such appointments.

76. This last portion of the ballot question also contributes to the unfair and inaccurate nature of the question as a whole. It suggests that the proposed amendment would take away power from the General Assembly—namely, the power to appoint its own members to executive and judicial boards and commissions. In fact, the proposed amendment would dramatically load the scales of power in favor of the General Assembly.

77. Last, but not least, the Separation of Powers Ballot Question does not even contain the words "separation of powers." It is difficult to imagine anything

more misleading than ballot language that fails to inform voters that they are amending the Separation of Powers Clause of their Constitution.

78. For all of these reasons, the Separation of Powers Ballot Question fails to portray the Separation of Powers Proposal fairly and accurately. Instead, it misrepresents and conceals what the voter is facing—portraying the proposal as a necessary, good-government amendment, when by its terms, it strips the Governor of constitutional authority and undoes the separation of powers that is central to our state government and so vital to the preservation of liberty. The Separation of Powers Ballot Question therefore violates Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I.

II. The Judicial Vacancies Ballot Question violates the North Carolina Constitution as applied to the Judicial Vacancies Proposal.

79. The Judicial Vacancies Ballot Question fares no better. It similarly fails to represent the Judicial Vacancies Proposal fairly and accurately, and therefore violates the North Carolina Constitution as well.

A. The Judicial Vacancies Proposal would eviscerate the Governor's constitutional authority to fill judicial vacancies and transfer that authority to the General Assembly.

80. The Judicial Vacancies Proposal would fundamentally alter the constitutional system for appointments to fill vacancies in the offices of justice and judge in the North Carolina General Court of Justice.

81. Under Article IV, § 19 of the North Carolina Constitution, the Governor is empowered to make appointments to fill all vacancies in the offices of justice or judge.

82. Under Article IV, § 22 of the North Carolina Constitution, the sole "qualification" to serve as a judge or justice is that a person must be an attorney licensed to practice law in North Carolina.

83. The Judicial Vacancies Proposal would repeal Article IV, § 19, and would replace it with a new provision that eliminates any meaningful power of the Governor to appoint justices and judges to fill vacancies in those offices by requiring the Governor to select between as few as two nominees submitted to him or her by the General Assembly. *See* Session Law 2018-118, § 1.

84. The proposed amendment also would entirely remove the appointment power from the Governor and transfer that power to the General Assembly when the Governor does not appoint one of the General Assembly's nominees within ten days after those nominees are submitted to him, or to the Chief Justice of the Supreme Court in certain circumstances when the General Assembly is in adjournment. *See* Session Law 2018-118, § 1.

85. In addition, the proposal would amend the list of legislative actions not subject to veto by the Governor in Section 22 of Article II of the Constitution to include bills enacted by the General Assembly pursuant to its self-conferred role in judicial appointments. Session Law 2018-118, § 5.

86. Under the proposed amendment, the two or more nominees submitted to the Governor would come from a majority vote of the General Assembly. A "Nonpartisan Judicial Merit Commission" or "local merit commission[]" would be the source of the list of eligible nominees. Session Law 2018-118, § 1. The proposed

amendment would impose no constraints—merit-based or otherwise—on the General Assembly's choice of nominees from that list. *See id.* In other words, the General Assembly would have no obligation to submit the nominees it deemed superior to others in terms of professional merit; rather, nominees would be identified merely by majority vote subject to no other test of absolute or relative merit or qualifications.

87. The role of the "nonpartisan commissions" would be solely to receive nominations from "the people" through a process the proposed amendment does not specify or even describe. These commissions would evaluate whether the potential nominees were "qualified or not qualified to fill the vacant office, as prescribed by law." Session Law 2018-118, § 1. The only qualification required for a justice or judge under current law is, as noted above, that he or she be an attorney licensed to practice in North Carolina who has not attained the mandatory retirement age. This proposed amendment would not require the "nonpartisan commissions" to evaluate and select nominees on the basis of any other professional qualification or standard. In sum, the proposed amendment prescribes a selection process unconnected to any evaluation of merit of candidates for the bench.

B. The Judicial Vacancies Ballot Question does not fairly or accurately portray the proposed amendment.

88. The Judicial Vacancies Ballot Question so distorts the actual meaning of the Judicial Vacancies Proposal that it violates the constitutional requirement that proposed amendments be fairly and accurately submitted to the voters.

89. The Judicial Vacancies Ballot Question describes the Judicial Vacancies Proposal as a "[c]onstitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections." Session Law 2018-118, § 6.

90. This ballot question will not fairly apprise voters of the actual meaning and import of the Judicial Vacancies Proposal, and will instead lure them into ratifying the proposed amendment using false, misleading, incomplete, and argumentative language.

91. In the first instance, the Judicial Vacancies Ballot Question fails the test of completeness by neglecting to apprise the voters of how the Judicial Vacancies Proposal would change current law. It does not advise the voters that the Governor currently has the constitutional power to choose whom to consider for appointment to fill judicial vacancies. It also does not inform the voters that the proposed amendment would repeal the constitutional provision—Article IV, § 19—granting the Governor that power, or that it would transfer such power to the General Assembly by authorizing it to identify persons eligible for appointment and requiring the Governor to choose an appointee from as few as two persons so identified. Nor does the Judicial Vacancies Ballot Question advise the voters that the Chief Justice of the North Carolina Supreme Court is granted the power of appointment when the General Assembly is adjourned, and that the General

Assembly reserves the power of appointment to itself if the Governor does not act within ten days.

92. The Judicial Vacancies Ballot Question also fails to advise the voters that the General Assembly's acts to put forth its nominees or to elect judges in certain instances are not subject to the Governor's veto power.Moreover, unlike the existing exceptions from the veto power in the Constitution, the proposed veto exception for judicial vacancy bills is not expressly limited to bills on that subject "and containing no other matter." N.C. Const. art. II, § 22(5); *see* Session Law 2018-118, § 5. The absence of this limitation is striking. It suggests that the Judicial Vacancies Proposal might be a Trojan horse through which the General Assembly will attempt to circumvent the veto power by placing unrelated legislation inside a judicial vacancy bill. Although such an attempt at circumvention would be subject to constitutional challenge on other grounds, the possibility that the General Assembly might rely on this proposed amendment to attempt such a maneuver exacerbates the ballot question's failure even to mention the veto power.

93. In addition to being materially incomplete, the Judicial Vacancies Ballot Question is false and misleading.

94. For instance, the representation that the Judicial Vacancies Proposal will "implement a nonpartisan merit-based system that relies on professional qualifications," Session Law 2018-118, § 6, falsely implies that merit-based professional qualifications will determine who is selected for judicial appointment. In fact, the sole role of the "nonpartisan commissions" specified in the proposed

amendment is to determine whether nominees are "qualified" "as provided by law." *Id.*, § 1. And, as explained above, the sole "qualification" provided by current law to serve as a justice or judge of the General Court of Justice is to be an attorney licensed to practice in North Carolina. Further, the General Assembly's identification of nominees to be submitted to the Governor from those determined to be "qualified" is not subject to any further standard of qualification or merit, and instead is determined by a simple majority vote of the General Assembly.

95. Similarly, nothing in the proposed amendment specifies the process for nomination of persons to the "nonpartisan commissions" or limits nominations to those who satisfy any merit-based standard. Thus, the representation in the Judicial Vacancies Ballot Question that the system is "merit-based" has no support in the actual method by which candidates reach those commissions.

96. The representation in the ballot question that the system will rely on "professional qualifications rather than political influence," Session Law 2018-118, § 6, is not only false and misleading, but also improper argument that the General Assembly is "taking politics out" of judicial selection. This representation is demonstrably false because nothing in the proposed amendment reduces the role of "political influence" in the selection process. The proposal would only shift the authority to identify eligible persons from the Governor to the General Assembly, with the latter body ultimately deciding who will be selected for consideration through a majority vote unguided by any standards that could remove or mitigate the role of "political influence" in that process.

97. Further, the phrase "political influence" in the Judicial Vacancies Ballot Question carries a pejorative connotation that impugns the current system, but without disclosing to the voters any of the basic facts of the current system to enable them to reach their own judgment as to which system they should prefer. The ballot question is unduly argumentative in this respect as well, suggesting that political influence corrupts the current system in a way that the proposed amendment would cure.

98. Similarly, the use of "nonpartisan" to describe the system that the proposed amendment would establish is misleading and argumentative. The most critical step in the selection process will be the identification of the limited slate of nominees—as few as two—to be submitted to the Governor for appointment. The General Assembly, and no one else, will choose those nominees by a simple majority vote, a process that has no nexus to "nonpartisan." The word "nonpartisan" in the ballot question implies that the current system is "partisan" in a sense that the proposed system would not be, and will tend to mislead the voters into believing that, by voting for the proposed amendment, they will be endorsing a system that is "nonpartisan."

99. For all of these reasons, the Judicial Vacancies Ballot Question fails to portray the Judicial Vacancies Proposal fairly and accurately. Instead, it misrepresents and conceals the consequences of the proposed amendment to induce voters to ratify it—and thus to strip the Governor of constitutional authority in favor of granting the General Assembly control over the process for filling judicial

vacancies. The Judicial Vacancies Ballot Question violates Section 4 of Article XIII and Sections 2, 3, 19, and 35 of Article I.

THE CHALLENGED BALLOT QUESTIONS POSE AN IMMEDIATE THREAT OF IRREPARABLE HARM

100. Under current law, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question will appear on the ballot for the November 2018 general election. *See* Session Law 2018-117, § 5; Session Law 2018-118, § 6.

101. On information and belief, the State Board of Elections and Ethics may finalize the November 2018 ballot as soon as August 8.

102. Absent an immediate injunction, therefore, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question will appear on the November 2018 ballot.

103. Including the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the November 2018 ballot threatens in multiple ways to inflict immediate and irreparable injury on Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

104. For example, including those ballot questions on the ballot threatens to strip the Governor and his Office of constitutional power by misleading voters into ratifying the Separation of Powers Proposal and the Judicial Vacancies Proposal—proposed amendments that would impair the separation of powers and effectuate a massive transfer of constitutional authority from the Governor to the General Assembly.

105. Permitting the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question to be included on the ballot would also violate Governor Cooper's duty to take care that the laws (which include the provisions of the North Carolina Constitution) be faithfully executed, N.C. Const. art. III, § 5(4), and his oath to support the North Carolina Constitution, N.C. Const. art. III, § 4.

106. These threatened constitutional violations are *per se* irreparable harm sufficient to support a preliminary injunction. *See, e.g.*, *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable."); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (similar).

FIRST CLAIM FOR RELIEF:
The ballot question in Section 5 of Session Law 2018-117 violates the North Carolina Constitution

107. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

108. A present and real controversy exists between the parties as to the constitutionality of the Separation of Powers Ballot Question.

109. The Separation of Powers Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Separation of Powers Proposal because the Separation of Powers Ballot Question does not fairly and accurately reflect the Separation of Powers Proposal.

110. Governor Cooper is entitled to declaratory relief ruling that the Separation of Powers Ballot Question is unconstitutional as applied to the Separation of Powers Proposal.

111. Governor Cooper is also entitled to preliminary and permanent injunctive relief against the inclusion of the Separation of Powers Ballot Question on the ballot for the November 2018 general election.

112. Absent such relief, the unconstitutional Separation of Powers Ballot Question will be included on the ballot for the November 2018 general election.

113. Including this unconstitutional ballot question on the ballot threatens immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

114. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

115. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

116. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

SECOND CLAIM FOR RELIEF:
The ballot question in Section 6 of Session Law 2018-118 violates the North Carolina Constitution

117. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

118. A present and real controversy exists between the parties as to the constitutionality of the Judicial Vacancies Ballot Question.

119. The Judicial Vacancies Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Judicial Vacancies Proposal because the Judicial Vacancies Ballot Question does not fairly and accurately reflect the Judicial Vacancies Proposal.

120. Governor Cooper is entitled to declaratory relief ruling that the Judicial Vacancies Ballot Question is unconstitutional as applied to the Judicial Vacancies Proposal.

121. Governor Cooper is also entitled to preliminary and permanent injunctive relief against the inclusion of the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

122. Absent such relief, the unconstitutional Judicial Vacancies Ballot Question will be included on the ballot for the November 2018 general election.

123. Including this unconstitutional ballot question on the ballot threatens immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

124. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

125. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

126. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

MOTION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

127. Governor Cooper incorporates and restates the allegations in the foregoing paragraphs by reference.

128. For the reasons set forth above, the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question violate Article XIII, § 4 and Article I, §§ 2, 3, 19, and 35 of the North Carolina Constitution as applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal, respectively.

129. Those violations constitute irreparable harm as a matter of law, and no further showing of irreparable harm is required.

130. In the alternative, the facts alleged above and the other facts of record establish irreparable harm to Governor Cooper, the Office of the Governor, and the people of North Carolina if the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are included on the ballot for the November 2018 general election.

131. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

132. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

133. The temporary and permanent injunctive relief sought by Governor Cooper will preserve the status quo while the Court adjudicates the constitutionality of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question.

134. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

135. Accordingly, pursuant to N.C. Rule of Civil Procedure 65, Governor Cooper moves for a temporary restraining order and preliminary injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Governor Cooper respectfully prays that the Court:

1. Issue a temporary restraining order and preliminary injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election during the pendency of this litigation;

2. Enter a declaratory judgment that the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question are unconstitutional as applied to the Separation of Powers Proposal and the Judicial Vacancies Proposal, respectively;

3. Enter a permanent injunction against the inclusion of the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election;

4. Award Governor Cooper his costs and expenses pursuant to applicable law; and

5. Grant such other and further relief as the Court deems just and proper.

NEW ALLEGATIONS

PROCEEDINGS AFTER FILING ORIGINAL COMPLAINT

136. The Governor filed his Original Complaint, Motion for Temporary Restraining Order, and Motion for Preliminary Injunction in this Court when it opened on the morning of August 6, 2018.

137. On the afternoon of August 6, Defendants the Board and Penry (the "State Board Defendants") filed their responsive papers, in which they answered the Complaint, crossclaimed against Defendants Berger and Moore (the "Legislative Defendants"), and moved for a temporary restraining order and a preliminary injunction.

138. The following day, August 7, the Honorable Paul C. Ridgeway heard the Governor's and the State Board Defendants' motions for temporary restraining order.

139. At the conclusion of the hearing, Judge Ridgeway stated that the matter should be heard by a three-judge panel, although he believed he had inherent authority to rule on a temporary restraining order to the extent it was not practically possible for a three-judge panel to rule in expeditious fashion.

140. That afternoon, Judge Ridgeway entered an order regarding the three-judge panel, and the Chief Justice assigned the members of the panel: the Honorables Forrest D. Bridges, Thomas H. Lock, and Jeffery K. Carpenter.

141. On August 15, the panel heard the preliminary injunction motions.

142. At the hearing, counsel for the State Board Defendants informed the panel that the contents of the ballot would need to be settled by September 1 so that the Board could satisfy a September 22 deadline imposed by federal law for making absentee ballots available to voters.

143. On August 21, a majority of the panel entered an order (the "Order") ruling that the Governor and the State Board Defendants had established a substantial likelihood that they would prevail on the merits of their claims that the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question violated the North Carolina Constitution. The panel also ruled that placing these questions on the ballot would inflict irreparable harm on the Governor and the State Board Defendants. The panel therefore granted a preliminary injunction and enjoined these ballot questions from appearing on the November 2018 ballot. On 23 August 2018, Judge Carpenter filed a separate opinion dissenting from portions of the Order.

144. On August 22, the Legislative Defendants noticed an appeal of the Order and filed a petition for a writ of supersedeas and a motion for temporary stay in the Court of Appeals.

145. On August 23, the Court of Appeals stayed the Order pending a ruling on the supersedeas petition, and stayed the preparation or printing of ballots pending further order of the Court of Appeals.

THE NEW PROPOSED AMENDMENTS

146. On August 24, the General Assembly convened a special session to enact new versions of the proposed amendments and ballot questions that the panel had enjoined.

147. The House of Representatives passed those proposals on August 24, and the Senate passed them on August 27.

148. Section 1 of Session Law 2018-133 (a true and correct copy of which is attached as **Exhibit D**) contains the first proposed amendment at issue here (hereinafter the "Elections Board Proposal"). This proposed amendment would restructure the Board to have eight members rather than the current nine. *See* Session Law 2018-133, § 1. The Governor would appoint the members of the Board, but he could not appoint more than four members from the same political party, and he would be required to choose the appointees from lists submitted by the majority and minority leaders in the General Assembly. *See id.* This proposed amendment would therefore overrule the Supreme Court's decision, in *Cooper v. Berger*, that a materially identical configuration of the Board violated the separation of powers by preventing the Governor from appointing a majority of members who shared his policy views and preferences. *See* 370 N.C. 392, 413-18, 809 S.E.2d 98, 110-14 (2018).

149. Section 2 of Session Law 2018-133 provides that the Elections Board Proposal shall be submitted to the voters in the November 2018 general election,

and that the following question shall appear on the ballot (hereinafter the "Elections Board Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.

Session Law 2018-133, § 2.

150. During the Senate and House debates amendments were offered that would have supplied omitted material facts concerning the meaning and true effects of the proposal, but all proposed amendments were tabled or defeated.

151. Sections 1 through 5 of Session Law 2018-132 (a true and correct copy of which is attached as **Exhibit E**) contain the second proposed amendment at issue here (hereinafter the "New Judicial Vacancies Proposal"). This proposed amendment would repeal the provision of the Constitution (Article IV, § 19) granting the Governor the power to fill judicial vacancies. *See* Session Law 2018-132, § 4. In its place, the proposal would add a new constitutional provision creating the following system for filling judicial vacancies:

a. When a vacancy occurs in the office of Justice or Judge, the people of the State would submit nominations to a commission, whose members would be appointed by the Chief Justice, the Governor, and the General Assembly. Session Law 2018-132, § 1.

b. The commission would inform the General Assembly whether each nominee was "qualified or not qualified to fill the vacant office, as prescribed by law." *Id.*

c. The General Assembly would choose two or more of the qualified nominees and recommend them to the Governor. *Id.*

d. The Governor would be required to appoint one of the nominees recommended by the General Assembly. If the Governor did not make such an appointment within ten days, the General Assembly would elect an appointee to fill the vacancy. *Id.*

e. Rather than serving until the next general election (as under current law), the appointees would serve until the next election *after that*—meaning that the appointees could serve for more than two years without being subject to election. *Id.*

152. Section 6 of Session Law 2018-132 provides that the New Judicial Vacancies Proposal shall be submitted to the voters in the November 2018 general election, and that the following question shall appear on the ballot (hereinafter the "New Judicial Vacancies Ballot Question"):

> [ ] FOR [ ] AGAINST
>
> Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

Session Law 2018-132, § 6.

153. During the Senate and House debates on Session Law 2018-132 amendments were offered that would have removed misleading language and supplied material omissions, but all proposed amendments were tabled or defeated.

PROCEEDINGS AFTER THE ADOPTION OF THE NEW PROPOSED AMENDMENTS

154. When it enacted the Elections Board Proposal and the New Judicial Vacancies Proposal, the General Assembly did not repeal the Separation of Powers Proposal or the Judicial Vacancies Proposal—even though these proposed amendments overlapped and conflicted with each other.

155. Instead, the General Assembly chose to rely on the preliminary injunction entered by the panel—a preliminary injunction that the Legislative Defendants had repeatedly insisted, both before the panel and on appeal, that the courts lacked jurisdiction to enter—as a backstop to prevent conflicting proposals from appearing on the ballot.

156. To that end, on August 28, the Legislative Defendants withdrew their appeal and their supersedeas petition in the Court of Appeals.

157. Also on August 28, the Court of Appeals dissolved its stay of the Order and the stay against the preparation and printing of ballots.

