No. COA24-440 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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; and TIMOTHY K. MOORE, in his official capacity as SPEAKER OF THE NORHT CAROLINA HOUSE OF REPRESENTATIVES; THE STATE OF NORTH CAROLINA; NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, et al.,

Defendants

From Wake County

****

AMICUS CURIAE BRIEF OF NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW AND JOHN LOCKE FOUNDATION IN SUPPORT OF LEGISLATIVE DEFENDANTS-APPELLEES

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INTRODUCTION[1]

Session Law 2023-136 (Senate Bill 512) and Session Law 2023-108 (House Bill 488) made several changes to the appointments and organization of several state boards and commissions. The changes included splitting appointments between executive branch officials, certain professional groups with relevant experience, and the North Carolina House of Representatives and Senate. This litigation ensued.

The crux of the controversy is whether the North Carolina Constitution gives a governor the power to control a majority of appointments to every board and commission, so that he may implement "executive policy" "consistent with "his views and priorities." (R p 13 (Compl. ¶30)). A three-judge panel of Superior Court judges decided below to consider the issue on a board by board (or commission by commission) basis, ultimately enjoining the challenged laws with respect to only two of the entities. Amici agree with the decision of the Superior Court panel and file this brief in support of Legislative Defendants-Appellees.

NATURE OF AMICI'S INTEREST

The North Carolina Institute for Constitutional Law (NCICL) is a 501(c)(3) corporation established to conduct research, and to educate and advise the general

[1] No one other than Amici and the undersigned wrote or helped write this brief or contributed any money for its preparation. See N.C. R. App. P. 28.1(b)(3)(c).

public, policy makers, and the Bar on the rights of citizens under the constitutions of the State of North Carolina and the United States of America. The NCICL engages in litigation as necessary to further these goals. Its mission is to ensure compliance with constitutional restraints on government and protect the rights of North Carolinians. The NCICL has conducted research and written on issues of separation of powers, administrative law, and regulatory reform.

The John Locke Foundation (JLF) was founded in 1990 as an independent, nonprofit thinktank. It employs research, journalism, and outreach to promote its vision of North Carolina—of responsible citizens, strong families, successful communities. It is committed to individual liberty, limited constitutional government, and fair, meaningful elections. The JLF has a long history of researching, analyzing, and reporting about state government structure and operations, including separation of powers concerns, administrative organization, and regulatory reform.

ISSUES PRESENTED

1. Whether the Separation of Powers Clause prohibits the General Assembly from legislating on executive branch functions?
2. Whether Executive Vesting Clause and Faithful Execution Clause prohibit the legislature from allocating duties within the executive branch and appointing members of boards with executive features?

ARGUMENT

I. Standard of Review

The Governor states in his Standard of Review, if this case goes to the Supreme Court, he "will argue that the legislature is not entitled to a presumption of constitutionality in separation of powers cases" and further that "the presumption of constitutionality should not apply to legislation knowingly enacted in violation of our Constitution." (Gov. Appellant's Br. 12-13). Although he acknowledges this Court is bound by precedent, he downplays the importance of the presumption of constitutionality.

Article I, § 2 is the starting point for any analysis of our state Constitution: "All political power is vested in and derived from the people . . . ." This provision has been appropriately read to mean that the North Carolina Constitution "is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982) (citations omitted). Accordingly, there is a "presumption . . . in favor of the constitutionality of an act, [and a]ll doubts must be resolved in favor of the [a]ct." *Id.* (citations omitted).

As North Carolina courts repeatedly recognized, courts should not lightly overturn the General Assembly's long-standing interpretation of a provision of the North Carolina Constitution. *In re Peoples*, 296 N.C. 109, 163, 250 S.E.2d 890, 921

(1978); *Perry v. Stancil*, 237 N.C. 442, 448, 75 S.E.2d 512, 517 (1953); *Reade v. City of Durham*, 173 N.C. 668, 683, 92 S.E 712, 718 (1917). Here, the General Assembly has, for many years, construed the state constitution as authorizing legislative appointments to countless boards, authorities, and commissions.

II. The Separation of Powers Clause Does Not Prohibit the General Assembly Legislating on Executive Branch Functions.

The Separation of Powers clause specifies that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct." N.C. Const. art I, §6. It does not mandate such powers shall be equal.

The "overwhelming majority" of state constitutions, but not North Carolina, contain a separation of powers clause that instructs one branch not to exercise the power of any of the others. North Carolina's Separation of Powers Clause simply divides the powers of government into three branches, without prohibiting one branch from exercising the power of another. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 Vand. L. Rev. 1167, 1190- 91 (1999). The Federalist Papers, which are often cited in support of the importance of the separation of powers principle, recognized that in North Carolina's first Constitution, "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct." James Madison, *Federalist* No. 47, in *The Federalist,* at 327-30 (J. Cooke ed. 1961).

Many powers of the state government are shared by more than one branch. For example, the office of the Governor is vested with powers that are arguably

legislative in the generic sense. He may call the legislature into session under certain circumstances. N.C. Const. art III, § 5(7); Art. II, § 22(7); art. III, § 5 (11). He may approve legislation. N.C. Const. art. II, § 22. And he may veto legislation. *Id.* There is no violation of the separation of powers when the Governor approves a piece of legislation even though his approval is as integral a part of the law-making process for most laws.

Conversely, the General Assembly is vested with powers that appear inherently executive. The General Assembly prescribes the duties of the Secretary of State, the Auditor, the Treasurer, the Superintendent of Public Instruction, the Commissioners of Agriculture, Labor and Insurance, and the Attorney General. N.C. Const. art. III, § 7(2). The General Assembly has the ultimate power to prescribe the "functions, powers and duties" of each of the administrative departments, agencies and offices of the State. N.C. Const. art. III, § 5(10). And, like the Governor, the General Assembly has the power to assign additional duties to the Lieutenant Governor. N.C. Const. art. III, § 6. There is no violation of the separation of powers when the General Assembly prescribes the duties of these officers who are undoubtedly members of the executive branch.

The Constitution also creates "independent constitutional officers" in the office of district attorney. *State v. Camacho*, 329 N.C. 589, 593, 406 S.E.2d 868, 870 (1991). Created by Article IV, the Judicial Article, rather than Article III, and charged with the prosecution of criminal actions, an inherently executive function, district attorneys cannot easily be categorized as members of any one branch.

By amending the Constitution, the people have allocated and reallocated the power of the state government several times since 1776. Section 4 of the Declaration of Rights in North Carolina's original Constitution declared the separation of the powers of government into three branches, and that Constitution contained several instances in which one branch exercised power that would appear to belong to another branch. N.C. Const. of 1776, Declaration of Rights, §4. For example, under the 1776 Constitution, the General Assembly elected the Governor and appointed judges of the Supreme Court.

Separation of powers does not demand that the branches of government "must be kept wholly and entirely separate and distinct[.]" *State v. Furmage*, 250 N.C. 616, 626, 109 S.E.2d 563, 570 (1950) (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States*, § 524 (1833)). Rather, violation of the principle of separation of powers occurs only when one branch exercises a power that the Constitution has allocated to another. A violation of this provision occurs when "one branch of state government exercises powers that are reserved for another branch of state government." *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003).

Given the language and history of the North Carolina Constitution, the people of North Carolina clearly intended for the General Assembly to have the authority to make appointments to boards or to assign the appointment authority to members of the Council of State. Consequently, the exercise of that power to appoint does not infringe on a power reserved to another branch of state

government (i.e., the power of appointment is not reserved under our Constitution to the Governor, except with respect to certain constitutionally created offices). *See State ex rel. Martin v. Melott*, 320 N.C. 518, 523, 359 S.E.2d 783, 787 (1987) (plurality opinion).

The powers of government are separate in so far as the Constitution makes them separate, and no further.

III. The Executive Vesting Clause and Faithful Execution Clause Do Not Prohibit the Legislature from Allocating Duties Within the Executive Branch.

According to the Governor's Appellant Brief, "The Constitution vests *only* the Governor with '[t]he executive power of the State' and the duty to 'take care that the laws be faithfully executed.' N.C. Const. art. III, §§1, 5(4)." (Gov. Appellant Br. 23). Appellants maintain that the executive authority of the Governor cannot be diminished either by the General Assembly by making appointments to "executive" boards and commissions or by it allocating appointments to such entities to other Article III officials, such that he cannot control the board or commission. But, the constitutional clauses that he cites cannot be quilted together to create a unitary executive.

Article III, Section 1 (the "Vesting Clause") allocates the "executive power of the State" to the Governor, and Section 5 defines the Governor's powers and duties. *See Cnty. of Cabarrus v. Tolson*, 169 N.C. App. 636, 638, 610 S.E.2d 443, 445 (2005). Article III, Section 5(4) (the "Faithful Execution Clause") obligates the Governor to "take care that the laws be faithfully executed."