158. Later that day, the Governor petitioned the Supreme Court for a writ of supersedeas or prohibition to prevent the Elections Board Ballot Question and the New Judicial Vacancies Ballot Question from appearing on the ballot in the November 2018 general election.

159. On August 29, the Supreme Court dismissed the Governor's petition "without prejudice to seek relief in the Superior Court."

160. On August 29, the Supreme Court entered an order in related litigation brought by the North Carolina State Conference of the NAACP. That order (a true and correct copy of which is attached as **Exhibit F**) provides: "The Court on its own motion temporarily stays the North Carolina Bipartisan State Board of Elections and Ethics Enforcement's preparation of ballots for the November 2018 general election until further order of the Court."

CHALLENGES TO BALLOT QUESTIONS

161. The Elections Board Ballot Question and the New Judicial Vacancies Ballot Question violate the North Carolina Constitution. These ballot questions are neither fair nor accurate. They are false. They are misleading. They are incomplete. And they are argumentative. Ultimately, these ballot questions do not fairly advise the voters of what is at stake or facilitate an intelligent, independent decision on the proposed amendments. The Elections Board Ballot Question and the New Judicial Vacancies Ballot Question are therefore unconstitutional and should not be included on the November 2018 ballot.

I. The Elections Board Ballot Question violates the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108.

162. The Elections Board Ballot Question describes the Elections Board Proposal as a "[c]onstitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law." Session Law 2018-133, § 2.

163. The Elections Board Ballot Question violates the constitutional process for submitting a proposed constitutional amendment to voters because it does not ask their consent to transfer the Governor's constitutional authority to the legislature, overrule a decision of the Supreme Court, or increase the legislature's control over the Bipartisan State Board of Elections and Ethics Enforcement at the expense of the Governor's constitutional duty under the Take Care Clause.

164. The Elections Board Ballot Question is false, misleading, and incomplete in stating that the Elections Board Proposal would "establish" the State Elections and Ethics Board. Session Law 2018-117, § 5. That Board already exists. Indeed, it is a Defendant in this case.

165. The General Assembly's use of the word "establish" falsely and deceptively suggests that voters need a constitutional amendment to create a board to administer our ethics and elections laws. Because this is not the case, the question is misleading. *See Evans v. Firestone,* 457 So. 2d 1351 (Fla. 1984), 457 So. 2d at 1355 (holding that ballot language was misleading because it stated that a proposal would "establish[]" citizens' rights in civil actions, whereas one aspect of the proposal (the availability of summary judgment) "ha[d] long been established in Florida," and the effect of the proposal was actually "to elevate this procedural rule to the status of a constitutional right").

166. The inclusion of the words "in the Constitution" in the ballot question do not remedy this failing. What voters are not told is that the Legislative Defendants seek to amend the Constitution to establish an elections board "in the

Constitution" because the North Carolina Constitution—as it currently exists—bars the legislative branch from exercising the level of control it desires over the existing Bipartisan State Board of Elections and Ethics Enforcement.

167. Just seven months ago, in *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018), the Supreme Court exercised its "supreme judicial powers" under the Separation of Powers clause of the Constitution to resolve a dispute between the legislative and executive branches over control of the Bipartisan State Board of Elections and Ethics Enforcement.

168. In its decision, the Court resolved a conflict between two competing constitutional provisions: the Governor's duty under the Take Care Clause to see that the laws are faithfully executed under Article III, § 5(4), and the legislature's ability to prescribe "functions, powers, and duties" of state agencies and boards under Article III, § 5(10). 370 N.C. at 412, 809 S.E.2d at 110.

169. The Court's analysis followed the framework established in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), which was in turn built on a foundation of earlier precedents, and ultimately on the Separation of Powers Clause of the Constitution.

170. Under these cases, the General Assembly unconstitutionally interferes with the Governor's duties under the Take Care Clause when it attempts to establish a structure for an executive branch commission that does not give the Governor sufficient control to ensure that the commission reflects his policy preferences and priorities.

171. In applying this standard to election board legislation materially identical to the structure in the Elections Board Proposal, the Court held that the legislation "impermissibly, facially, and beyond a reasonable doubt interfere[d] with the Governor's ability to ensure that the laws are faithfully executed." *Id.* at 418, 809 S.E.2d at 114.

172. The Supreme Court's decision represents the settled resolution of a separation of powers dispute involving all three branches of government. The legislature used its legislative powers to pass a law regarding the Bipartisan State Board of Elections and Ethics Enforcement, the executive challenged the Board's structure under the Take Care clause, and the judiciary exercised its supreme judicial powers to adjudicate the dispute in favor of the Governor.

173. Earlier this year, the General Assembly passed new legislation in an attempt to circumvent the Supreme Court's ruling in *Cooper*—legislation that is the subject of ongoing judicial proceedings before a three-judge panel.

174. The Legislative Defendants have asked that panel to withhold decisions on pending motions to see if their efforts to amend the Constitution succeed—further highlighting the connection between the proposed constitutional amendment and the ongoing separation of powers dispute regarding the Elections Board.

175. Thus, as *Cooper* and the ongoing legislative efforts and litigation show, the Elections Board Proposal is the legislature's attempt to overcome this Supreme

Court decision and exercise more control over the Bipartisan State Board of Elections and Ethics Enforcement than the Constitution currently allows.

176. The Elections Board Ballot Question, by contrast, does not even hint that the primary purpose and effect of the proposed amendment is to overcome this Supreme Court decision, end litigation over a pending facial constitutional challenge, and increase legislative control over the Bipartisan State Board of Elections and Ethics Enforcement beyond the bounds of the existing Constitution.

177. If the General Assembly wants the voters of this State to take its side in an ongoing separation powers dispute and support their ongoing efforts to enhance their control over state government, it is critical that the ballot question present the issue fairly and accurately to voters. The Elections Board Ballot Question does not.

178. The Elections Board Ballot Question is also argumentative and improperly takes a position in favor of the proposed amendment in stating that the Elections Board Proposal would make the Board "bipartisan." Session Law 2018-133, § 3..

179. Having four members from each party would likely produce partisan gridlock, not bipartisanship, which is one of the reasons the Supreme Court invalidated the same structure. *See Cooper,* 370 N.C. at 415-16, 809 S.E.2d at 112-113 (taking issue with the fact that the commission would include enough members of the opposite party to block the implementation of the Governor's policy preferences).

180. The Elections Board Ballot Question is also misleading because it is phrased to appeal to voters who support principles of bipartisanship, ethics, and elections enforcement without informing them that the primary purpose and effect is to advance the legislature's control over the Board.

181. Because this sleight of hand does not allow voters intelligently to express their opinion on the amendment that is actually being proposed, it violates the constitutional submission process. *See Kimmelman v. Burgio*, 497 A.2d 890, 895-96 (N.J. App. Div. 1985 (holding that ballot language was misleading because, as here, it portrayed a proposed amendment as a "routine housekeeping matter," when the proposal actually would have overruled a decision of the New Jersey Supreme Court and "alter[ed] the basic relationship between the executive and legislative branches of government").

182. Finally, the Elections Board Ballot Question is unfair and inaccurate by omission. This ballot question fails to mention that it would shift power from the Governor to the General Assembly, or even that it would *affect* the Governor, his duty to take care that the laws be faithfully executed, or the separation of powers. Indeed, none of these words and concepts even *appear* in this ballot question—even though taking authority away from the Governor is the primary purpose and effect of the proposed amendment.

183. Far from advising the voters of what is at stake, this ballot question hides the ball. *See Johnson*, 316 S.W.2d at 198-99 (holding that ballot language was materially incomplete because it failed to inform voters about the scope of the

changes that the proposed amendment would make). For all of these reasons, the Elections Board Ballot Question violates both the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108. This question should not appear on the ballot.

II. The New Judicial Vacancies Ballot Question violates the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108.

184. The New Judicial Vacancies Ballot Question would lead voters to think they are being asked to change the process for filling judicial vacancies from a system controlled by a single branch of government, the executive, to a new and improved system in which the people of North Carolina will have opportunities to provide input, all three branches of government will share authority for determining judicial qualifications, and authority will be divided between the legislature (recommending) and the governor (appointing).

185. This is all a charade. The ballot language obfuscates the primary purpose and effect of this proposed amendment: to strip the Governor of his constitutional authority to appoint judges, transfer that authority to the exclusive control of the General Assembly, and entrench the legislature's preferred judges by extending their terms in the vacant seats they would fill.

186. First, the New Judicial Vacancies Ballot Question is misleading in failing to inform voters that the Governor's authority to fill judicial vacancies resides in the Constitution. Telling voters that they would be repealing (indeed removing) the Governor's constitutional authority to fill judicial vacancies would elicit a very different reaction from voters than presenting the misleading

suggestion that they will be distributing some of his "sole appointment power" to other branches.

187. In referring to the Governor's "sole appointment power," the New Judicial Vacancies Ballot Question also mischaracterizes existing law. In making appointments to the district court bench, which is responsible for most of the public's regular interactions with the judiciary, from family law cases to misdemeanors and wills, the Governor has a statutory obligation to consider up to five candidates nominated from the local bar. *See* N.C. Gen. Stat. § 7A-142. Judicial districts conduct bar elections to make these nominations, and the Governor generally selects the top vote-getter.

188. The district court judges whom our State's voters are most likely to encounter are therefore not subject to the "sole appointment power" of the Governor, as the ballot question falsely informs voters. District court judges are actually selected in cooperation with practicing attorneys in the district who know the candidates and have assessed their qualifications firsthand.

189. The New Judicial Vacancies Ballot Question is also misleading in suggesting that the "people of the State" would now play a meaningful role in selecting judges. Session Law 2018-132, § 6. The people's role is limited to providing names to the commission, and the General Assembly picks the judges.

190. To the extent the General Assembly wants to appoint judges that the people have nominated, individual members of the legislature could simply submit

the names of preferred judges, or rely on an interest group to do for them. The "people of the State" will not have any substantive role.

191. Next, the New Judicial Vacancies Ballot Question says that a commission made up of representatives from all three branches of government will be charged with making recommendations as to which judges are "qualified" to serve on the bench.

192. The ballot question's suggestion that the new system to be created by the amendment will involve an increased focus on or evaluation of whether judges are qualified is misleading.

193. North Carolina law establishes only the most basic requirements for service: a Justice or Judge must be (1) "duly authorized to practice law in the courts of this State," N.C. Const. art. IV, § 22, (2) at least 21 years of age, and less than 72 years of age, N.C. Const. art. VI, § 6; N.C. Gen. Stat. § 7A-4.20, and (3) eligible to vote in the district in which they serve. N.C. Const. art. VI, § 8; *see also* N.C. Gen. Stat. § 7A-140 (requiring district court judges to be residents of their districts).

194. The New Judicial Vacancies Ballot Proposal does not impose any substantive qualifications on judges and there is no process for rating or ranking judges. The General Assembly also has no obligation to give any deference or consideration to the recommendations, in contrast to the Governor's statutory obligations regarding district court judges. Thus, the suggestion that the commission will determine whether judges are "qualified" and play a substantive role in the process is misleading to voters.

195. Next, the New Judicial Vacancies Ballot Question states that the "legislature will recommend at least two nominees to the Governor." Under the New Judicial Vacancies Proposal, however, the legislature does not "recommend" judges to the Governor in any ordinary sense of that word.

196. Webster's defines "recommend" as "to present as worthy of acceptance," "to endorse as fit, worthy, or competent," or to "advise." Under the New Judicial Vacancies Proposal, the Governor is not receiving recommendations, endorsements, or advice from the legislature. Their "recommendation" is a command. He must pick this judge or that judge. If he does not exercise this Hobson's choice, the legislature picks for him. Session Law 2018-132, § 1.

197. The reference in the New Judicial Vacancies Ballot Question to "appointments" by the Governor is also inconsistent with the reality of the proposed amendment.

198. When the Governor "appoints" judges under the Section IV, Article 19 of the Constitution as it currently exists, the Governor has the ability to select candidates he deems qualified and capable, often in consultation with other judges and members of the bar.

199. Under the New Judicial Vacancies Proposal, "appointment" by the Governor means nothing more than signing the paperwork for one or the other of the candidates chosen by the General Assembly. Session Law 2018-132, § 1.

200. Accordingly, by referring to the legislature's "recommendations" to the Governor and suggesting that the Governor's will "appoint" judges, the New

Judicial Vacancies Ballot Question is extraordinarily misleading. It suggests the Governor will have some agency or choice in this process, when in fact he has none.

201. The proposed amendment also makes significant and undisclosed change to the current process for judicial elections following vacancies.

202. Justices or judges appointed by the Governor under the current constitutional process must stand for election by the people at the earliest possible opportunity. *See* N.C. Const. Art. IV, § 19 ("[A]ppointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices.").

203. This requirement ensures that the Governor's appointees are quickly subject to review by voters, who will decide whether to keep or reject them. It therefore enables voters to play a central role in selecting their judges through elections, as the Constitution requires, even when vacancies occur.

204. The New Judicial Vacancies Proposal, by contrast, would let the judges and justices appointed by the legislature to "hold their places *until the next election following the election for members of the General Assembly held after the appointment occurs*, when elections shall be held to fill those offices." Session Law 2018-132, § 1 (emphasis added).

205. Thus, if the legislature filled a vacancy shortly after an election, that judge or justice could serve a significant period of time before going before the voters in an election. In fact, this language would apparently permit judges and

justices picked by the legislature to serve nearly four years before an election—just short of half of a full eight-year term under the Constitution.

206. The purpose and effect of this provision are clear: to confer an incumbency advantage on justices and judges the legislators have chosen. By permitting the judges they would appoint to fill a vacancy for the full time remaining before the next election *and a full additional two years* until the next election, legislators offer the judges they select a significant advantage in the electoral process. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 256 (2006) (plurality op.) (observing that challengers typically must bear "higher costs . . . to overcome the name-recognition advantage enjoyed by an incumbent").

207. This running head start will help ensure that the legislature's favored judges receive a continuing electoral advantage, contravening constitutional principles in the process. *See* N.C. Const. Art. I, §§ 9-10 (requiring that elections be frequent and free); Art. IV, § 16 (requiring judicial elections).

208. The New Judicial Vacancies Ballot Question does not inform voters that they would be giving judges and justices appointed by the legislature the ability to serve for an extended period of time, or that they would be surrendering a meaningful portion of their constitutionally mandated role in electing their judges.

209. Because the New Judicial Vacancies Ballot Question does not ask voters to make this change to the judicial elections process, the New Judicial Vacancies Proposal would not reflect their consent if adopted. To the contrary, the ballot question gives exactly the opposite impression—that voters will play a larger

role, and not a lesser one, and certainly not that the people will be giving up part of their constitutional right to participate in the selection of judges through the electoral process.

210. Taken as a whole, the New Judicial Vacancies Ballot Question would give voters the impression that authority currently held by the Governor would create a role for the people in judicial appointments, distribute responsibility among the three branches, and ultimately allow the Governor and legislature to play a cooperative role in selecting judges.

211. Although this language in the ballot question would appeal to the voters' sense of good civics by promising a more democratic process involving all three branches, the primary purpose and effect of the proposed amendment is actually to concentrate power over the judiciary in the legislature.

212. Under the process actually established by the New Judicial Vacancies Proposal, it is very clear that the legislature will be able to ensure that they can fill every judicial vacancy with their preferred candidate, with little or no involvement from anyone else. The actual structure of the proposed amendment therefore stands in sharp contrast with the ballot question the voters would see.

213. North Carolina law does not permit deceiving the voters in this fashion. For the legislature to properly exercise its authority to submit a proposed amendment under Section 4 of Article XIII, "it is essential that [the question] be stated in such a manner to enable them intelligently to express their opinion upon

it." *Hill v. Lenoir Cty.*, 176 N.C. 572, 578, 97 S.E. 498, 500-01 (1918). The New Judicial Vacancies Ballot Question fails this test.

THE CHALLENGED BALLOT QUESTIONS POSE AN IMMEDIATE THREAT OF IRREPARABLE HARM

214. Absent an immediate injunction, Session Laws 2018-132 and 2018-133 require the ballot questions at issue here to appear on the ballot for the November 2018 general election.

215. Including the ballot questions at issue here on the November 2018 ballot threatens in multiple ways to inflict immediate and irreparable injury on the Governor, the Governor's Office, and the people whom the Governor was elected to serve.

216. For example, including these ballot questions on the ballot threatens to strip the Governor and his Office of constitutional power by misleading voters into ratifying the Elections Board Proposal and the New Judicial Vacancies Proposal—proposed amendments that would impair the separation of powers and transfer constitutional authority from the Governor to the General Assembly.

217. Permitting these ballot questions to be included on the ballot would also violate the Governor's duty to take care that the laws be faithfully executed, N.C. Const. art. III, § 5(4), and his oath to support the North Carolina Constitution, N.C. Const. art. III, § 4.

218. These threatened constitutional violations are *per se* irreparable harm sufficient to support a preliminary injunction. *See, e.g.*, *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 653, 142 S.E.2d 697, 700 (1965) ("[E]quity jurisdiction will

be exercised to enjoin the threatened enforcement of a statute or ordinance which contravenes our Constitution, where it is essential to protect property rights and the rights of persons against injuries otherwise irremediable."); *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 495 (1973) (stating a similar principle).

THIRD CLAIM FOR RELIEF:
The ballot question in Section 2 of Session Law 2018-133 violates North Carolina law

219. The Governor incorporates and restates the allegations in the foregoing paragraphs by reference.

220. A present and real controversy exists between the parties as to the constitutionality of the Elections Board Ballot Question.

221. The Elections Board Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 10, 19, and 35 of the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108 because it does not reflect the Elections Board Proposal in a fair, accurate, or nondiscriminatory manner and does not fairly present to the voter the primary purpose and effect of the proposed amendment.

222. The Governor is entitled to declaratory relief ruling that the Elections Board Ballot Question violates the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108.

223. The Governor is also entitled to preliminary and permanent injunctive relief against the inclusion of the Elections Board Ballot Question on the ballot for the November 2018 general election.

224. Absent such relief, the unlawful Elections Board Ballot Question will be included on the ballot for the November 2018 general election.

225. Including this unlawful ballot question on the ballot threatens immediate and irreparable harm to the Governor, his Office, and the people whom the Governor was elected to serve.

226. For the reasons set forth above, the Governor is likely to succeed on the merits of his claims.

227. Providing the Governor with the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

228. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by the Governor.

FOURTH CLAIM FOR RELIEF:
The ballot question in Section 6 of Session Law 2018-132 violates North Carolina law

229. The Governor incorporates and restates the allegations in the foregoing paragraphs by reference.

230. A present and real controversy exists between the parties as to the constitutionality of the New Judicial Vacancies Ballot Question.

231. The New Judicial Vacancies Ballot Question violates Article XIII, § 4 and Article I, §§ 2, 3, 9, 10, 19, and 35 of the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108 because it does not reflect the New Judicial Vacancies Proposal in a fair, accurate, or nondiscriminatory manner and does not fairly present to the voter the primary purpose and effect of the proposed amendment.

232. The Governor is entitled to declaratory relief ruling that the New Judicial Vacancies Ballot Question violates the North Carolina Constitution and N.C. Gen. Stat. § 163A-1108.

233. The Governor is also entitled to preliminary and permanent injunctive relief against the inclusion of the New Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

234. Absent such relief, the unlawful New Judicial Vacancies Ballot Question will be included on the ballot for the November 2018 general election.

235. Including this unlawful ballot question on the ballot threatens immediate and irreparable harm to Governor Cooper, the Office of the Governor, and the people whom Governor Cooper was elected to serve.

236. For the reasons set forth above, Governor Cooper is likely to succeed on the merits of his claims.

237. Providing Governor Cooper the injunctive relief he seeks is necessary to protect his rights during the course of this litigation.

238. The balance of the equities and the public interest strongly favor granting the injunctive relief sought by Governor Cooper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Governor Cooper respectfully prays that the Court:

6. Enter a declaratory judgment that the Separation of Powers Ballot Question, the Judicial Vacancies Ballot Question, the Elections Board Ballot Question, and the New Judicial Vacancies Ballot Question violate North Carolina law;

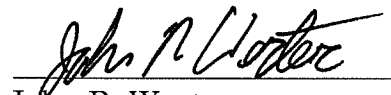
7. Enter a permanent injunction against the inclusion of the Separation of Powers Ballot Question, the Judicial Vacancies Ballot Question, the Elections

Board Ballot Question, and the New Judicial Vacancies Ballot Question on the ballot for the November 2018 general election;

8. Award the Governor his costs and expenses pursuant to applicable law; and

9. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 30th day of August, 2018.



John R. Wester
North Carolina Bar No. 4660
jwester@robinsonbradshaw.com
J. Dickson Phillips, III
North Carolina Bar No. 8941
dphillips@robinsonbradshaw.com
Adam K. Doerr
North Carolina Bar No. 37807
adoerr@robinsonbradshaw.com
Erik R. Zimmerman
North Carolina Bar No. 50247
ezimmerman@robinsonbradshaw.com
Morgan P. Abbott
N.C. Bar No. 50546
mabbott@robinsonbradshaw.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 N. Tryon St., Ste. 1900
Charlotte, North Carolina 28246
Telephone: 704.377.2536
Facsimile: 704.378.400

Attorneys for Plaintiff Roy A. Cooper, III, Governor of the State of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been served upon each of the parties to this action by email, as previously agreed to by counsel for all parties, to the addresses below:

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com
Facsimile: 919.329.3799

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matt Sawchak
Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
Facsimile: 919.716.0185

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

This 30th day of August, 2018.

Erik R. Zimmerman

EXHIBIT A

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-117
HOUSE BILL 913

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO ESTABLISH A BIPARTISAN BOARD OF ETHICS AND ELECTIONS ENFORCEMENT AND TO CLARIFY BOARD APPOINTMENTS.

The General Assembly of North Carolina enacts:

SECTION 1. Article VI of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and election laws, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only but shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made as follows:

(a) Four members by the General Assembly, upon the recommendation of the President Pro Tempore of the Senate, from nominees submitted to the President Pro Tempore by the majority leader and minority leader of the Senate, as prescribed by general law. The President Pro Tempore of the Senate shall not recommend more than two nominees from each leader.

(b) Four members by the General Assembly, upon the recommendation of the Speaker of the House of Representatives, from nominees submitted to the Speaker of the House by the majority leader and minority leader of the House of Representatives, as prescribed by general law. The Speaker of the House of Representatives shall not recommend more than two nominees from each leader."

SECTION 2. Section 6 of Article I of the North Carolina Constitution reads as rewritten:

"**Sec. 6. Separation of powers.**

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

(2) The legislative powers of the State government shall control the powers, duties, responsibilities, appointments, and terms of office of any board or commission prescribed by general law. The executive powers of the State government shall be used to faithfully execute the general laws prescribing the board or commission."

SECTION 3. Section 20 of Article II of the North Carolina Constitution reads as rewritten:

"**Sec. 20. Powers of the General Assembly.**

(1) Each house shall be judge of the qualifications and elections of its own members, shall sit upon its own adjournment from day to day, and shall prepare bills to be enacted into laws. The two houses may jointly adjourn to any future day or other place. Either house may, of its own motion, adjourn for a period not in excess of three days.

(2) No law shall be enacted by the General Assembly that appoints a member of the General Assembly to any board or commission that exercises executive or judicial powers."

SECTION 4. Section 5 of Article III of the North Carolina Constitution reads as rewritten:

"**Sec. 5. Duties of Governor.**

...

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed. In faithfully executing any general law enacted by the General Assembly controlling the powers, duties, responsibilities, appointments, and terms of office of any board or commission, the Governor shall implement that general law as enacted and the legislative delegation provided for in Section 6 of Article I of this Constitution shall control.

...

(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. The legislative delegation provided for in Section 6 of Article I of this Constitution shall control any executive, legislative, or judicial appointment and shall be faithfully executed as enacted.

...."

SECTION 5. The amendments set out in Sections 1 through 4 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to establish a bipartisan Board of Ethics and Elections to administer ethics and election laws, to clarify the appointment authority of the Legislative and the Judicial Branches, and to prohibit legislators from serving on boards and commissions exercising executive or judicial authority."

SECTION 6. If a majority of the votes cast on the question are in favor of the amendments set out in Sections 1 through 4 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendments to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office.

SECTION 7. If the amendments are approved by the qualified voters as provided in this section, Sections 2 through 4 of this act become effective upon certification and Section 1 becomes effective March 1, 2019.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28th day of June, 2018.

s/ Kathy Harrington
Presiding Officer of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT B

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

SESSION LAW 2018-118
SENATE BILL 814

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO PROVIDE FOR NONPARTISAN JUDICIAL MERIT COMMISSIONS FOR THE NOMINATION AND RECOMMENDATION OF NOMINEES WHEN FILLING VACANCIES IN THE OFFICE OF JUSTICE OR JUDGE OF THE GENERAL COURT OF JUSTICE AND TO MAKE OTHER CONFORMING CHANGES TO THE CONSTITUTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article IV of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 23. Merit selection; judicial vacancies.**

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a

majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law."

SECTION 2. Section 10 of Article IV of the North Carolina Constitution reads as rewritten:

"**Sec. 10. District Courts.**

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly."

SECTION 3. Section 18 of Article IV of the North Carolina Constitution is amended by adding a new subsection to read:

"(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office."

SECTION 4. Section 19 of Article IV of the North Carolina Constitution is repealed.

SECTION 5. Subsection (5) of Section 22 of Article II of the North Carolina Constitution reads as rewritten:

"(5) Other exceptions. Every bill:

(a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;

(b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;

(c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter; ~~or~~

(d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;

(e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution; or

(f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution,

shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses."

SECTION 6. The amendments set out in Sections 1 through 5 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to implement a nonpartisan merit-based system that relies on professional qualifications instead of political influence when nominating Justices and judges to be selected to fill vacancies that occur between judicial elections."

SECTION 7. If a majority of the votes cast on the question are in favor of the amendment set out in Sections 1 through 5 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective upon certification and applies to vacancies occurring on or after the date of the general election.

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 28th day of June, 2018.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT C

GENERAL ASSEMBLY OF NORTH CAROLINA
FIRST EXTRA SESSION 2018

SESSION LAW 2018-131
HOUSE BILL 3

AN ACT TO CLARIFY THE DESIGNATIONS TO APPEAR ON THE BALLOT FOR CONSTITUTIONAL AMENDMENTS AND OTHER REFERENDA.

The General Assembly of North Carolina enacts:

SECTION 1.(a) G.S. 163A-1114(h) reads as rewritten:

"(h) Order of Precedence for Referenda. – ~~The~~Without referencing a numerical order or other reference of order by category or within a category, the referendum questions to be voted on shall be arranged on the official ballot in the following order:

(1) Proposed amendments to the North Carolina Constitution, in the chronological order in which the proposals were approved by the General Assembly. Proposed amendments shall be designated by only the ~~short caption provided by the Constitutional Amendments Publication Commission under Article 4A of Chapter 147 of the General Statutes.~~phrase "Constitutional Amendment" prior to setting forth the referendum question.

(2) Other referenda to be voted on by all voters in the State, in the chronological order in which the proposals were approved by the General Assembly.

(3) Referenda to be voted on by fewer than all the voters in the State, in the chronological order of the acts by which the referenda were properly authorized."

SECTION 1.(b) This section is effective when it becomes law and applies to ballots used in the 2018 general election and thereafter. No numerical order or other reference of order for referenda, by category or within a category, shall appear on the 2018 general election ballot. Any captions adopted by the Constitutional Amendments Publication Commission pursuant to G.S. 147-54.10(a) prior to this bill becoming law are null and void and shall not appear on the ballot used in the 2018 general election.

SECTION 2. G.S. 147-54.10(a) reads as rewritten:

"(a) At least 75 days before an election in which a proposed amendment to the Constitution, or a revised or new Constitution, is to be voted on, the Commission shall prepare an explanation of the amendment, revision, or new Constitution in simple and commonly used language. ~~The explanation shall include a short caption reflecting the contents,that shall not include a numerical or other reference of order, to be used on the ballot and the printed summary.~~"

SECTION 3. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 24th day of July, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

VETO Roy Cooper
Governor

Became law notwithstanding the objections of the Governor at 11:55 a.m. this 4th day of August, 2018.

s/ Sarah Lang Holland
Senate Principal Clerk

EXHIBIT D

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2018

SESSION LAW 2018-133
HOUSE BILL 4

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO ESTABLISH A BIPARTISAN BOARD OF ETHICS AND ELECTIONS ENFORCEMENT.

The General Assembly of North Carolina enacts:

SECTION 1. Article VI of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**

(1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and elections law, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only and shall exercise all of its powers independently of the Executive Branch.

(2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made by the Governor as follows:

(a) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two Senate political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

(b) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two House of Representatives political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

(3) The General Assembly shall enact general laws governing how appointments shall be made if the Governor fails to appoint a member within 10 days of receiving recommendations as required by this section."

SECTION 2. The amendment set out in Section 1 of this act shall be submitted to the qualified voters of the State at a statewide general election to be held in November of 2018, which election shall be conducted under the laws then governing elections in the State. Ballots, voting systems, or both may be used in accordance with Chapter 163A of the General Statutes. The question to be used in the voting systems and ballots shall be:

"[ ] FOR [ ] AGAINST

Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law."

SECTION 3. If a majority of the votes cast on the question are in favor of the amendment set out in Section 1 of this act, the Bipartisan State Board of Elections and Ethics Enforcement shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office.

SECTION 4. If the amendment is approved by the qualified voters as provided in this section, Section 1 becomes effective March 1, 2019.

SECTION 5. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27th day of August, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT E

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2018

SESSION LAW 2018-132
HOUSE BILL 3

AN ACT TO AMEND THE CONSTITUTION OF NORTH CAROLINA TO PROVIDE FOR NONPARTISAN JUDICIAL MERIT COMMISSIONS FOR THE NOMINATION AND RECOMMENDATION OF NOMINEES WHEN FILLING VACANCIES IN THE OFFICE OF JUSTICE OR JUDGE OF THE GENERAL COURT OF JUSTICE AND TO MAKE OTHER CONFORMING CHANGES TO THE CONSTITUTION.

The General Assembly of North Carolina enacts:

SECTION 1. Article IV of the North Carolina Constitution is amended by adding a new section to read:

"**Sec. 23. Merit selection; judicial vacancies.**

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a

majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity, and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law."

SECTION 2. Section 10 of Article IV of the North Carolina Constitution reads as rewritten:

"**Sec. 10. District Courts.**

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly."

SECTION 3. Section 18 of Article IV of the North Carolina Constitution is amended by adding a new subsection to read:

"(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office."

SECTION 8. Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 27th day of August, 2018.

s/ Philip E. Berger
President Pro Tempore of the Senate

s/ Tim Moore
Speaker of the House of Representatives

EXHIBIT F

No. 261P18 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE)

v.)

TIM MOORE, IN HIS OFFICIAL CAPACITY, PHILIP BERGER, IN HIS OFFICIAL CAPACITY, THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, ANDREW PENRY, IN HIS OFFICIAL CAPACITY, JOSHUA MALCOLM, IN HIS OFFICIAL CAPACITY, KEN RAYMOND, IN HIS OFFICIAL CAPACITY, STELLA ANDERSON, IN HER OFFICIAL CAPACITY, DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY, STACY EGGERS IV, IN HIS OFFICIAL CAPACITY, JAY HEMPHILL, IN HIS OFFICIAL CAPACITY, VALERIE JOHNSON, IN HER OFFICIAL CAPACITY, JOHN LEWIS, IN HIS OFFICIAL CAPACITY)

FILED

AUG 29 2018

SUPREME COURT OF NORTH CAROLINA

Wake County

****

ORDER

The Court on its own motion temporarily stays the North Carolina Bipartisan State Board of Elections and Ethics Enforcement's preparation of ballots for the November 2018 general election until further order of the Court.

By order of the Court in Conference, this the 29th day of August, 2018.

Michael R. Morgan

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21 day of August, 2018.

Amy L. Funderburk

AMY L. FUNDERBURK

Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Ms. Kimberley Hunter, Attorney at Law, For NC NAACP - (By Email)
Mr. David L. Neal, Attorney at Law, For NC NAACP - (By Email)
Ms. Mary MacLean Asbill, Attorney at Law, For NC NAACP - (By Email)
Brooks Rainey Pearson, Attorney at Law, For NC NAACP - (By Email)
Mr. Irving Joyner, Attorney at Law, For NC NAACP - (By Email)
Mr. Daryl V. Atkinson, Attorney at Law, For NC NAACP - (By Email)
Ms. Leah J. Kang, Attorney at Law, For NC NAACP - (By Email)
Mr. D. Martin Warf, Attorney at Law, For Moore, Tim, et al. - (By Email)
Mr. Matthew W. Sawchak, Solicitor General, For Moore, Tim, et al. - (By Email)
Mr. Amar Majmundar, Senior Deputy Attorney General, For Moore, Tim, et al. - (By Email)
Mrs. Olga Vysotskaya de Brito, Special Deputy Attorney General, For Moore, Tim, et al. - (By Email)
Mr. Noah H. Huffstetler, III, Attorney at Law, For Moore, Tim, et al. - (By Email)
Mr. Robert F. Orr, Attorney at Law, For North Carolina Professors of Constitutional Law - (By Email)

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 9805
ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff, vs. 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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT, Defendants.	**DEFENDANTS BERGER AND MOORE'S RESPONSE IN OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER**

COME NOW 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, "Defendants"), and hereby file and serve this Response in Opposition to Motion for Temporary Restraining Order. In support of this Response, Defendants show the following:

INTRODUCTION

Plaintiff Governor Roy A. Cooper, III seeks a temporary restraining order to enjoin the inclusion of the proposed constitutional amendment set forth in Session Law 2018-132, regarding the filling of judicial vacancies in lieu of the amendment proposed in Session Law 2018-118, and the proposed constitutional amendment set forth in Session Law 2018-133, regarding the establishment of a Bipartisan State Board of Ethics and Elections Enforcement in the Constitution in lieu of the amendment proposed in Session Law 2018-117. However, the challenge to Session Law 2018-132 and Session Law 2018-133 (collectively, the "New Proposed Amendments") is a non-justiciable political question. Moreover, any challenge to the ballot language for the New Proposed Amendments fails under every applicable standard.

STATEMENT OF THE CASE

Following entry on August 21, 2018, of this Court's Order on Injunctive Relief, which enjoins the inclusion of the proposed constitutional amendments set forth in Session Law 2018-117 and Session Law 2018-118 on the November 2018 ballot, the General Assembly convened for a special session during which the New Proposed Amendments were passed in response to the specific issues raised by this Court.

A. Session Law 2018-132

Session Law 2018-132 sets forth the same proposed amendment to Article IV (regarding the judicial branch) for filling judicial vacancies as set forth in Session Law 2018-118:

> In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

Session Law 2018-132, § 1. As in Session Law 2018-118, in Session Law 2018-132, the Nonpartisan Judicial Merit Commission

> shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law . . . . Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

Id. Session Law 2018-132 does, however, propose a different amendment to Article II, Section 22(5) (regarding the gubernatorial veto), making clear that

recommendations of nominees for judicial vacancies made to the Governor by the General Assembly and election of nominees by the General Assembly in the event the Governor fails to act are a limited exception not subject to the Governor's veto; the proposed amendment in Session Law 2018-132 makes clear that only bills recommending nominees or electing nominees – and "containing no other matter" – are excepted from the Governor's veto. *Id.* at § 5.

The ballot question set forth in Session Law 2018-132 also differs from that set forth in Session Law 2018-118. It reads as follows:

> Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

2018 N.C. Sess. Laws 132, § 6.

B. Session Law 2018-133

The current Bipartisan State Board of Elections and Ethics Enforcement (the "Board") consists of nine members appointed by the Governor, four members from each of the State's two largest political parties, and one member who is not affiliated with the Democratic or Republican Parties. *See* 2018 N.C. Sess. Laws 2, § 8.(b).[1]

[1] The Board is currently the subject of a facial constitutional challenge brought by Governor Cooper in the Wake County Superior Court, Case No. 18 CVS 3348.

Session law 2018-133 proposes a constitutional amendment that would establish a Bipartisan State Board of Ethics and Elections Enforcement (the "New Board") in Article VI (Suffrage and Eligibility to Office) of the Constitution. *See* 2018 N.C. Sess. Laws 133, § 1. As proposed, the New Board would consist of eight members, no more than four of whom may be registered with the same political affiliation, to be appointed by the Governor upon the recommendation of the leaders of the two House and Senate political party caucuses with the most members. *Id.* The Governor would appoint no more than two members from the recommendation of each leader. *Id.* In contrast to Session Law 2018-117, which also proposed changes to Article I, Section 6 (Separation of Powers), Article II, Section 20 (Powers of the General Assembly), and Article III, Section 5 (Duties of the Governor), Session Law 2018-133 does not propose amendments to any other section of the Constitution.

The General Assembly provided the following language to be used on the November 2018 ballot for voter consideration of the proposed amendment:

> Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.

2018 N.C. Sess. Laws 133, § 2.

C. Status of Appellate Review

After passage of the New Proposed Amendments, on August 28, 2018, Plaintiff filed his Petition for Writ of Supersedeas or Prohibition, Motion for Temporary Stay, and Motion to Suspend Appellate Rules with the Supreme Court, asserting his constitutional challenge to the ballot language in Session Laws 2018-132 and 2018-

133 but ignoring the Rules of Civil Procedure and Rules of Appellate Procedure. In an effort to bypass this Court and the standard of review applied by the majority in the August 21, 2018 Order on Injunctive Relief, which Plaintiff presumably believes will not favor his requested relief, Plaintiff challenged the New Proposed Amendments in the Supreme Court as if it had original jurisdiction. Of course, "[u]nder the Constitution as revised in 1971, the Supreme Court is strictly an appellate court, its jurisdiction limited 'to review upon appeal any decision of the courts below upon any matter of law or legal inference.'" *Smith v. State*, 289 N.C. 303, 330, 222 S.E.2d 412, 429 (1976) (citing N.C.Const. art. IV, s 12(1)). Therefore, on August 29, 2018, the Supreme Court dismissed Plaintiff's Petition for Writ of Supersedeas "without prejudice to seek relief in the Superior Court." (*See* Order in Supreme Court Case No. 2676P18.)

Thus, on August 30, 2018, Plaintiff[2] filed an Amended Complaint challenging the New Proposed Amendments and filed his Motion for Temporary Restraining Order seeking to exclude the New Proposed Amendments from the November 2018 ballot.

[2] Notably, the NAACP, which also sought a writ of supersedeas related to the New Proposed Amendments before the Supreme Court that was dismissed by Order dated August 29, 2018, has not filed a challenge to the New Proposed Amendments before this Court. Likewise, the Board, which filed its Answer and Crossclaim joining in Plaintiff's challenge to Session Laws 2018-117 and 2018-118 the same day Plaintiff's original Complaint was filed, has not responded to Plaintiff's Amended Complaint.

ARGUMENT

Although Defendants disagree with the findings, reasoning, and conclusions of the majority in its Order on Injunctive Relief, the ballot language for the New Proposed Amendments resolves the issues with the ballot language in Session Laws 2018-117 and 2018-118 identified by the three-judge panel below. As such, Plaintiff is not likely to succeed on his challenge to the ballot language in the New Proposed Amendments. Moreover, Plaintiff cannot show that he will suffer irreparable harm given that he can continue to litigate any challenge to the ballot language for the New Proposed Amendments even after the ballot is prepared.