The Vesting Clause does not define executive power, rather, it simply vests the executive power that is otherwise created by the Constitution in the Governor. "Article III, Sec. 1 of the Constitution provides that '[t]he executive power shall be vested in the Governor' but it does not define executive power. We believe it means 'the power of executing laws.'" *Melott*, 320 N.C. at 523, 359 at 787; *see also Advisory Op. In re Separation of Powers*, 305 N.C. 767, 774, 295 S.E.2d 589, 593 (1982). Laws, of course, are enacted by the legislature. Thus, the Vesting Clause does not grant the Governor any specific powers but serves as an allocation of the executive powers created by the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring) ("I cannot accept the view that [the federal vesting clause] is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.").[2] The specific powers allocated to the Governor are set forth in the remainder of Article III and other provisions of the Constitution. *See* N.C.

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[2] In addressing the President's justification for federal seizure of steel mills, Justice Jackson noted as follows:

> The Solicitor General seeks the power of seizure in three clauses of the Executive Article, the first reading, "The executive Power shall be vested in a President of the United States of America." Lest I be thought to exaggerate, I quote the interpretation which his brief puts upon it: "In our view, this clause constitutes a grant of all the executive powers of which the Government is capable." *If that be true, it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones*.

343 U.S. at 640 (emphasis added).

Const. Art. III § 5 (describing powers and duties of Governor); Art. II § 22 (conferring gubernatorial veto).

A. The Executive Vesting Clause Does Give the Governor Dominion Over the Entire Executive Branch.

The Vesting Clause does not define the powers of the executive branch and does not provide that the Governor is vested with some general concept of executive power. Rather, the section utilizes the definite article "the" indicating that a specific thing–"the executive power of the State"–is vested in the Governor. The executive power is defined elsewhere.

Further, the contrast between the executive vesting language and the judicial vesting language of Article IV, § 1 is informative of the scope of the Executive Vesting Clause. Article IV, §1 vests the judicial power of the State, except as to certain administrative agencies, in the courts. Notably, that section also limits the legislature: "The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than those permitted by this Article." N.C. Const. art. IV, §1.

The Governor's across-the-board challenge to SB 512 and HB 488 hinges on a theory that the General Assembly may not deprive a governor of *any* power or jurisdiction of the executive branch. Not only is that notion inconsistent with the General Assembly's power to assign the duties of most executive branch constitutional officers, but it is also unsupported by the language of the Executive

Vesting Clause which, unlike the judiciary's vesting language, contains no express restriction on the General Assembly.

Article IV's proscription on the use of legislative power to deprive the judicial branch of power or to create courts not authorized by the Constitution would be unnecessary if "vesting" power in another branch of government were itself enough to restrict the legislative branch from legislating on the internal divisions of its co-ordinate branches of government. If drafters had intended to stop the General Assembly from legislating on the assignments of authority within the executive branch merely because executive power is "vested' in the Governor, then the drafters would have included some language stating the General Assembly had no power to deprive the Governor of any power or jurisdiction that belongs to the entirety of the executive branch. But they didn't.

In fact, the constitution assumes the General Assembly has the power to make appointments. The executive veto clause contains a veto exception for appointments by the General Assembly to "public office." N.C. Const. art II, §22(5)(a). The veto exception protects the General Assembly's selection of public officers from gubernatorial veto. Without the exception, the Governor would be able to override the General Assembly's choice. The veto exception would not have been necessary if the Constitution did not authorize the General Assembly to exercise an appointment power. The appointments exception to the Governor's veto power is strong evidence that the Constitution authorizes the General Assembly to make appointments.

As amply explained by Legislative Defendant-Appellees, North Carolina does not have a unitary executive and never has. The Constitution creates 10 executive branch offices. That alone demonstrates that the Office of the Governor is not in and of itself the executive branch. Close examination of other language used in Article III highlights the significant difference between the office of the Governor and the whole of the executive branch.

The duties of the Governor are listed at Article III, §5. Among those is: "The Governor may at any time require information in writing from the head of any administrative department or agency upon any subject relating to the duties of *his office*." N.C. Const. art. III, §5(9) (emphasis added). This reflects that the office of the Governor is not the entirety of the executive branch, and underscores the plural, rather than unitary, executive established in the Constitution. If a governor has the constitutional power to control the entire executive department and its myriad administrative agencies, the Constitution would not have to spell out his authority to request information from them.

B. The Faithful Execution Clause Does Not Enlarge the Power of the Governor to Control the Entirety of the Executive Branch.

The Faithful Execution Clause requires that a governor "take care that the laws be faithfully executed." That language does not bestow upon a governor the right to enforce his policy preferences as he goes about executing the laws enacted by the General Assembly, nor does it not imbue in the office of the governor supervisory responsibility over the whole executive branch.