I. PLAINTIFF IS NOT LIKELY TO SUCCEED IN HIS CHALLENGE TO THE BALLOT LANGUAGE FOR THE NEW PROPOSED AMENDMENTS.

A. The textual commitment to the General Assembly of the manner for proposing constitutional amendments and the lack of manageable standards in our Constitution for judicial intervention render Plaintiff's challenge a non-justiciable political question.

While recognizing that the majority of this panel[3] found in its Order on Injunctive Relief that Plaintiff's facial challenge to Session Laws 2018-117 and 2018-118 present a justiciable issue, (*see* Order on Injunctive Relief at ¶ 9), Defendants

[3] In his 23 August 2018 Memorandum of Dissent to Majority Order on Injunctive relief, Judge Carpenter agreed that the challenge to the proposed amendments before the three-judge panel—like the challenge to the New Proposed Amendments raised by Plaintiff here—amounts to a political question. (*See* Memorandum of Dissent at 3 ("I would find that the matters presented by all Plaintiffs in both cases at bar are non-justiciable political questions as the presentation of proposed constitutional amendments by legislative act is placed squarely and solely with the General Assembly. See N.C. Const. art. XIII, § 4.").)

again challenge the subject matter jurisdiction of this Court to hear Plaintiff's challenges to the New Proposed Amendments. As expressly set forth in our current Constitution, the right to propose amendments, and the time and manner for their submission to the voters, belongs solely to the General Assembly, and the right to reject or ratify such proposed amendments belongs solely to the voters:

> A proposal of a new or revised Constitution or an amendment or amendments to this Constitution may be initiated by the General Assembly, but only if three-fifths of all the members of each house shall adopt an act submitting the proposal to the qualified voters of the State for their ratification or rejection. The proposal shall be submitted at the time and in the manner prescribed by the General Assembly. If a majority of the votes cast thereon are in favor of the proposed new or revised Constitution or constitutional amendment or amendments, it or they shall become effective January first next after ratification by the voters unless a different effective date is prescribed in the act submitting the proposal or proposals to the qualified voters.

N.C. Const. art. XIII, § 4. Article I, Section 3 of the Constitution also gives the people the sole and exclusive right to amend the Constitution:

> The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

N.C. Const. Art. I, § 3. Thus, any limitations on amending the Constitution are only those that flow from the United States Constitution.

As set forth more fully in Defendants' Opposition to Motions for Temporary Restraining Order and Preliminary Injunction in the related case of *NC NAACP v.*

Moore, Wake County Superior Court Case No. 18 CVS 9806, where the text of our Constitution makes clear that the commitment of the power to propose and submit constitutional amendments is reserved for the General Assembly, the issue is a political question that this Court has no authority to review. *See Baker v. Carr,* 369 U.S. 186, 217 (1962) (holding that a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it" may give rise to a non-justiciable political question).

Here, because the Constitution recognizes the right of the General Assembly to propose amendments "at the time and in the manner prescribed by the General Assembly," and because it is the people of this State who have the "sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution," there is no constitutional controversy for this Court to decide. *See, e.g., Brannon v. N.C. State Bd. of Elections*, 331 N.C. 335, 340, 416 S.E.2d 390, 393 (1992) ("If the meaning of our Constitution is clear from the words used, we need not search for a meaning elsewhere."). Any judicial decision on the propriety of the ballot language for the New Proposed Amendments would infringe on the balance of powers struck within the Constitution itself. The Governor has no veto over proposed constitutional amendments (or the accompanying ballot language). The judicial branch has no standard to measure "fairness" or whether what might be considered a misleading proposal for amendment to one person is not to another. *See, e.g., Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004)

("In our view, not only are the applicable statutory and constitutional provisions persuasive in and of themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children."). If the courts attempt to decide the challenge alleged by Plaintiff to the New Proposed Amendments, the courts would be creating a separation of powers violation by performing the role of a gatekeeper between the textual authority given to the General Assembly to propose amendments and the textual (exclusive) right of the people to pass judgment upon them.

Plaintiff does not allege that the ballot questions for the New Proposed Amendments violate the federal constitution (*i.e.,* substantive due process)[4] and does not allege a separation of powers question related to the ballot language. Absent such allegations, for which there is a measureable standard for review, *see, e.g., Burton v. State of Ga.*, 953 F.2d 1266, 1271 (11th Cir. 1992) ("So long as the election process is not so impaired that it is 'patently and fundamentally unfair,' substantive due process is satisfied."), the determination of the propriety of the language on the ballot for a proposed constitutional amendment is a political question such that this Court should decline jurisdiction and refuse to insert itself into the process. *See Bank of Union v. Redwine*, 171 N.C. 559, 570, 88 S.E. 878, 883 (1916) ("We simply declare the law as we find it, without usurping the power to change the Constitution, a power which the

[4] The requirement to comply with substantive due process is expressly built in to our Constitution. *See* N.C. Const. art. I, § 3.

people have reserved to themselves."); *State v. Smith,* 352 N.C. 531, 553, 532 S.E.2d 773, 787 (2000) (similar).

B. Defendants disagree with the standard created by the majority of this Court to determine whether ballot language for a proposed constitutional amendment is constitutional.

This Court, in addition to relying on decisions from foreign jurisdictions as a basis for the standard under which to review ballot language for constitutional amendments, relied on *Hill v. Lenoir Cty.*, 176 N.C. 572, 97 S.E. 498, 499 (1918). In *Hill*, a special tax was put on the ballot. The ballot language referenced only a county tax and made no mention of a township tax. The county tax was defeated at the polls by county-wide voters, but voters in the township of Kinston had voted in favor of the special tax. Thus, the board of commissioners declared that a special tax in Kinston township had passed. A challenge was brought, and a preliminary injunction was entered restraining the board from levying and collecting the special tax in Kinston. The court held that if the statute under which the tax was put on the ballot "permitted the submission of the twofold proposition, one for the county tax and one for the township tax, to be based upon a single ballot, such intention on the part of the Legislature is contrary to public policy and against the decisions of this court." *Hill*, 176 N.C. at ___, 97 S.E. at 499. The Supreme Court's focus was on whether two propositions (e.g., a county tax and a township tax) could be submitted to a single vote of the people:

> But under the act of 1911 every single voter who casts his vote in favor of the tax for the entire county, under the defendants' construction of the act, also votes for the tax for his township, regardless of his attitude toward the question of levying the tax solely in the township in which he resides. The two propositions are so antagonistic that their

> submission at a single election and upon a single ballot is contrary to the Constitution, as we will show, to a sound public policy, and to the principle which should govern a fair election

Hill, 176 N.C. at ___, 97 S.E. at 500. The *Hill* court went on to hold that

> *In elections of this character* great particularity should be required in the notice in order that the voters may be fully informed of the question they are called upon to decide. 15 Cyc. 325. There is high authority for the principle that, even where there is no direction as to the form in which the question shall be submitted to the voters, it is essential that it be stated in such manner as to enable them intelligently to express their opinion upon it, and for that purpose the proposition *should be submitted separate and distinct from any other proposition, which is different from the question upon which a vote is desired, or not germane to it.*

Id. at ___, 97 S.E. at 500-501 (emphasis added).

Hill is not controlling.[5] There was no question before the Supreme Court regarding ballot language for proposed constitutional amendments. What was before the *Hill* court – can more than one proposition be included in a single vote – is not at issue here because each of the proposed constitutional amendments is to be presented on the ballot separately.

Cases from foreign jurisdictions cited by this Court (and also relied on by Plaintiff) can be distinguished. For example, in *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 193, 34 A.3d 1164, 1181 (2012), the Maryland court relied on a long line of cases and statutes setting forth specific requirements for ballot language

[5] *Hill* does further support Defendants' argument that Plaintiff will not suffer irreparable harm if a writ is issued and if the ballot language is included on the ballots given that the challenge was brought after the election and ultimately enjoined the township tax.

in considering the sufficiency of a ballot question summarizing a proposed amendment. In *State ex rel. Voters First v. Ohio Ballot Bd.*, 978 N.E.2d 119, 126 (Ohio 2012), the Supreme Court of Ohio relied upon the "three-part test for evaluating the propriety of ballot language for a proposed constitutional amendment" previously adopted, based specifically on language in Ohio's constitution. North Carolina has no such test. *See also Fla. Dep't of State v. Fla. State Conference of NAACP Branches*, 43 So. 3d 662, 668 (Fla. 2010) (question before the court was whether the ballot language proposed "comports with the requirements of section 101.161, the Florida Constitution, and our case law governing placement of proposed constitutional amendments on the ballot.") Finally, in *Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992), the court noted that Georgia "formerly had a statute that required ballot language to enable the voter to 'pass intelligently' on the proposed amendment." Since the statute's repeal, however, the Georgia Supreme Court "has conducted only a minimal review of ballot language if the state followed all of the constitutionally and statutorily required procedures for amending the constitution, including printing, publicizing and distributing the amendment." *Id.* The Georgia court went on to hold:

> Although we believe that the legislature should in every instance strive to draft ballot language that leaves no doubt in the minds of the voters as to the purpose and effect of each proposed constitutional amendment, there are several reasons for limiting the scope of our review. First, constitutional amendments are often complex. Any summary of the proposal may be subject to various interpretations. Even the legislators who sponsor an amendment may not agree on the purpose and effect of a particular amendment. Moreover, the court must trust the people and the political process to determine the contents of the Constitution. We

> must presume that the voters are informed on the issues and have expressed their convictions in the ballot box.

Id. Defendants submit that *Donaldson* actually supports their position; ballot language can be interpreted in different ways by different people, but such different interpretations do not render the language misleading, unfair, or inaccurate. And, it should be left to the voters – not the Governor and not the courts – to decide if an amendment is appropriate or not.

The decisions cited by this Court do discuss standards for ballot language applicable in the foreign court's specific jurisdictions. However, these decisions have limited application here given their reliance on standards set forth in applicable constitutions, statutes, or case law that do not exist in North Carolina. Out-of-state requirements should not be foisted on the elected representatives of North Carolina.

Defendants do not claim that the Constitution would condone misleading, unfair, or inaccurate language on the ballot. Rather, Defendants contend that the ballot questions challenged here are not misleading; they are not fundamentally unfair; and they provide ample information such that voters can easily discern which amendment is before them. Moreover, given the express language of the Constitution, which commits the preparation of the proposal for constitutional amendment to the General Assembly and given there is no clear standard for what constitutes a "fair and accurate" ballot question under North Carolina law, Defendants dispute that Plaintiff can overcome the presumption of constitutionality of the New Proposed Amendments to establish they are likely to succeed on the merits on their claims that the ballot questions at issue are unconstitutional.

C. Session Laws 2018-132 and 2018-133 resolve the issues identified by the majority of this Court.

The challenged ballot language does more than just inform the voters of the substance of the proposed amendments; it also corrects the deficiencies perceived by the three-judge panel below.[6] Because the New Proposed Amendments satisfy the even stricter standard applied by this Court than is required by our Constitution, Plaintiff cannot establish he is likely to succeed on the merits of his challenge.

1. Session Law 2018-133

Session Law 2018-133 proposes a constitutional amendment that would establish the New Board in Article VI (Suffrage and Eligibility to Office) of the Constitution but makes no changes to any other provision of the Constitution. *See* 2018 N.C. Sess. Laws 133, § 1. Thus, Session Law 2018-133 is significantly narrower than Session Law 2018-117.

The ballot language in Session Law 2018-133 explains that the New Board would be established as a constitutional—rather than statutory—board. 2018 N.C. Sess. Laws 133, § 2. As opposed to the current nine-person board established by statute, the ballot language in Session Law 2018-133 informs voters that the New Board will be an eight-person board. *Id.* The ballot language succinctly lays out the proposed amendment that the voters are asked to consider, fairly identifies that the primary purpose and effect of the amendment is to establish the New Board in the

[6] Defendants do not concede that the original proposals were defective or even that this Court could properly consider the political question presented. Nonetheless, in the interest of time and in an effort to eliminate any doubt that the voters should be permitted to consider the proposed amendments, the General Assembly enacted the New Proposed Amendments to correct any perceived deficiencies.

Constitution, and does not imply a position in favor of or opposed to the proposed amendment. (Order on Injunctive Relief at ¶ 44.)

The ballot language set forth in Session Law 2018-133 is similar to but even more detailed than the ballot language that was unobjectionable to this Court. As set forth in the Order on Injunctive Relief, "saying that the amendment 'establishes' a [B]oard," is not "so misleading, standing alone, so as to violate constitutional amendments." (Order on Injunctive Relief at ¶ 54.) The language to which this Court took issue is not found in Session Law 2018-133 because the proposed amendment no longer includes the provisions identified by such language.

2. Session Law 2018-132

Session Law 2018-132 sets forth a virtually identical proposed amendment to that found in Session Law 2018-118. Unlike in Session Law 2018-118, however, Session Law 2013-132 makes the ballot language more express, indicating that voting for the amendment would mean that the Governor would no longer have the sole authority to appoint judges to fill vacancies. 2018 N.C. Sess. Laws 132, § 6. It also explains that in the vacancy process, voting for the amendment would involve nominations by the general public, as well as other branches of government, while still retaining the Governor's authority to appoint judges to fill vacancies. *Id.* This revised language resolves the main issues identified by this Court in its Order on Injunctive Relief. Unlike Session Law 2018-118, the new ballot language expressly mentions the Governor, (Order on Injunctive Relief ¶ 57(b)), and focuses on procedural changes rather than (even arguably) implying a position in favor of or

opposed to choosing judges "based on professional qualifications instead of political influcence," (*id.* ¶ 57(a)). The ballot language also references each provision of the Constitution that would be changed (vacancies in Article IV and the gubernatorial veto in Article II) and makes clear that only recommendations for nominees and election of nominees are excepted from the Governor's veto authority. 2018 N.C. Sess. Laws 132, § 6.

Therefore, although Defendants disagree with the ruling in the Order on Injunctive Relief, the New Proposed Amendments and the ballot language therein resolve the issues with Session Laws 2018-117 and 2018-118 identified by this Court. Accordingly, Plaintiff is unlikely to succeed on his appeal, so his Motion should be denied.

II. PLAINTIFF CANNOT SHOW IRREPARABLE HARM WHERE THERE IS THE ABILITY TO LITIGATE HIS CLAIMS REGARDING THE NEW PROPOSED AMENDMENTS EVEN AFTER THE BALLOT IS PRINTED.

Plaintiff alleges that a violation of the Constitution gives rise to irreparable harm as a matter of law. (*See* Amended Complaint at ¶ 218; Motion for TRO at ¶ 6.) But that is not the rule in our courts. "[T]he mere fact that a statute is alleged to be unconstitutional or invalid will not entitle a party to have its enforcement enjoined." *Fox v. Bd. of Comm'rs of Durham Cty.*, 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956). "Further circumstances must appear bringing the case under some recognized head of equity jurisdiction and presenting some actual or threatened and irreparable injury to complainant's rights for which there is no adequate legal remedy." *Id.* Beyond his

claim that the New Proposed Amendments are unconstitutional, Plaintiff is not able to show the necessary "further circumstances."

Plaintiff also argues that the availability of information or open discourse about the New Proposed Amendments cannot undo the perceived irreparable harm associated with the challenged ballot language. (*See, e.g.*, Motion for TRO at ¶ 9). Defendants disagree. Not only is the full text of each of the proposed constitutional amendments that will appear on the ballot easily accessible, but also Plaintiff (and any political parties, political action groups, or public interest groups) may counter any alleged misleading language through their own speech. *See Grudzinski v. Bradbury*, No. CIV. 07-6195-AA, 2007 WL 2733826, at *3 (D. Or. Sept. 12, 2007); *see also Donaldson v. Dep't of Transp.*, 262 Ga. 49, 51, 414 S.E.2d 638, 640 (1992). Moreover, by law, the Constitutional Amendments Publication Commission will prepare an explanation of the amendment in commonly used language that

> shall be printed by the Secretary of State, in a quantity determined by the Secretary of State. A copy shall be sent along with a news release to each county board of elections, and a copy shall be available to any registered voter or representative of the print or broadcast media making request to the Secretary of State. The Secretary of State may make copies available in such additional manner as the Secretary may determine.

N.C. Gen. Stat. § 147-54.10. Voters can take such educational documentation or guides into the voting booth with them to aid in their decision. *See* 8 N.C. Admin. Code 10B.0107(a)(1) (permitting the use of "electronic, paper, or mechanical devices by the voter, while alone in the voting booth and not in contact with another person

outside the voting booth"). Even Plaintiff's own expert, Craig M. Burnett,[7] concludes his research by noting "that exposing individuals to basic campaign information—in our case, endorsements from prominent interests groups—greatly attenuates the framing effects of ballot text." *When Does Ballot Language Influence Voter Choices? Evidence from a Survey Experiment*, p1 (2015) (available at: https://cpb-us-w2.wpmucdn.com/u.osu.edu/dist/e/1083/files/2015/02/stolenintiative-21w55m1.pdf).

While entering a temporary restraining order that would allow the ballots to be prepared *without* the amendments set forth in Session Laws 2018-132 and 2018-133 would block the amendments from reaching the voters for consideration and leave Defendants with no further review, denying Plaintiff's motion would not moot his claims or create irreparable harm. In many of the cases cited by this Court (and Plaintiff) as support for a court's ability to review proposed amendment language, the courts were analyzing the language *after* the voters considered the proposals during an election. *See*, *e.g.*, *Armstrong v. Harris*, 773 So. 2d. 7, 22 (Fl. 2000); *Hill v. Lenoir Cty.*, 176 N.C. 572, 97 S.E. 498, 499 (1918). Just as in those cases, Plaintiff would remain free to challenge the constitutionality of the ballot provisions before or after the November 2018 election. As noted in *Fox*, "[i]f it is apparent that the law can

[7] Defendants renew their objection to the Affidavit of Craig M. Burnett, Ph.D. made at the hearing held in this matter on August 15, 2018. *See* Rules 403, 702, and 704 of the North Carolina Rules of Evidence; Hearing Transcript at 82:20-25. Moreover, Defendants note that the Affidavit was executed on August 10, 2018, before the New Proposed Amendments had been ratified by the General Assembly. Thus, none of Dr. Burnett's opinions are specific to the New Proposed Amendments.

furnish all the relief to which the complainant is entitled, the injunction will be refused." *Fox*, 244 N.C. at 500, 94 S.E.2d at 485.

Plaintiff claims that he will be irreparably harmed by what he alleges is misleading ballot language, but the true focus of his attention is on the substance of the proposed amendments themselves.[8] The General Assembly has not enacted, via statute, an eight-person board in charge of ethics and elections enforcement or a new procedure for filling judicial vacancies. What the General Assembly has done is set the time and manner for the people of North Carolina to decide for themselves whether they want to reshape the Constitution. It is ultimately up to the voters whether to make the proposed changes. There is no irreparable harm in allowing the voters the opportunity to consider the proposed amendments for ratification or rejection, but there is irreparable harm in taking away the right of the people to have that opportunity. No new law, court, or act of the people can undo such harm or create a pathway for later examination of an election that has come and gone without the New Proposed Amendments on the ballot.

CONCLUSION

For the foregoing reasons, Plaintiff's challenges to Session Laws 2018-132 and 2018-133 address non-justiciable political questions over which this Court lacks

[8] For example, in his Motion for Temporary Restraining Order, Plaintiff argues that "these ballot questions threaten to strip the Governor of constitutional authority over the Board and constitutional power to fill judicial vacancies by misleading the voters into ratifying the New Proposed Amendments." (*See* Motion for TRO at ¶ 7.) Of course, it is only the amendments to the Constitution—not the ballot language itself—that can change the Governor's constitutional authority.

subject matter jurisdiction, and, because Plaintiff cannot show likelihood of success on the merits or that he will suffer irreparable harm if the challenged ballot language is included on the November ballot, this Court should deny Plaintiff's Motion for Temporary Restraining Order, allowing the ballot to be prepared, and the voters the opportunity to decide.

Respectfully submitted this the 30th day of August, 2018.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Noah H. Huffstetler, III
N.C. State Bar No. 7170
D. Martin Warf
N.C. State Bar No. 32982

By: /s/D. Martin Warf
D. Martin Warf
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
Telephone: (919) 329-3800
Facsimile: (919) 329.3799
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ATTORNEYS FOR 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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the persons indicated below via electronic mail addressed as follows:

Matthew W. Sawchak
Solicitor General
Amar Majmundar
Special Deputy Attorney General
Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
Robinson Bradshaw & Hinson, P.A.
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

This the 30th day of August, 2018.

/s/D. Martin Warf
D. Martin Warf

IN THE NORTH CAROLINA GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

* *

ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA,	)	WAKE COUNTY
Plaintiff,	)	18 CVS 9805
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; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A.("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,	)	
Defendants.	)	

* *

TRANSCRIPT OF PROCEEDINGS

Friday, August 31, 2018

* *

Transcript of proceedings in the General Court of Justice, Superior Court Division, Wake County, North Carolina before the Three-Judge Panel of the Honorable Forrest D. Bridges, Jeffery K. Carpenter, and Thomas H. Lock, Judges Presiding.

Tammy L. Johnson, CVR-CM-M
Official Court Reporter
Tenth Judicial Circuit
Raleigh, North Carolina

APPEARANCES

ON BEHALF OF PLAINTIFF COOPER:

Morgan P. Abbott
Adam K. Doerr
J. Dickson Phillips, III
John R. Wester
Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON P.A.
101 North Tryon Street, Suite 1900
Charlotte, North Carolina 28246
(704)377-2536
mabbott@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
jwester@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com

ON BEHALF OF DEFENDANTS BERGER AND MOORE:

Noah H. Huffstetler
D. Martin Warf
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 ParkLake Avenue
Raleigh, North Carolina 27612
(919)329-3800
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

ON BEHALF OF DEFENDANTS-CROSSCLAIMANTS BOARD OF ELECTIONS AND ETHICS ENFORCEMENT AND PENRY:

Matthew W. Sawchak, Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602
(919)716-6400
msawchak@ncdoj.gov

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PROCEEDINGS

(The case of ROY A. COOPER, III, in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA, Plaintiff, versus PHILIP E. BERGER, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, et. al, Defendants, Wake County case number 18 CVS 9805, was called for hearing at 11:00 a.m. on Friday, August 31, 2018.)

11:01 JUDGE BRIDGES: Welcome to Wake County Superior Court. All right. We have previously addressed one procedural issue. I believe we have communicated to counsel that we'd like to limit the arguments to 30 minutes per side. I understand that the Attorney General's Office, on behalf of the Board of Elections, plans to take somewhat less than that amount of time.

11:01 MR. SAWCHAK: Yes, Your Honor. Good morning. I'm Matt Sawchak. And, yes, I would expect we would consume no more than five minutes.

11:01 JUDGE BRIDGES: All right. Who will present arguments on behalf of the Governor?

11:01 MR. WESTER: May it please the Court. I'm John Wester from Robinson Bradshaw, and my partner, Adam Doerr, and I. And we have Eric Zimmerman. The division of labor, in light of the timing, may call on the three of us, but Mr. Doerr and I plan to make the presentation.

11:02 JUDGE BRIDGES: Do you wish to reserve any time for rebuttal?
11:02 MR. WESTER: Yes, sir. Five minutes.
11:02 JUDGE BRIDGES: All right. We'll hear from you.
11:02 MR. WESTER: Very well. May it please the Court. I'll introduce my partners also with us today. Two more partners here are Morgan Abbott and Dickson Phillips. William McKinney, general counsel to Governor Cooper, is also with us.
11:02 First of all, we appreciate the Court's fast return to this, following yesterday's ruling that we would be here today, and we are pleased to be here, not particularly we were pleased because we didn't know we would have this opportunity that led us to file the petitions for the writ that we filed earlier this week. We have now the benefit of the brief from counsel for the legislative defendants that came in last evening, and I think it focuses in a way that I had not expected.
11:03 Notably, the legislative defendants prefer not to address at any depth the merits of the new ballot questions. That's what comes through to us. They devote most of their argument in their briefing to jurisdictional and procedural issues that we've previously delved into at great length. They continue to argue that all of those things, even though this panel, by a majority, concluded and resolved those

11:03 issues in its order granting a preliminary injunction.

11:03 For example, they argue that the case presents a political question still. They continue to argue in this most recent brief that this Court should apply a substantive due process standard, and they continue to argue that the Court should not rule on the Governor's challenge until after the ballots are counted.

11:04 The Court, this Court, gave careful consideration to all those points when it granted the preliminary injunction against the first ballot questions. I'm reluctant to call them old ballot questions because they're barely that, but the first round. There is no reason, we suggest, to revisit the jurisdictional arguments again because of the extensive briefing and this Court's ruling.

11:04 Indeed, after this Court ruled and the injunction was in place, the legislative defendants relied on the effect of that injunction as opposed to appealing it to take care of these first two ballot questions. I mention that because as we speak here today, the only thing that stops those ballot questions from going farther are their dismissal of them, dismissal by this Court, when, in fact, they argued for so long this Court had no jurisdiction over them, so but that's -- dismissal of their appeal is what stops it from going forward instead of a repeal by the General Assembly of either of the first ballot questions.

11:05 There was no such repeal.

11:05 Ultimately, the legislative defendants have devoted fewer than three pages of their brief to the merits of the new ballot questions, a 21-page brief and about three pages devoted to that. But this is not a page count proposition. Even when they do go to the merits, even when they do go to the merits, their principal argument is that the new ballot questions are constitutional because they are better than their first shot at it. That's their argument.

11:05 Two examples, on page 16, they say, "Unlike in Session Law 2018-118, however, the new session law makes the ballot language more express." That's the most credit they give it. One other place, the preceding page, they say -- the language to which this Court took issue in the other ballot questions, 2018-117 -- they say, quote, "That is not found in the session law," the new one they've advanced. That's their standard, we've done it better this time.

11:06 If there is one thing I would leave with you that I would hope would stay with you throughout my argument and beyond is this: The question is not whether the new ballot questions are better than the old ones. The question is whether the new ballot questions are constitutional in their own right. That is what this Court addressed and that's what this Court correctly ruled. The way to decide that question is to take the standards, the standards that this

11:07 Court articulated in its previous ruling, standards whose
11:07 foundation is impressive, this Court identify from here as
11:07 well as other jurisdictions, from North Carolina and other
11:07 jurisdictions, harmonious to our standards, and apply those
11:07 standards to the new ballot questions. When this Court does
11:07 that, as we are about to explain, it will become clear that
11:07 the new ballot questions violate the North Carolina
11:07 Constitution as surely as the first ballot questions did.
11:07 The standard this Court articulated in his ruling
11:07 of August 21 relied in major respects on Hill v. Lenoir
11:07 County, a case in which our -- in which our Supreme Court
11:07 was clear and plain addressing something sufficiently
11:08 analogous that it should count here. The defendants have
11:08 quoted at length from the Hill decision in their brief and
11:08 then they reached this sentence, "Hill is not controlling."
11:08 I will not quibble with their phrasing. I will say that
11:08 does not influence our argument in the slightest. What Hill
11:08 does is it guides. It counsels all of us here to the
11:08 correct decision.
11:08 This Court found the essential parts of that and
11:08 put it in its ruling. To refresh you, it's page 19,
11:08 paragraph 43, and this is the quotation you provided to
11:08 which we subscribe and which we emphasize is guiding and
11:08 instructing. Quote, "In elections of this character, great
11:08 particularity should be required in the notice in order that

11:08 the voters may be fully informed of the question they are
11:08 called upon to decide." You put in italics, *"fully informed*
11:09 *of the question they are called upon to decide."* Continuing
11:09 your quotation, "There is high authority for the principle
11:09 that even where there is no direction as the form in which
11:09 the question is submitted to the voters, it is essential
11:09 that it be stated in such a manner to enable them
11:09 intelligently to express their opinion upon it." That is
11:09 the very fine instruction -- I stopped quoting you and I
11:09 stopped quoting Hill there. That's the very thoroughly
11:09 applicable -- the very clear and thoroughly applicable
11:09 instruction that we find from Hill, and I suggest that that
11:09 phrase, the one you chose, the one the Supreme Court wrote
11:09 in Hill, transcends its particular context, and I would add
11:09 that that was a tax question and whether there could be a
11:10 merger of two proposals in Hill. That's what was under
11:10 focus.
11:10 Here we're dealing with the cardiovascular. We're
11:10 dealing with principles of separation of powers, and there
11:10 should be, if anything, an even more exact, a more
11:10 demanding, a higher scrutiny to be sure that the questions
11:10 put to the voters in this context are plain, clear, fully
11:10 leading to a clear understanding of what the voter is
11:10 deciding to do, and without that, our system suffers so
11:10 badly and avoidably.

That is the leading reason that we are asking this Court for an injunction to stop this now. These ballot questions are no -- if they are any better, is not the standard. The standard is they are unconstitutional because they do not do what our constitution requires. Mr. Doerr will proceed.

MR. DOERR: Good morning. May it please the Court. I'm Adam Doerr from Robinson Bradshaw for Governor Cooper. My partner was reading from paragraph 43 of this panel's order. I'd like to turn to the next paragraph where the Court says that it is drawing from the requirements expressed in Hill as well as analyses from other jurisdictions. The majority of this panel finds that relevant considerations include, one, whether the ballot question clearly makes known to the voter what he or she is being asked to vote upon; two, whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment; and, three, whether the language used in the ballot question implies a position in favor of or opposed to the proposed amendment.

I'd like to start with the second of those questions, whether the ballot question fairly presents to the voter the primary purpose and effect of the proposed amendment. There are actually two questions there, does it fairly present the purpose and does it fairly present the

effect? The effect of the amendment is a question that asks "what." What will happen if I vote for this proposal? What is its effect? The second part about the primary purpose is a "why" question. Why as a voter am I being asked to amend our constitution? The legislative defendants want to focus only on the "what." To the extent they address the merits, is this question. They don't want to talk about the why, what the primary purpose of these proposed amendments is, but that's what this case is all about. The Legislature has not told voters why they seek these two amendments to our state constitution.

We've explained in our papers why these amendments are proposed. First, to take the Governor's role in appointing members to the State Board of Election and essentially take over his executive role in the management of that executive agency. Second, on the judicial vacancies, the primary purpose is to take the Governor's constitutional authority as it exists under the constitution now to appoint judges and give that to the North Carolina General Assembly. We have said that these are the primary purposes of these two amendments in just about every paper we've filed, which is quite a lot for a case that is not even four weeks old.

The legislative defendants have filed their share of papers too, but in all of those papers, they have not

11:14 claimed that taking constitutional authority from the
11:14 Governor and giving it to the General Assembly is not the
11:14 goal of these amendments. They have made no rebuttal to the
11:14 primary purpose. They have also not articulated some
11:14 alternative purpose. They have not said, for example, with
11:14 regard to the Bipartisan Board, that the primary purpose of
11:14 that amendment is to put the Board in the constitution, that
11:14 it needs to be there for some specific reason. One reason
11:14 you might want to put a board in the constitution is to give
11:14 it special powers.
11:14 So if you look at Section 1 of the proposed
11:14 amendment, it does talk about powers. It says, "The
11:15 Bipartisan State Board of Ethics and Election Enforcement
11:15 shall be located within the Executive Branch for
11:15 administrative purposes only and shall exercise all of its
11:15 powers independently of the Executive Branch." So if you
11:15 look through the rest of the proposed amendment, there's
11:15 nothing in there about powers. The Board is not given some
11:15 extra special power that it would otherwise lack or that it
11:15 doesn't have now. Instead, if you review, you'll see that
11:15 the powers that the Board would be exercising are
11:15 legislative powers prescribed by the General Assembly. So
11:15 the point here is that all of the powers regarding the
11:15 administration of our state's elections are powers that the
11:15 General Assembly would prefer to exercise or control in some

11:16 measure itself.

11:16 Similarly, with regard to judicial vacancies, they have not argued that the primary purpose of these amendments is to take -- is not to take constitutional authority away from the Governor or that that this amendment is necessary for some other reason. The only issue that they raise with the Governor's constitutional authority to appoint judges to fill vacancies is that he has it and they would like to have it. They haven't made any real argument in all of their papers that the commission in the proposed amendment will play a central role in picking judges. They haven't argued that the voted name provided by the people of the state are critical to this process or that the Governor will actually still have some role in appointing judges to fill vacancies if the amendment passes.

11:17 So let's be clear. The primary purpose of the Elections Board's proposal is to take the Governor's authority in a way that the constitution does not currently permit them to do. That's what the Supreme Court held in the Cooper v. Berger decision. When the General Assembly tried to pass the legislation, it would have set up an Elections Board with eight appointees, four chosen by -- four chosen in sympathy with the Governor and four not, that that violated the constitution because it did not give the Governor sufficient control over that executive agency for

him implement his policies and priorities.

Does the new ballot language fairly describe this primary purpose as the Court's test requires? The answer clear beyond a reasonable doubt is that it does not. It says nothing about it. On the Elections Board ballot question, if you look at that, it talks about a constitutional amendment to establish an eight-member board, an eight-member Bipartisan Board of Ethics and Elections Enforcement in the constitution to administer ethics and election law. It gives the effect to establish the board. It does not give the purpose to overcome the existing constitutional limit on the General Assembly's ability to have some exercised measure of control over that board.

The same is true with the election -- the Judicial Vacancies Ballot Question. The purpose of that proposed amendment is to take the Governor's authority to fill judicial vacancies and give it to the General Assembly. Again, looking to the Court's test, does the new ballot language fairly describe that primary purpose? The answer again is clear beyond a reasonable doubt that it does not. There's a lot of language in the new question. It's quite long. But nowhere in all of that language does it actually communicate that the General Assembly ultimately has all of the authority to make the appointments. This Court pointed out in its order that there are no standards in the proposed

11:20 amendment for this commission to evaluate. That's still the
11:20 case.
11:20 We pointed out in our papers previously that the
11:20 nomination of judges by the people of our state to that
11:20 commission doesn't play any substantive role in the process.
11:20 None of that has changed. The only thing that has changed
11:20 is that the question has gotten longer but it still does not
11:20 inform voters of the primary purpose.
11:20 The bottom line is that, as this Court held, the
11:20 issue is whether the voters are able to exercise
11:20 intelligently their franchise, whether when they're asked to
11:20 amend the constitution, they're being told why they're being
11:20 asked to amend the constitution, and on that ground, these
11:20 questions fail.
11:21 JUDGE BRIDGES: Thank you, sir. Mr. Sawchak?
11:21 MR. SAWCHAK: Good morning, Your Honor. Again,
11:21 I'm Matt Sawchak from the Department of Justice representing
11:21 the Board of Elections, as well as its chairman, Mr. Penry.
11:21 I'd just like to add that the Board, as we described at
11:21 length last time, has a nondelegable duty under Section 1108
11:21 to ensure that ballots are fair and readily understandable
11:21 by voters and nondiscriminatory, and having studied these
11:21 new ballot questions, I must say that the Board remains
11:21 concerned that these measures, these ballot questions, fail
11:21 these standards.

11:21 And I'm not going to reiterate everything that Mr. Doerr said, but I think that as the Court evaluates the ballot questions, using the standards that it laid out, the majority laid out so well in paragraphs 43 and 44 of the preliminary injunction order, it would be very helpful for the Board to remember the points made in Dr. Burnett's affidavit, specifically on pages 6 and 7 of the affidavit, and here are the main ones: "For the great majority of voters, these questions are all that they will see. Although we would wish that it weren't so, people have a lot of competing demands on their time, and the only protection they have, the only protection that the constitution itself has, is this language."

That's critical for the Court's assessment of the fairness and nondiscrimination of the language. And I have to say, having spent a fair bit of time in the recent days, there are objective concerns under the standards laid out by this Court, mainly the primary purpose and effect standard and whether the questions imply a position one way or the other that these ballot questions failed. I would say especially the Judicial Vacancies Question is written in a way that certainly implies a position almost from a one-sided, one-party, decision-making model to what is represented as a multiparty model when that, in fact, is not the case.

So I think there's actually little disagreement once the non-merits points are swept away, as the majority has already swept them away, that there is an objective standard of truthfulness, the absence of misleadingness, fairness. Even the defendant's brief last night on the middle of page 14 states that the constitution does not condone misleading or unfair ballot questions. In view of the Board's obligations, affirmative, nondelegable obligations under Section 1108, it remains concerned and wants to report those concerns to the Court.

Finally, a word about timing. As has come up before in these hearings, the hour is certainly growing late for this controversy. We regret the imposition on the Court's time here on a Friday before the Labor Day weekend, but we must urge the Court, if possible, to rule today and perhaps even with some business day remaining. There's already been a tremendous flurry of appellate activity in this case, as I'm sure the Court is aware. The parties are all currently operating under the aegis of the stay of ballot preparation and printing that our State Supreme Court issued on Wednesday night, and it is under that aegis that this hearing is occurring, but it certainly behooves us all in the interest of the absentee voters and all voters to get a resolution of these very important issues, and this Court can assist the parties very much, if possible, by ruling

today at least from the bench so that further appellate activity by whoever it is, the disappointed party is, might occur. And, again, I say that with the greatest of apology for the imposition on the Court's time situation. Thank you, Your Honor.

JUDGE CARPENTER: Mr. Sawchak?

MR. SAWCHAK: Yes, Your Honor.

JUDGE CARPENTER: You made mention in regards to the new proposed language for the judicial vacancies, that it proposes a multiparty, but in actuality, it is a single-party appointment process. Did I understand you correctly?

MR. SAWCHAK: I would say that its essence reposes all of the real decision-making power to the General Assembly. That might be a better to say it.

JUDGE CARPENTER: Not a party, but the General Assembly whose makeup ebbs and flows depending on the will of the electorate every two years.

MR. SAWCHAK: Yes. And, Your Honor, I apologize. I did not mean the word "party" in the sense of Democratic or Republican parties. I meant it in the sense of actor; in other words, branch.

JUDGE CARPENTER: Branch. Okay. Thank you, sir.

MR. SAWCHAK: Thank you.

JUDGE BRIDGES: Thank you, sir. Who will argue on behalf of the General Assembly?

11:26 MR. HUFFSTETLER: May it please the Court. I'm Noah Huffstetler of Nelson, Mullins, Riley & Scarborough. With me today is my law partner, Martin Warf. With the Court's permission, we'll divide our argument. I'll speak very briefly to the threshold issue, and then the balance of time will be taken by Mr. Warf.

11:27 JUDGE CARPENTER: Do you wish to reserve time?

11:27 MR. HUFFSTETLER: If we have the opportunity for surrebuttal, I will reserve five minutes.

11:27 JUDGE CARPENTER: All right, sir.

11:27 MR. HUFFSTETLER: Thank you, Your Honor. With all due respect to the opinion of the majority in the earlier edition of the controversy we're dealing with today, we would be remiss if we did not reassert in this new litigation the principle upon which we relied, and that is that the Governor's challenge to the proposed amendments presents a political question which is nonjusticiable and over which this Court has no subject matter jurisdiction.

11:27 Again, very briefly, I would remind the Court that the language of Article XIII, Section 4 of our constitution is clear and unmistakable. It reserves for the people of this state the exclusive ability to change the constitution and it provides one mechanism for that process to be started in having the General Assembly propose to the voters a constitutional amendment. And then it goes on to say, "The

11:28 proposal shall be submitted at the time and in the manner
11:28 prescribed by the General Assembly."
11:28 Members of the Court, I cannot imagine a clearer
11:28 or more explicit way in which the constitution could give
11:28 the question of constitutional amendments to the Legislative
11:28 Branch. And that's important because of the cases that we
11:28 cited in our brief -- and I'll mention at least two of them.
11:28 One is Bacon versus Lee which was decided by the Supreme
11:29 Court in 2001 which cited a number of federal cases and
11:29 decisions of the United States Supreme Court and which
11:29 stated in part the political question doctrine excludes from
11:29 judicial review those controversies which revolve around
11:29 policy choices and value determinations constitutionally
11:29 committed for resolution to a different branch of our
11:29 government.
11:29 And the test for that goes back to one of the
11:29 cases relied upon by the Supreme Court in Bacon versus Lee,
11:29 and it's the United States Supreme Court case of Baker v.
11:29 Carr. Among the factors that the Court found to weigh in
11:29 favor of the determination that something is a political
11:30 question, not subject to judicial review was, and I'm
11:30 quoting, "a textually demonstrable constitutional commitment
11:30 of the issue to a coordinate political party." Here we have
11:30 in Article XIII, Section 4 the statement, "The proposal
11:30 shall be submitted at the time and in the manner prescribed

11:30 by the General Assembly." There could be no clearer textual
11:30 commitment of this issue to the Legislative Branch rather
11:30 than the judiciary.
11:30 I think that the reemergence of this case or the
11:30 controversy regarding these proposed amendments the second
11:30 time makes clear that another one of these factors cited in
11:30 Baker versus Carr is present again here. The Supreme Court
11:31 in Baker talks about a lack of judicially discoverable and
11:31 management standards for resolving it. And this Court
11:31 wisely indicated in the majority opinion that the Court did
11:31 not wish to supervise the General Assembly in carrying out
11:31 its responsibility, but specifically allowed the General
11:31 Assembly to have an opportunity to respond to his concerns
11:31 and to fix the language to be presented to the voters.
11:31 As Mr. Warf will discuss in more detail, that's
11:31 precisely what the Legislature did. The arguments you heard
11:31 today, I think, make it clear that no particular language
11:31 would be unobjectionable to the plaintiff. There is a
11:31 myriad of ways that every attempt of the General Assembly to
11:31 carry out its constitutional responsibility can be delayed
11:32 and frustrated by quibbles over particular language. And
11:32 the more and more that the plaintiff emphasizes what he
11:32 calls the merits of these amendments, it becomes clearer and
11:32 clearer that these are policy questions; they are policy
11:32 questions that have been specifically given for resolution

to the General Assembly.

I will conclude by responding to an argument made by the Governor's counsel that somehow our use of the interlocutory order entered earlier in this matter prevents us from raising the political question doctrine here and now. The doctrine of political question goes to the subject matter jurisdiction of the Court, and as our Court of Appeals recognized in Stark versus Ratashara, a 2006 decision, copies of which I have if the Court would like to see it, the Court of Appeals enunciated the well-established rule that -- and, again, I'm quoting -- "subject matter jurisdiction cannot be conferred upon a court by consent, waiver or estoppel, and failure to demur or object to the jurisdiction is immaterial." This case goes on to say that subject matter jurisdiction can be raised at any time, even on appeal that hasn't been raised in the trial tribunal, and the Court may ex mero motu dismiss the case for lack of subject matter jurisdiction.

So I would conclude by saying as a threshold issue and as the dissent in the first hearing recognized, this is a case presenting a political question which is not justiciable, and, therefore, this Court has no subject matter jurisdiction over this particular controversy and should dismiss the Governor's complaint on that grounds. Thank you very much.

11:34 JUDGE BRIDGES: Thank you, sir. Mr. Warf?
11:34 MR. WARF: Thank you, Your Honor. May it please the Court. Before I start, I want to hand up one thing to Your Honors if I can.
11:34 JUDGE BRIDGES: Yes, sir.
11:34 MR. WARF: I'll get to that in just a minute, but the last time we were together, I started my argument by saying we were here on a straightforward question: Should this Court step into the constitutional amendment process and pull proposed amendments before they are voted on by the people of North Carolina? The majority of this Court said yes. Therefore, I do not want to spend the remainder of our time discussing why we believe the standards applied by this Court in that decision are incorrect because we believe these questions meet any standard. I also do not want to spend our limited time here discussing why there is no irreparable harm other than to reemphasize that the allegations of unconstitutionality are not, per se, irreparable harm. We cited the Fox case in our brief for this point and laid out in our brief why there is no irreparable harm here.
11:36 What I do want to talk about is the ballot questions for these two amendments in light of this Court's prior order. This Court expedited its ruling to give the General Assembly a chance to immediately act and correct the

11:36 ballot language so the amendments could appear on the
11:36 ballot. The Court noted that the process was up to the
11:36 General Assembly, subject only to constitutional
11:36 limitations. What were the constitutional limitations
11:36 identified by this Court? Voters need to be sufficiently
11:36 informed to intelligently express their opinion upon the
11:36 issue. As Mr. Doerr pointed out, the questions the Court
11:36 arrived at were whether the question clearly makes known
11:36 what is being voted on, whether the question fairly presents
11:36 the primary purpose and effect, and whether the language in
11:37 the question implies a position in favor of or opposed to
11:37 the proposed amendment.
11:37 What did this Court say is not required by the
11:37 constitution? The question does not need to explain all
11:37 potential legal ramifications. Implementing language is not
11:37 necessarily required and there will be no determination of
11:37 wisdom, political ramifications, or possible motives of
11:37 legislators in suggesting the amendments. The question is
11:37 does the ballot question describe the proposed amendment
11:37 with sufficient particularity in order that the voters may
11:37 be fully informed of what they are deciding? The majority
11:37 listed that twice.
11:37 The question for the Court is not whether the
11:37 ballot question expresses every legal nuance that the
11:37 adoption of the amendment might create because if you think

11:38 about it this way, if there was no ballot question language
11:38 and the question before the voters was just for or against
11:38 and it listed the entire amendment, if so, would the
11:38 challenges still raised by the Governor here be applicable?
11:38 If they are, then the challenges are not to the ballot
11:38 question, but they're to the amendment itself, and that is
11:38 beyond the purview of the Court at this juncture. That is a
11:38 question for the people.
11:38 So when we look to the ballot question, I would
11:38 like to turn your direction to the handout that I handed up.
11:38 The first ballot question is at the top of the sheet, "For
11:38 or Against: Constitutional amendment to establish an
11:38 eight-member Bipartisan Board of Ethics and Elections
11:39 Enforcement in the constitution to administer ethics and
11:39 elections laws." Does that ballot question describe the
11:39 proposed amendment with sufficient particularity in order
11:39 that the voters may be fully informed of what they are
11:39 deciding, and the answer is yes. It is, as you can see
11:39 below, essentially the same question that all three judges
11:39 passed upon on this panel and said was not unconstitutional.
11:39 And when you look at the other ballot questions
11:39 that are listed there, you see Session Law 2018-128,
11:39 "Constitutional amendment to require voters to provide photo
11:39 identification before voting in person." This Court applied
11:39 the standard in its opinion and found that that question was

11:39 constitutionally drafted.

11:39 If you look at the other two down at the bottom, those are amendments to the constitution that were not subject to any standard, but you can see there, "Constitutional amendments granting veto power to the Governor." That was all that was on the ballot. That doesn't explain the exceptions to that veto power. It doesn't talk about the laws and how the General Assembly would be changed by drafting bills that would need to go to the Governor. It just says do you want to give the Governor veto power?

11:40 And last, but not least, the "Constitutional amendment revising those portions of the present or proposed state constitution concerning state and local finance." There is no challenge to this amendment language either. When you look at the ballot language that is issued here with the Bipartisan Board, does the question clearly make known what is being voted on? Yes. The voters are voting to establish or not an agency in the constitution.

11:41 Two, does the question fairly present the primary purpose and effect of the amendment? Yes. The people are asked to put an eight-member, eight-member board in place to administer elections and ethics laws. Eight percent is referenced there, not nine or seven, and we are noting that is being established in the constitution. And the plaintiff

11:41 scoffs about that language in the constitution, at least in
11:41 paragraph 165 of his complaint, yet the concurring opinion
11:41 cited in that paragraph, Evans v. Firestone out of Florida,
11:41 there was an issue in that case where the Court said, well,
11:41 I think by this amendment, you're trying to elevate a
11:41 procedural rule into a constitutional status, and they
11:41 kicked it because that wasn't referenced. A concurring
11:41 opinion by one of the justices in Florida said, "Here's what
11:41 you can do; say it places it in the constitution." That's
11:42 exactly what it says. This answers that question.
11:42 And, finally, does this language in the question
11:42 imply a position in favor of or opposed to the amendment?
11:42 No. There's no favor here. You can either vote to adopt
11:42 this or not. There's no sway or anything associated with
11:42 it. There's no framing associated with it.
11:42 And, Your Honor, if we turn to the second ballot
11:42 question, the judicial vacancies, that's on the back page.
11:42 It's double-sided. I'm saving one tree in this process.
11:42 The Judicial Vacancies Ballot Question before you is listed
11:42 on the back, and as the plaintiff's counsel has pointed out,
11:43 it is a lot longer than it was before. Does the ballot
11:43 question here describe the proposed amendment with
11:43 sufficient particularity in order that the voters may be
11:43 fully informed of what they are deciding? The answer to
11:43 that question is yes. When you look at it, it says, "A

11:43 constitutional amendment to change a process for filling
11:43 judicial vacancies that occurs between judicial elections
11:43 from a process where the Governor has sole appointment power
11:43 to a process," and here is described the process. There is
11:43 a commission comprised of appointees from Judicial,
11:43 Executive and Legislative Branches charged with making
11:43 recommendations to the Legislature to which nominees are
11:43 deemed qualified. And this is important. "Then the
11:43 Legislature will recommend at least two nominees to the
11:43 Governor via legislative action that is not subject to
11:43 gubernatorial veto, and the Governor will appoint judges
11:44 from among these nominees." These nominees. Which
11:44 nominees? The ones the General Assembly is proposing to him
11:44 that he cannot veto.

11:44 So even to the extent that the plaintiffs argue
11:44 we're not telling the people what they're doing, they are
11:44 having a choice between whether they want the Governor to
11:44 maintain a system of sole appointment power or do they want
11:44 to add others in, in a system wherein the General Assembly
11:44 will be recommending people to the Governor and he chooses
11:44 from those nominees. Everything about this process is right
11:44 here in this ballot question. The ballot question
11:44 identifies judicial vacancy appointments of Article IV of
11:44 the Constitution. The ballot question identifies the
11:44 Governor. It identifies the Legislature. And it identifies

11:44 Article II, Section 22 on the veto power. The debatable
11:45 loophole is now undebatable. The ballot question does not
11:45 try to sway voters by talking about choosing qualifications
11:45 over political influences. This ballot question and the
11:45 change to the amendment addresses the concerns of the
11:45 majority of this Court. Does it clearly make known what is
11:45 being voted on? Yes. A change in the process of how we
11:45 choose judicial vacancy appointments. Does the question
11:45 fairly present the primary purpose and effect of the
11:45 amendment? Yes. The ballot question describes the process
11:45 we're going to. It describes the old process. It describes
11:45 the new process. And it gives it up to the voters on
11:45 whether they want to do it or not. Again, this Court does
11:45 not judge the wisdom or the political motivations for
11:45 placing this amendment on the ballot. The people of North
11:45 Carolina can decide for themselves whether they want this
11:45 change, which is clearly identified as a change.
11:45 And the last question, does this language in the
11:46 question, ballot question, that is, imply a position in
11:46 favor of or opposed to the proposed amendment? No, it does
11:46 not. If the people like the current process, they can vote
11:46 against this amendment. If the people want to change the
11:46 process, as described here, which is perfectly described as
11:46 a funneling technique, then they can vote for this
11:46 amendment. Again, there is no attempt to swaying -- sorry

11:46 -- sway or frame the issue.

The challenge to the notion of having, quote, "sole appointment power" is, in fact, an accurate description of what the Governor has in the constitution. The plaintiffs want you to look to Section 7A-142 to say that it isn't sole appointment power, a statute. And when you look at that statute, Your Honor, the very first sentence of that statute says, "A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor," not by a commission or by the local Bar, but by appointment of the Governor. And the last sentence says, "The Governor shall give due consideration to the nominees provided by the Bar." Due consideration is still sole appointment power in the Governor.

Briefly, Your Honor, I want to touch on two points in rebuttal before I close. Mr. Sawchak brought up Section 1108 of 163, as this Court looked at and determined that was not a constitutional standard, but a statutory standard. And he also brought up the Burnett affidavit, which we have objected to under Rule 702, but as we've identified in our brief, Mr. Burnett himself says that the framing of a ballot question, if that even exists, is dramatically lessened by the discourse and endorsements that occur during the political process. Clearly we have an amazing amount of discourse over these amendments, and we have an amazing

11:48 number of endorsements either for or against.
11:48 This Court gave the General Assembly an
11:48 opportunity to redraft the ballot language and fix potential
11:48 issues that this panel saw. The General Assembly did that.
11:48 The Governor challenges again, but as Mr. Huffstetler
11:48 pointed out, it is not the ballot language that he's really
11:48 concerned about; it is the amendments. He does not want
11:48 these amendments to see the light of day. The people of
11:48 North Carolina deserve to see them. There is no confusing
11:48 language. There is no bait and switch. There is no attempt
11:49 to mislead. The people can read these ballot questions,
11:49 understand them, listen to the debate about them, read the
11:49 explanation prepared by the Constitutional Amendment
11:49 Publication Committee, and make up their mind, and that's
11:49 what we ask this Court to allow the people to do. Thank
11:49 you, Your Honor.
11:49 JUDGE BRIDGES: Thank you, sir. Any rebuttal from
11:49 the Governor?
11:49 MR. WESTER: Yes, Your Honor. First we'll hear
11:49 from Mr. Doerr.
11:49 MR. DOERR: Yes, Your Honor. I'd like to address
11:49 a few points that were raised. Mr. Huffstetler called our
11:49 concerns with the proposed ballot language quibbles. We are
11:49 challenging the Elections Board proposal because it does not
11:49 say that it overrules a Supreme Court decision that involved

11:49 all three branches of government. That is quintessential
11:49 separation of powers. You've got the Legislature passing
11:49 the law; the Governor challenging it because it infringes on
11:49 his executive authority; and the Supreme Court, in the
11:49 exercise of its supreme judicial authority, entering a
11:49 definitive ruling about what our constitutional amendment
11:50 is. Telling the voters that that would be changing, that
11:50 these amendments would be overruled, it would overrule that
11:50 decision, is not a quibble.
11:50 On the judicial vacancies proposal, we are
11:50 challenging the fact that the amendment -- the description
11:50 of the amendment in the ballot doesn't say that they are
11:50 repealing the Governor's constitutional authority and
11:50 transferring it to the General Assembly, as well as the
11:50 fact, when reviewing it more closely on this round, that
11:50 they are actually going to let those judges serve a whole
11:50 extra term that the Governor's appointees have not
11:50 previously served before they would stand for election.
11:50 None of these are quibbles.
11:50 They say that we are insisting that every legal
11:51 nuance must be on the ballot. We are not. We are saying
11:51 that, as a majority of this Court held, the ballot question
11:51 must fairly present the primary purpose and effect of the
11:51 change to the constitution. And with regard to the
11:51 Elections Board, we're saying that when the primary purpose

11:51 is to overrule a recent Supreme Court decision and transfer
11:51 power from the Governor to the General Assembly, the
11:51 question must tell voters about that.
11:51 Mr. Warf raised two changes that have been made in
11:51 the language that would appear on the ballot about the
11:51 Elections Board. These are that it has eight members and
11:51 that it's in the constitution. These are hints at the
11:51 primary purpose, but they are far too subtle for the voters
11:51 to see them and be intelligently informed about what they
11:51 would be voting on.
11:52 So what are they hinting at? Eight- member, that
11:52 hints at the fact that the last time the General Assembly
11:52 tried to pass a statute in setting up an eight-member board,
11:52 the Supreme Court said it was unconstitutional because it
11:52 violated the Take Care Clause. "In the constitution," which
11:52 is the other language they've added, what does that hint at?
11:52 Well, as a matter of substantive text, it's basically
11:52 redundant. I mean, it's a constitutional amendment to amend
11:52 the constitution. Of course, it's going to be in the
11:52 constitution.
11:52 But the real reason that that's there is because
11:52 if the General Assembly doesn't put the language in the
11:52 proposed amendment in the constitution, they are
11:52 constitutionally prohibited from the structure they would
11:52 like the Elections Board to have. That's the effect of the

11:52 Cooper v. Berger decision. They can't have an eight-member
11:53 board because the Governor has a right as his role in the
11:53 executive of the state, to take care that the law is being
11:53 faithfully executed, that, as the Court has held now in
11:53 multiple decisions, extends to being able to have some
11:53 ability to influence and ensure that state agencies that are
11:53 part of the Executive Branch have some authority and reflect
11:53 his policy priorities.
11:53 On the Judicial Vacancies Question, the Court
11:53 initially found that the description of the proposal as a
11:53 nonpartisan merit-based system was misleading because that
11:53 wasn't actually what the amendment would accomplish, and so
11:53 they've dropped that description, but they haven't addressed
11:53 the reason that it was misleading, which is that the
11:53 amendment sets up a structure where the Legislature gets to
11:54 pick the judges. The proposed ballot language still does
11:54 not make that clear. This Court noted in the order that the
11:54 General Assembly is not required to consider any criteria
11:54 from the commission that would be set up by the amendment.
11:54 The language still doesn't address that. It still fails to
11:54 acknowledge and is consistent where the Legislature picks
11:54 the judges. A voter reading this would not understand that
11:54 that is the effect. In fact, there is no way an ordinary
11:54 voter would understand from reviewing this text in the time
11:54 available in the voting booth that the primary purpose is to

11:54 shift virtually complete discretionary control to the
11:54 General Assembly when choosing judicial -- judges to fill
11:54 vacancies.
11:55 It's also still misleading because it contains
11:55 language about the Governor's role. It says that the
11:55 Legislature would recommend at least two nominees to the
11:55 Governor by legislative action and the Governor will appoint
11:55 judges from among those nominees. The system that's set up
11:55 by the amendment is not a recommendation. It is a mandate,
11:55 a command. The Governor must pick one of the two judges
11:55 that the General Assembly selects. If he does not do that
11:55 and within ten days, they will do it for him.
11:55 Finally, is the reference to appointment. Under
11:55 the constitution as it stands now, the Governor appointing
11:55 judges means that he gets to review the qualifications of
11:55 those judges, meet with them, interview them, have his staff
11:55 meet with them, and figure out who the best judges would be.
11:56 That's what appointment means now. Under this language,
11:56 appointment means that he gets to sign the paperwork for the
11:56 judges sent to him by the General Assembly. That is
11:56 profoundly misleading and mischaracterizing of the
11:56 Governor's role in the process.
11:56 So in short, we submit that not only does this not
11:56 address the Court's concerns, it's actually misleading in
11:56 new ways. These are not quibbles. These are important

substantive issues and, therefore, we request the Court to enjoin them from appearing on the ballot.

MR. WESTER: May it please the Court. To close our rebuttal, to reference a few moments ago, direct reference to the statute that Mr. Sawchak had cited, Section 1108 in the election laws, it has far more significant than counsel for the legislative defendants would attribute to it, and it sounds like an effort to diminish it. It fits here in a constitutional context. I encourage the Court to remember the Leandro decision. We now have many of those. And in the 1997 decision -- and I give the citation here. It was in our petition for the writs, but I find this fully applicable here today. I leave to you whether you agree. Leandro versus the State, 346 N.C. 336 at 347, the Court observed in the course of interpreting the constitution grant -- the constitutional ground of a right to a sound, basic education, that the General Assembly had embraced that right, had done so by statute.

So it is here. The constitutional right that our citizens have to a full understanding of the constitutional ballot because it is they who are sovereign and only they who can change their constitution when an amendment is properly submitted to them, that embraces Section 1108 of the elections statutes which requires in explicit language that kind of standard. It fleshes it out, just as our

statutes flesh out the right to a sound, basic education.

The arguments from the gentleman for the General Assembly, that we cannot hear this because there is no -- there is no limit on what you can submit to the people, they can do it; they cannot do it if you're not straight up with them. They cannot do it unless you are clear and cover, absolutely cover, avoid the difficulties that Mr. Doerr has now itemized that I'll not repeat, and these difficulties are so permeating in this second round that they are different difficulties but no less severe and no less depriving of the understanding that our constitution requires our people to have.

I think that if we -- if we had a political question decision -- a decision to come down based on political question which is worth an examination of what the consequences would be, we would vacate the preliminary injunction on the prior amendments. That's what the argument would be. That would mean we would have four amendments on the ballot on these subjects, overlapping and highly confusing.

So I know they make this argument with citing Supreme Court cases. They don't fit here because it doesn't go anywhere here and particularly because someone counseled the General Assembly not to repeal these first two ballots. So that's where we would be, and put aside all the legal

11:59 doctrines here, as a matter of common sense, which I do
12:00 think fit the proper legal doctrine, it makes no sense to
12:00 seek refuge or rescue in political question.
12:00 The final point I make, Your Honor, is to
12:00 encourage you as you look at our proposed order. What we've
12:00 endeavored to do there is to follow the express direction of
12:00 this Court in its first order. What we've done, frankly, is
12:00 to repeat your findings and frame a holding -- what we've
12:00 done is hold that up like it was a lens -- to the new ballot
12:00 questions. And when we do that, you will find these new
12:00 ballot questions are clearly lacking in the details. And it
12:00 is just a fact if the Judicial Vacancies Question does not
12:00 convey to the people that the General Assembly will
12:00 hereafter be the sole gatekeeper and control appointments.
12:01 It does not do that. The sense is that a multibranch
12:01 commission will choose somehow. That does -- that misleads
12:01 the voter. It does that.
12:01 Similarly, in one phrase with the Elections
12:01 Commission, the question does not convey that the General
12:01 Assembly will now control the membership of that body.
12:01 Reduced to one sentence. That's it. It does not convey
12:01 that the General Assembly will not control -- will now
12:01 control the membership of that body. It says nothing about
12:01 how the members are chosen and nothing approaching that the
12:01 constitution prohibits that sort of board. Thank you, sir.

12:01 JUDGE BRIDGES: Thank you, sir.
12:01 MR. WESTER: All of you.
12:01 JUDGE BRIDGES: Rebuttal from the General Assembly?
12:01 MR. HUFFSTETLER: Briefly, Your Honor. In describing what the Governor is saying as quibbles, we mean no disrespect to the arguments made by Governor's counsel. The point is that there will always be more that can be said about a particular amendment or different phrasing that someone could argue is a more perfect way to describe what the people are being asked to address.
12:02 For example, one of the things that Governor's counsel is arguing here is that these -- this language should somehow refer to a previous decision of the Court that would be changed or overruled. There will never be language proposed that some argument cannot be made against. And, indeed, fairness and intelligibility, I think, as you've seen from the arguments today, can often be in the eye of the beholder.
12:02 We would respectfully suggest that it is apparent that the plaintiff's real problem here is not with the language of the proposed amendments, but with the amendments themselves and its real objective is to prevent the people of North Carolina from having the opportunity to vote yes or no on these important questions.

12:03 Again, members of the Court, Article XIII, Section
12:03 4 of our constitution says that the proposal for a
12:03 constitutional amendment shall be submitted at the time and
12:03 the manner prescribed by the General Assembly. Were you to
12:03 accept the Governor's arguments here, that would officiate
12:03 that important clause in the constitution itself. As a
12:03 matter of procedure, members of the Court, we have submitted
12:03 to you an order which finds that this is a political
12:04 question which -- over which the Court has no subject matter
12:04 jurisdiction, but as the Supreme Court asked the trial court
12:04 to do in a previous challenge that Mr. Warf and I were
12:04 involved in, the trial court, the three-judge panel, had
12:04 found political question and dismissed on that basis. It
12:04 went up to the Supreme Court. The Supreme Court then asked
12:04 the three-judge panel to issue an indicative opinion of what
12:04 its opinion on the merits would be if it were not dismissed
12:04 as a political question. So in the order that we have
12:04 submitted to you, we find that we have the Court find that
12:04 this is a political question, nonjusticiable. The Court,
12:04 therefore, has no subject matter jurisdiction, but in light
12:04 of the almost certain appeal of whatever the Court's
12:05 decision is, it goes on to address the arguments made by the
12:05 Governor.
12:05 I will conclude by asking the Court to dismiss
12:05 this case, to find it is a -- it presents a nonjusticiable

political question, but also go on to find that in the event the appellate court should do it differently, that each of these ballot submissions is proper and appropriate. I'd be happy to respond to any questions.

JUDGE BRIDGES: Thank you very much, gentleman, for your arguments. We have been asked to decide and to decide quickly, is what I gathered the request to be. That's what I understood the request to be.

MR. SAWCHAK: Yes, Your Honor. Thank you.

JUDGE BRIDGES: I suspect that while all of you certainly disagree on many important points, that may be one point on which all of you do agree, that you would like for us to decide and decide quickly.

MR. HUFFSTETLER: On behalf of the legislative defendants, that's certainly our view as well.

MR. WESTER: I'll speak for the Governor, Your Honor. We urge, I will call it all deliberate speed, a phrase I recall from another case. We don't suggest that it would be any implication or anything anyone has asked for anything different from that. We expect that reflection time may be necessary.

JUDGE BRIDGES: The panel has met this morning prior to arguments to attempt to formulate the issues to be addressed. We have not yet discussed in our pre-argument conference the merits of the case presented today. What I

12:06 would like to do at this time is for the judges to retire
12:06 and begin our deliberations. If you-all are willing to
12:07 remain here for a while, once we see what kind of progress
12:07 we are making in those deliberations, we would like to
12:07 report back to you as to whether or not we believe that we
12:07 will be able to reach a decision today. At this point, I
12:07 can't say. I cannot say definitively that we will be able
12:07 to reach a decision today, but I think after we see how
12:07 those deliberations are going, we may be able to report back
12:07 to you fairly quickly as to the likelihood that we will be
12:07 able to reach a decision. So I suggest that if you're
12:07 willing to do so, please remain here for a while. We will
12:07 report back to you shortly, and then if necessary, continue
12:07 our deliberations in an effort to arrive at a decision
12:08 either quickly or with all deliberate speed, whichever may
12:08 deem to be the outcome.
12:08 So at this time we'll take a brief recess as we --
12:08 JUDGE CARPENTER: I have a couple of quick
12:08 questions.
12:08 JUDGE BRIDGES: Okay.
12:08 JUDGE CARPENTER: Mr. Wester, you mentioned that
12:08 the General Assembly failed to repeal the former proposed
12:08 amendment language.
12:08 MR. WESTER: Yes, sir.
12:08 JUDGE CARPENTER: What would -- constitutionally

speaking, how could they do that?

MR. WESTER: They met -- constitutionally speaking, I think, is not --

JUDGE CARPENTER: Three-fifths? Three-fifths?

MR. WESTER: Yes, sir. Put it this way: When they met -- and it was Monday of this week following Friday of last week, the House on Friday of last week and the Senate on Monday of this week, they could have passed a measure in each chamber to repeal the constitutional amendments that we argued about when we first gathered.

JUDGE CARPENTER: After three-fifths of each chamber, the constitution requires that it be submitted, so how would the Legislature at that point effectively go about constitutionally repealing --

MR. WESTER: I think they have the authority to repeal amendments.

JUDGE CARPENTER: Thank you, sir. In regards to time frame for challenging the constitutionality of the proposed ballot language, any thoughts on that? Is there a statute of limitation?

MR. WESTER: The time frame to challenge the constitutionality?

JUDGE CARPENTER: The constitutionality of the ballot language.

MR. WESTER: Well, not that pertains here. I

12:09 don't know of one. I think folks can challenge, yes, sir.
12:09 You recall our emphasis in our argument that the time to
12:09 challenge is now, and we have gone as fast as we could.
12:09 JUDGE CARPENTER: Thank you, sir.
12:09 MR. WESTER: In particular, their recent convening
12:09 last Friday and then this Monday shows that you can't tell
12:09 what constitutional amendments you're going to face until
12:09 after they adjourn. They proved that again in the last
12:09 week.
12:10 JUDGE CARPENTER: Thank you. Thank you, Judge
12:10 Bridges, for the point of indulgence.
12:10 JUDGE BRIDGES: Judge Lock, questions?
12:10 JUDGE LOCK: No, I don't.
12:10 JUDGE BRIDGES: Well, the question posed by Judge
12:10 Carpenter does lead me to another question, and I'll direct
12:10 this to Mr. Huffstetler and Mr. Warf. What is the
12:10 significance of that, of the General Assembly's failure to
12:10 repeal the prior bills?
12:10 MR. WARF: Your Honor, I don't know that it is a
12:10 failure so much as it is an act in the interest of time. I
12:10 believe it is the interpretation under the constitution
12:10 ironically debating the power of the gubernatorial veto that
12:10 if a bill in the General Assembly included a repeal of one
12:10 constitutional provision in the proposal of another, that
12:11 would potentially be more than just the proposal of a

12:11 constitutional amendment; therefore, that would need to be
12:11 submitted to the Governor who would have 10 days if the
12:11 General Assembly was in session to rule upon it, or 30 days
12:11 if the General Assembly was not in session, to pass judgment
12:11 upon that, and both of those options, 10 or 30, extended far
12:11 beyond when we could print the ballots in the State of North
12:11 Carolina.
12:11 JUDGE BRIDGES: Well, is the effect of the present
12:11 bills to amend the previous proposed constitutional
12:11 amendments?
12:11 MR. WARF: No, Your Honor. These are -- these are
12:11 amendments -- new amendments in and of themselves, separate
12:11 session laws. They do not refer back to the other Session
12:11 Laws 2018-117 and 118. As this Court enjoined the printing
12:12 of the ballot language of those session laws on the ballot
12:12 in its order, those would not appear at all on the ballot.
12:12 The question is would these be here at all so that we're
12:12 looking at is there going to be two or four, based upon the
12:12 NAACP's arguments, or six, based upon the arguments of the
12:12 Governor here. Two are not at issue for anybody, have been
12:12 explained by the Publications Committee and are ready to go
12:12 on the ballot. Two, I believe, are subject to a final writ
12:12 of supersedeas in the Court of Appeals, which will be
12:12 addressed today, and the last two are these two.
12:12 JUDGE BRIDGES: All right.

12:12 MR. WARF: Thank you, Your Honor.
12:12 JUDGE BRIDGES: Let's take a short recess. We'll begin our deliberations.
12:12 THE BAILIFF: Superior Court stands in recess.
12:13 (A recess was taken at 12:13 p.m.)
13:48 (Back on the record at 1:49 p.m.)
13:49 JUDGE BRIDGES: Please be seated. Thank you very much for your patience. The panel has deliberated. We have arrived at a decision. We have prepared and signed a written order that will be file stamped shortly. Any of you who wish to receive a copy of that signed and filed order may do so within the next very few minutes.
13:49 After due consideration, this panel now has arrived at a decision on which we are unanimous as to the result, and that is that given the present language proposed by the General Assembly, we are unable to find beyond a reasonable doubt that that language is facially unconstitutional; the facial constitutional challenge to the proposed ballot language included in these two proposed amendments, at this stage, at least, is being denied. The Governor's request for injunctive relief at this stage is beginning denied.
13:50 Our order does reflect that the preliminary injunction we previously entered, of course, remains in full force and effect pending further orders of this or an

13:50 appellate court having jurisdiction over the matter. I believe that will fully address the issues before us today.

MR. ZIMMERMAN: Your Honor, Erik Zimmerman. One procedural issue, if I may.

JUDGE BRIDGES: Yes, sir.

MR. ZIMMERMAN: In light of the Court's ruling, the appellate rules require us to seek a stay in the trial court in the first instance. I'm not sure we necessarily need to do that in light of the Supreme Court's stay, which probably covers us, but just in terms ensuring we've checked all the boxes, we'd like to make an oral motion to stay the ruling the Court is currently making pending our appeal of that ruling.

JUDGE BRIDGES: That does bring to mind one other point that we did address in the written order, and that is given the nature and the posture of this case, we do find that our order affects substantial rights, and even though any appeal from this order would be in the nature of an interlocutory appeal, we are certifying this matter for immediate appeal to the appellate courts. We did not address the question of stays in the written order we have prepared. What do y'all wish to say about that in view of the present posture and view of the orders entered by the Supreme Court?

MR. WARF: Your Honor, I don't know if -- I think

13:52 we would say that it would be unnecessary for the Court to
13:52 enter a stay, given the Supreme Court's order which could
13:52 only be changed by that court, and so I think there would be
13:52 a certain level of redundancy associated with that since the
13:52 stay of the Supreme Court is to not prepare the ballots
13:52 until further order of that court.
13:52 MR. HUFFSTETLER: Your Honor, I might add that
13:52 counsel for all the parties, I believe -- and they can speak
13:52 for themselves -- have agreed to consent to bypass the Court
13:52 of Appeals in this --
13:52 MR. WESTER: That is correct, Your Honor.
13:52 JUDGE BRIDGES: Would you-all give me one minute
13:53 to confer? Let's step right here.
13:53 (The panel confers off the record.)
13:53 JUDGE BRIDGES: With regard to that issue, we
13:53 agree with -- that is, this panel agrees with the
13:53 proposition that the entry of a stay by this Court would be
13:54 unnecessary in light of the rulings that have been issued by
13:54 the Supreme Court, and we're going to add a provision to our
13:54 written order reflecting that point.
13:54 MR. ZIMMERMAN: Thank you, Your Honor.
13:54 JUDGE BRIDGES: That the denial of a request for
13:54 stay is within that context. Are there other matters that
13:54 need to be addressed?
13:54 (No verbal response given.)

13:54 JUDGE BRIDGES: So with that minor change, which we will make right now, we should have copies of this order ready for you-all shortly. All right. Please adjourn court.

13:54 THE BAILIFF: All rise. Oh, yes. Oh, yes. Oh, yes. This special session for the County of Wake now stands adjourned sine die. God save the state and this Honorable Court.

13:54 (Proceeding concluded and court adjourned sine die at 1:54 p.m.)

CERTIFICATION OF TRANSCRIPT

This is to certify that the foregoing transcript of proceedings taken at the August 31, 2018, Three-Judge Panel Special Session of Wake County Superior Court is a true and accurate transcript of the proceedings taken by me and transcribed by me. I further certify that I am not related to any party or attorney, nor do I have any interest whatsoever in the outcome of this action.

This 31st day of August, 2018.

Tammy Johnson, CVR-CM-M
Official Court Reporter
Tenth Judicial Circuit
Raleigh, North Carolina

NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY

18-CVS-9805

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 the PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

ORDER DENYING REQUEST FOR TEMPORARY RESTRAINING ORDER

THIS MATTER CAME ON TO BE HEARD before the undersigned three-judge panel on August 31, 2018, on Plaintiff's motion to amend the complaint and motion for a temporary restraining order. All adverse parties to this action received the notice required by Rule 65 of the North Carolina Rules of Civil Procedure. The Court considered the pleadings, supplemental affidavits, submissions and arguments of the parties and counsel in attendance, as well as the record established thus far.

THE COURT, in the exercise of its discretion and for good cause shown, hereby makes the following findings of fact and conclusions of law:

1. On August 21, 2018, the undersigned three-judge panel entered an order wherein a majority of this panel granted Plaintiff Governor Roy A. Cooper's (hereinafter "Governor Cooper") motion for preliminary injunction. The order enjoined 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, (hereinafter "Legislative Defendants"), as well as cross-claimant Bipartisan State Board of Elections and Ethics Enforcement (hereinafter "State Board of Elections"), from preparing any ballots, printing any ballots or authorizing any person or entity to prepare or print any ballots for the November 2018 general election containing the Ballot Question language contained in Section 5 of Session Law 2018-117 and Section 6 of Session Law 2018-118. On August 23, 2018, a memorandum of dissent was entered by the Honorable Jeffery K. Carpenter.

2. The facts of the case at bar, as well as the guiding legal principles, applicable legal standards, and analysis regarding this panel's consideration of the constitutionality of Session Law 2018-117 and Session Law 2018-118 were fully set forth in the August 21, 2018, order and August 23, 2018, memorandum of dissent. As such, those facts, principles, standards, and analyses are incorporated in this order by reference and will not be repeated here unless necessary to understand the rationale for our decision.

3. In this panel's August 21, 2018, order, we invited Legislative Defendants to act immediately to correct the problems in the language of the enjoined Ballot Questions so that the corresponding proposed amendments could appear on the 2018 general election ballot. On August 27, 2018, the General Assembly enacted Session Law 2018-133 (hereinafter "S.L. 2018-

133" or "Board of Elections Proposed Amendment") and Session Law 2018-132 (hereinafter "S.L. 2018-132" or "Judicial Vacancies Proposed Amendment").

4. S.L. 2018-133 and S.L. 2018-132 do not repeal the previously-enacted S.L 2018-117 and S.L. 2018-118; however, S.L. 2018-133, in effect, replaces Session Law 2018-117, and S.L. 2018-132, in effect, replaces Session Law 2018-118. Accordingly, the entry of this order does not operate to rescind or otherwise alter our prior order granting a preliminary injunction enjoining the ballot language contained in S.L 2018-117 and S.L. 2018-118.

5. As previously explained by counsel for the State Board of Elections, the deadline under federal law for the Board to begin printing 2018 general election ballots is September 1, 2018.

6. On August 30, 2018, Governor Cooper filed a motion to amend the complaint in this action pursuant to Rule 15 of the North Carolina Rules of Civil Procedure. On August 30, 2018, Legislative Defendants, through counsel, consented via email to Governor Cooper's motion to amend the complaint.

7. On August 30, 2018, Governor Cooper also filed a motion for a temporary restraining order to prevent ballot questions in Section 6 of S.L. 2018-132 and Section 2 of S.L. 2018-133 from appearing on the ballot for the 2018 general election.

8. Governor Cooper has asserted facial challenges to the constitutionality of acts of the General Assembly. As such, the portions of these claims constituting facial challenges to the constitutionality of acts of the General Assembly are within the statutorily-provided jurisdiction of this three-judge panel. N.C.G.S. § 1-267.1; N.C.G.S. § 1A-1, Rule 42(b)(4). All other matters will be remanded, upon finality of any orders entered by this three-judge panel, to the Wake County Superior Court for determination.

9. Furthermore, a majority of the undersigned three-judge panel has again concluded that Governor Cooper's facial constitutional challenges, as expressed, present a justiciable issue as distinguished from "a non-justiciable political question arising from nothing more than a policy dispute," *Cooper v. Berger*, 370 N.C. 392, 412, 809 S.E.2d 98, 110 (2018).

THE PROPOSED AMENDMENTS AND BALLOT LANGUAGE[1]

10. S.L. 2018-133 and S.L. 2018-132, like their predecessors, contain the text of proposed amendments to the North Carolina Constitution, *see* 2018 N.C. Sess. Laws 133 § 1; 2018 N.C. Sess. Laws 132 §§ 1-5, and the language to be included on the 2018 general election ballot submitting the proposed amendments to the qualified voters of our State. *See* 2018 N.C. Sess. Laws 133 § 2; 2018 N.C. Sess. Laws 132 § 6.

11. Section 1 of S.L. 2018-133 proposes to amend Article VI of the North Carolina Constitution by adding a new section to read:

> **Sec. 11. Bipartisan State Board of Ethics and Elections Enforcement.**
> (1) The Bipartisan State Board of Ethics and Elections Enforcement shall be established to administer ethics and elections law, as prescribed by general law. The Bipartisan State Board of Ethics and Elections Enforcement shall be located within the Executive Branch for administrative purposes only and shall exercise all of its powers independently of the Executive Branch.
> (2) The Bipartisan State Board of Ethics and Elections Enforcement shall consist of eight members, each serving a term of four years, who shall be qualified voters of this State. Of the total membership, no more than four members may be registered with the same political affiliation, if defined by general law. Appointments shall be made by the Governor as follows:
> (a) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two Senate political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

[1] In the following, full quotations of the proposed amendments, underlined text in the proposed amendments represents additions to the North Carolina Constitution, ~~strikethrough~~ text in the proposed amendments represents language to be removed from the North Carolina Constitution, and text that is not otherwise underlined or struck through represents already-existing language of the North Carolina Constitution that will remain unchanged. The proposed amendments are displayed in this manner so that it is readily apparent what is proposed to be added to and removed from the North Carolina Constitution.

(b) Four members upon the recommendation of the leader, as prescribed by general law, of each of the two House of Representatives political party caucuses with the most members. The Governor shall not appoint more than two members from the recommendations of each leader.

(3) The General Assembly shall enact general laws governing how appointments shall be made if the Governor fails to appoint a member within 10 days of receiving recommendations as required by this section.

2018 N.C. Sess. Laws 133, § 1.

12. Section 2 of S.L. 2018-133 contains the language to be included on the 2018 general election ballot submitting the proposed amendment in Section 1 of S.L. 2018-133 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-117 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law.

2018 N.C. Sess. Laws 133, § 2.

13. Section 1 of S.L. 2018-132 proposes to amend Article IV of the North Carolina Constitution by adding a new section to read:

Sec. 23. Merit selection; judicial vacancies.

(1) All vacancies occurring in the offices of Justice or Judge of the General Court of Justice shall be filled as provided in this section. Appointees shall hold their places until the next election following the election for members of the General Assembly held after the appointment occurs, when elections shall be held to fill those offices. When the vacancy occurs on or after the sixtieth day before the next election for members of the General Assembly and the term would expire on December 31 of that same year, the Chief Justice shall appoint to fill that vacancy for the unexpired term of the office.

(2) In filling any vacancy in the office of Justice or Judge of the General Court of Justice, individuals shall be nominated on merit by the people of the State to fill that vacancy. In a manner prescribed by law, nominations shall be received from the people of the State by a nonpartisan commission established under this section, which shall evaluate each nominee without regard to the nominee's partisan affiliation, but rather with respect to whether that nominee is qualified or not qualified to fill the vacant office, as prescribed by law. The evaluation of each nominee of people of the State shall be forwarded to the General Assembly, as prescribed by law. The General Assembly shall recommend to the Governor, for each vacancy, at least two of the nominees deemed qualified by a nonpartisan

commission under this section. For each vacancy, within 10 days after the nominees are presented, the Governor shall appoint the nominee the Governor deems best qualified to serve from the nominees recommended by the General Assembly.

(3) The Nonpartisan Judicial Merit Commission shall consist of no more than nine members whose appointments shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. The General Assembly shall, by general law, provide for the establishment of local merit commissions for the nomination of judges of the Superior and District Court. Appointments to local merit commissions shall be allocated between the Chief Justice of the Supreme Court, the Governor, and the General Assembly, as prescribed by law. Neither the Chief Justice of the Supreme Court, the Governor, nor the General Assembly shall be allocated a majority of appointments to a nonpartisan commission established under this section.

(4) If the Governor fails to make an appointment within 10 days after the nominees are presented by the General Assembly, the General Assembly shall elect, in joint session and by a majority of the members of each chamber present and voting, an appointee to fill the vacancy in a manner prescribed by law.

(5) If the General Assembly has adjourned sine die or for more than 30 days jointly as provided under Section 20 of Article II of this Constitution, the Chief Justice shall have the authority to appoint a qualified individual to fill a vacant office of Justice or Judge of the General Court of Justice if any of the following apply:

(a) The vacancy occurs during the period of adjournment.

(b) The General Assembly adjourned without presenting nominees to the Governor as required under subsection (2) of this section or failed to elect a nominee as required under subsection (4) of this section.

(c) The Governor failed to appoint a recommended nominee under subsection (2) of this section.

(6) Any appointee by the Chief Justice shall have the same powers and duties as any other Justice or Judge of the General Court of Justice, when duly assigned to hold court in an interim capacity, and shall serve until the earlier of:

(a) Appointment by the Governor.

(b) Election by the General Assembly.

(c) The first day of January succeeding the next election of the members of the General Assembly, and such election shall include the office for which the appointment was made.

However, no appointment by the Governor or election by the General Assembly to fill a judicial vacancy shall occur after an election to fill that judicial office has commenced, as prescribed by law.

2018 N.C. Sess. Laws 132, § 1.

14. Section 2 of S.L. 2018-132 proposes to amend Article IV, Section 10 of the North Carolina Constitution by rewriting the section to read as follows:

Sec. 10. District Courts.

(1) The General Assembly shall, from time to time, divide the State into a convenient number of local court districts and shall prescribe where the District Courts shall sit, but a District Court must sit in at least one place in each county. District Judges shall be elected for each district for a term of four years, in a manner prescribed by law. When more than one District Judge is authorized and elected for a district, the Chief Justice of the Supreme Court shall designate one of the judges as Chief District Judge. Every District Judge shall reside in the district for which he is elected.

(2) For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years.

(3) The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. ~~Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.~~ Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

2018 N.C. Sess. Laws 132, § 2.

15. Section 3 of S.L. 2018-132 proposes to amend Article IV, Section 18 of the North Carolina Constitution by adding a new subsection to read:

(3) Vacancies. All vacancies occurring in the office of District Attorney shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term in which a vacancy has occurred expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office.

2018 N.C. Sess. Laws 132, § 3.

16. Section 4 of S.L. 2018-132 repeals in its entirety Article IV, Section 19 of the North Carolina Constitution, which currently reads as follows:[2]

Unless otherwise provided in this Article, all vacancies occurring in the offices provided for by this Article shall be filled by appointment of the Governor, and the appointees shall hold their places until the next election for members of the General

[2] For the sake of clarity, this section is not displayed as ~~struck through~~ despite the proposed amendment fully removing the language from the North Carolina Constitution.

> Assembly that is held more than 60 days after the vacancy occurs, when elections shall be held to fill the offices. When the unexpired term of any of the offices named in this Article of the Constitution in which a vacancy has occurred, and in which it is herein provided that the Governor shall fill the vacancy, expires on the first day of January succeeding the next election for members of the General Assembly, the Governor shall appoint to fill that vacancy for the unexpired term of the office. If any person elected or appointed to any of these offices shall fail to qualify, the office shall be appointed to, held and filled as provided in case of vacancies occurring therein. All incumbents of these offices shall hold until their successors are qualified.

2018 N.C. Sess. Laws 132, § 4.

17. Section 5 of S.L. 2018-132 proposes to amend Article II, Section 22, Subsection (5) of the North Carolina Constitution by rewriting the subsection to read as follows:

> (5) Other exceptions. Every bill:
> (a) In which the General Assembly makes an appointment or appointments to public office and which contains no other matter;
> (b) Revising the senate districts and the apportionment of Senators among those districts and containing no other matter;
> (c) Revising the representative districts and the apportionment of Representatives among those districts and containing no other matter;~~ or~~
> (d) Revising the districts for the election of members of the House of Representatives of the Congress of the United States and the apportionment of Representatives among those districts and containing no other ~~matter,~~matter;
> (e) Recommending a nominee or nominees to fill a vacancy in the office of Justice and Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter; or
> (f) Electing a nominee or nominees to fill a vacancy in the office of Justice or Judge of the General Court of Justice, in accordance with Section 23 of Article IV of this Constitution and containing no other matter,
> shall be read three times in each house before it becomes law and shall be signed by the presiding officers of both houses.

2018 N.C. Sess. Laws 132, § 5.

18. Section 6 of S.L. 2018-132 contains the language to be included on the 2018 general election ballot submitting the proposed amendments in Sections 1-5 of S.L. 2018-132 to the qualified voters of our State. The "question to be used in the voting systems and ballots" is required by S.L. 2018-132 to read as follows:

[ ] FOR [ ] AGAINST

Constitutional amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees.

2018 N.C. Sess. Laws 132, § 6.

TEMPORARY RESTRAINING ORDER

19. A temporary restraining order may be issued "for the purpose of preventing the commission or continuance of some act which during the litigation would produce injury to the plaintiff or tend to render judgment in his favor ineffectual. It is an ancillary remedy afforded by the courts of equity and authorized by statute for the purpose of preserving the *status quo* pending the action." *Seaboard A. L. R. Co. v. Atl. C. L. R. Co.*, 237 N.C. 88, 94, 74 S.E.2d 430, 434 (1953); N.C.G.S. § 1A-1, Rule 65. "A temporary restraining order is not predicated upon illusory injury, loss, or damage, . . . but is entered only upon a showing of immediate and irreparable injury, loss, or damage." *Jolliff v. Winslow*, 24 N.C. App. 107, 108, 210 S.E.2d 221, 222 (1974).

Board of Elections Proposed Amendment

20. S.L. 2018-133, as shown above, proposes to amend Article VI of the North Carolina Constitution by adding a new section. The language of the Ballot Question, also as shown above, is as follows: "Constitutional amendment to establish an eight-member Bipartisan Board of Ethics and Elections Enforcement in the Constitution to administer ethics and elections law."

21. Governor Cooper complains that this Ballot Language is misleading in that the language fails to inform the voters of our State of the primary purpose and effect of the corresponding amendment. Governor Cooper takes particular issue with the Ballot Language for not informing the voters that the amendment will overrule a decision of the Supreme Court of North Carolina and transfer authority over the Board of Elections from the Governor to the General Assembly.

22. While the language may not be the most detailed description of the purpose and effect of the amendment, we do not find that the language in this Ballot Question is so misleading so as to violate the constitutional requirements explained in our August 21, 2018 order. Indeed, as noted in our prior order, while a Board of Elections and Ethics already exists under law, such a Board has not previously been specifically addressed by our state constitution.

23. In determining facial constitutional challenges, this panel should not concern itself with the wisdom of the legislation, its political ramifications, or the possible motives of the legislators in submitting the issue to voters in the form of a proposed constitutional amendment. This court is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-133, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

Judicial Vacancies Proposed Amendment

24. S.L. 2018-132, as shown above, proposes to amend Article IV of the North Carolina Constitution by adding a new section; amend Article IV, Section 10 by rewriting the section; amend Article IV, Section 18 by adding a new subsection; repeal in its entirety Article IV, Section 19; and, amend Article II, Section 22, Subsection (5) by rewriting the subsection. The language of the Ballot Question, also as shown above, is as follows: "Constitutional

amendment to change the process for filling judicial vacancies that occur between judicial elections from a process in which the Governor has sole appointment power to a process in which the people of the State nominate individuals to fill vacancies by way of a commission comprised of appointees made by the judicial, executive, and legislative branches charged with making recommendations to the legislature as to which nominees are deemed qualified; then the legislature will recommend at least two nominees to the Governor via legislative action not subject to gubernatorial veto; and the Governor will appoint judges from among these nominees."

25. Governor Cooper similarly complains that this Ballot Language is misleading in that the language fails to inform the voters of our State of the primary purpose and effect of the corresponding amendment. Governor Cooper takes particular issue with the Ballot Language for failing to mention that appointed judges would hold their seats beyond a subsequent election, mischaracterizing the current system for filling judicial vacancies as one in which the Governor has "sole appointment power," and using language that wrongfully suggests the new system for filling judicial vacancies is one in which all parties involved in the appointment process share equal power.

26. While the language may not be the most accurate or articulate description of the purpose and effect of these provisions, we do not find that the language in this Ballot Question is so misleading so as to violate the constitutional requirements explained in our August 21, 2018 order. Again, this panel is limited to determining whether the enacting legislation is facially unconstitutional. With regard to S.L. 2018-132, this panel cannot conclude beyond a reasonable doubt that any such facial invalidity has been shown.

27. We therefore find that there is not a substantial likelihood that Governor Cooper will prevail on the merits of this action with respect to the constitutionality of the Ballot Question language pertaining to the Board of Elections Proposed Amendment and the Judicial Vacancies Proposed Amendment.

28. Under these circumstances, this panel, in its discretion and after a careful balancing of the equities, concludes that the requested temporary restraining order shall not issue in regards to S.L. 2018-133 and S.L. 2018-132.

29. In view of the fact that counsel for all parties have candidly expressed a likelihood that ANY decision of this panel in this case will be appealed, this three-judge panel hereby certifies pursuant to Rule 54 of the North Carolina Rules of Civil Procedure this matter for immediate appeal, notwithstanding the interlocutory nature of this order, finding specifically that this order affects substantial rights of each of the parties to this action.

30. In light of the Supreme Court of North Carolina's previous stay of the printing of ballots, this panel considers that granting a stay of this order by this panel pending appeal to be unnecessary.

31. The Honorable Jeffrey K. Carpenter concurs in the result.

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff Governor Cooper's motion to amend the complaint is GRANTED.

2. Plaintiff Governor Cooper's motion for a temporary restraining order as to the ballot language in S.L 2018-133 and S.L. 2018-132 is hereby DENIED.

3. The August 21, 2018, order granting a preliminary injunction enjoining the ballot language contained in S.L 2018-117 and S.L. 2018-118 remains in full force and effect as to those Session Laws, pending further decision of this panel or the appellate courts.

4. Plaintiff's request for a stay of the order of this panel pending appeal is hereby DENIED.

SO ORDERED, this 31st day of August, 2018.

Forrest D. Bridges, Superior Court Judge

Thomas H. Lock, Superior Court Judge

Jeffery K. Carpenter, Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was served on the following persons by depositing a copy of the same in the United States mail, postage prepaid, and properly addressed, as follows:

John R. Wester
J. Dickson Phillips, III
Adam K. Doerr
Erik R. Zimmerman
Morgan P. Abbott
ROBINSON BRADSHAW & HINSON, PA
101 N. Tryon Street, Suite 1900
Charlotte, NC 28246
jwester@robinsonbradshaw.com
dphillips@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com
mabbott@robinsonbradshaw.com

Noah H. Huffstetler
Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH, LLP
GlenLake One, Suite 200
4140 Parklake Avenue
Raleigh, NC 27612
noah.huffstetler@nelsonmullins.com
martin.warf@nelsonmullins.com

Alexander McC. Peters
Matthew W. Sawchak
Office of the Attorney General
NC DEPARTMENT OF JUSTICE
PO Box 629
Raleigh, NC 27602
apeters@ncdoj.gov
msawchak@ncdoj.gov

This the 31st day of August, 2018.

Kellie Z. Myers
Trial Court Administrator, 10th Judicial District
kellie.z.myers@nccourts.org

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 9805

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;
NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT; and
JAMES A. ("ANDY") PENRY, in his official capacity as CHAIR OF THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT,

Defendants.

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3), Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, hereby gives notice of appeal to the North Carolina Court of Appeals from the Order entered on August 31, 2018 in the North Carolina Superior Court for Wake County that denied the Governor's Motion for Temporary Restraining Order.

Respectfully submitted this 31st day of August, 2018.

John R. Wester
North Carolina Bar No. 4660
jwester@robinsonbradshaw.com
J. Dickson Phillips, III
North Carolina Bar No. 8941
dphillips@robinsonbradshaw.com
Adam K. Doerr
North Carolina Bar No. 37807
adoerr@robinsonbradshaw.com
Erik R. Zimmerman
North Carolina Bar No. 50247
ezimmerman@robinsonbradshaw.com
Morgan P. Abbott
N.C. Bar No. 50546
mabbott@robinsonbradshaw.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 N. Tryon St., Ste. 1900
Charlotte, North Carolina 28246
Telephone: 704.377.2536
Facsimile: 704.378.4000

Attorneys for Plaintiff Roy A. Cooper, III, Governor of the State of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal has been served upon each of the parties to this action by email, as previously agreed to by counsel for all parties, to the addresses below on August 31, 2018:

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matthew W. Sawchak
Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry

This 31st day of August, 2018.

John R. Wester

STATEMENT REGARDING EXPEDITED RECORD

Counsel for the Plaintiff-Appellant states as follows:

1. Because this is appeal has been expedited, the undersigned counsel was not able to follow the process for settling the Record on Appeal under Appellate Rule 11 given the extremely limited time constraints. Nonetheless, counsel for the Plaintiff-Appellant has attempted to ensure that this Record contains all of the proceedings below necessary to a complete understanding of the proceedings in the trial court.

2. To the extent that counsel for the other parties believe that other materials filed below should be considered by the Court, counsel for the Plaintiff-Appellant does not object to the submission of those materials as a Supplement pursuant to Appellate Rule 11(c).

3. All captions, signatures, headings of papers, certificates of service, and documents filed with the trial court, Court of Appeals and Supreme Court that are not necessary for an understanding of the Record on Appeal may be omitted from the record, except as required by Rule 9 of the North Carolina Rules of Appellate Procedure.

4. Documents filed as attachments to the pleadings are attached as part of the documents filed with the court as originally filed.

5. The foregoing constitutes Plaintiff-Appellant's best effort, within the extremely limited time available, to provide the Court and all the parties with an expedited Record on Appeal.

This the 1st day of September, 2018.

PROPOSED ISSUES ON APPEAL

Pursuant to Rule 10(b) of the Rules of Appellate Procedure, Plaintiff-Appellee intends to present the following proposed issues on appeal:

I. Whether the November 2018 ballot should include two proposed constitutional amendment ballot questions that fail fairly to convey to voters the primary purpose and effects of the proposed amendments.

IDENTIFICATION OF COUNSEL FOR THE APPEAL

For the Appellants:

John R. Wester
N.C. Bar No. 4660
jwester@robinsonbradshaw.com

J. Dickson Phillips, III
N.C. Bar. No. 8941
dphillips@robinsonbradshaw.com

Adam K. Doerr
N.C. Bar No. 37807
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
N.C. Bar No. 50247
ezimmerman@robinsonbradshaw.com

Morgan P. Abbott
N.C. Bar No. 50546
mabbott@robinsonbradshaw.com

ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
Telephone: (704) 377-2356
Facsimile: (704) 378-4000

Attorneys for Plaintiff Roy Cooper
Governor of the State of North Carolina

For the Appellees:

Noah H. Huffstetler, III
N.C. State Bar No. 7170
noah.huffstetler@nelsonmullins.com

D. Martin Warf
N.C. Bar. No. 32982
martin.warf@nelsomullins.com

NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
Telephone: (919)
Facsimile:

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matthew W. Sawchak
Solicitor General
N.C. Bar No. 17059
msawchak@ncdoj.gov

Amar Majmundar
Senior Deputy Attorney General
N.C. State Bar No. 24669
amajmundar@ncdoj.gov

Olga Vysotskaya de Brito
Special Deputy Attorney General
N.C. State Bar No. 31846
ovysotskaya@ncdoj.gov

NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602-0629

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

D. Martin Warf
NELSON MULLINS RILEY & SCARBOROUGH LLP
GlenLake One
4140 Parklake Avenue
Suite 200
Raleigh, NC 27612
martin.warf@nelsonmullins.com

Attorneys for Defendants Philip E. Berger and Timothy K. Moore

Matthew W. Sawchak
Solicitor General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P. O. Box 629
Raleigh, NC 27602-0629
msawchak@ncdoj.gov

Attorneys for Defendants North Carolina Bipartisan State Board of Elections and Ethics Enforcement and J. Anthony ("Andy") Penry, in his official capacity as Chair of the Board

This 1st day of September, 2018.

Electronically Submitted
John R. Wester