Consider the differences between the United States Constitution and the North Carolina Constitution. The United States Constitution includes a Faithful Execution Clause and a Commissions Clause which together direct the President "shall take Care that the laws be faithfully executed, and shall Commission all the Officers of the United States." U.S. Const. art II, §3. The federal constitution separates the Commissions Clause and the Faithful Execution Clause by a mere comma, rather than placing the Commissions Clause in among appointments authority at Article II, §2 ("The President … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." U.S. Const. art II, §2). This signifies that the Framers contemplated the President will supervise others in their execution of the law.

The United States Supreme Court has treated the Commissions Clause of the federal constitution as a kind of complement to the Faithful Execution Clause—a means of fulfilling his duty to execute the laws: "The Constitution, section 3, Article 2, declares that the President 'shall take care that the laws be faithfully executed,' and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies." *Myers v. United States*, 272 U.S. 52, 133, 47 S. Ct. 21, 32, 71 L. Ed. 160, 172-73, 1926 U.S. LEXIS 35, 134 (1926).

By contrast, the North Carolina Constitution includes an Appointments Clause for officers whose appointments are not otherwise provided for and a Faithful Execution Clause, which is not followed by language comparable to the Commissions Clause of the federal constitution. The lack of such language suggests the opposite of the federal constitution, specifically that the Faithful Execution Clause does not itself grant a governor supervisory authority.

C. The Governor is Not Entitled to Control the Majority of Every Board and Commission with Executive Features.

The Governor's arguments, if adopted by this Court, would cast doubt on the validity of past actions of every single board and commission in which a member (especially a majority) has been appointed by the General Assembly. This is particularly true of boards and commissions which were created by legislation that does not contain a severability clause. See, e.g., Act of Aug. 17, 2004, ch. 189, 2003 N.C. Sess. Law (2004 Reg. Sess.) 757, 757-61 (creating License to Give Trust Fund Commission; General Assembly to appoint the majority **eight** members and Governor to appoint **seven** members; no severability clause); Act of Aug. 16, 2001, ch. 369, 2001 N.C. Sess. Laws 1182, 1182-88 (creating North Carolina Locksmith Licensing Board; General Assembly to appoint **six** members and Governor to appoint **three** members; no severability clause); Act of July 11, 1995, ch. 414, 1995 N.C. Sess. Laws 1100, 1100-10 (creating North Carolina Board for Licensing of Soil Scientists; General Assembly to appoint **four** members and Governor to appoint **three** members; no severability clause). When a statute does not include a severability clause, the absence of such a clause reflects legislative intent that the

entire statute fails if any portion is determined to be invalid. *In re Appeal of Springmoor, Inc.*, 348 N.C. 1, 14, 498 S.E.2d 177, 185 (1998).

In sum, the Governor does not have authority to control the appointments of all or even a majority of boards and commissions with some executive authority.[3] The Vesting Clause and the Faithful Execution Clause, taken together or separately, do not give him that power. Adding the Separation of Powers Clause to his mix does not lead to a different result.

CONCLUSION

The Court should affirm the Superior Court's conclusion appealed by the Governor.

Respectfully submitted the 21st day of November, 2024.

/s/ Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
919.332.2319
N.C. Bar No. 29127
jeanette.doran@nciclorg
Counsel for Amici

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[3] In *People ex rel. Welker v. Bledsoe*, 68 N.C. 457 (1873), the North Carolina Supreme Court found that the General Assembly lacked the authority to make appointments to the Board of Directors of the State Penitentiary based on the express language of Section 10. *Id.* at 464. Under the Supreme Court's interpretation of the 1868 Constitution, the General Assembly could create statutory offices, but it lacked the power to designate how the offices could be filled. The Supreme Court premised its analysis on the text of the 1868 Appointments Clause, not the Vesting Clause and not the Separation of Powers Clause. *See also,* N.C. Const. of 1868, art. III, §10.

CERTIFICATE OF COMPLIANCE

Pursuant to N.C. R. App. P. 28.1(b)(3), counsel for NCICL and JLF certifies that the foregoing brief of amici curiae, which uses 12-point Century type, contains fewer than 3,750 words (not counting parts of the brief excluded by Rule 28(j)(1)) as reported by the word processing software.

Respectfully submitted the 21st day of November, 2024.

/s/ Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
919.332.2319
N.C. Bar No. 29127
jeanette.doran@ncicl.org
Counsel for Amici

CERTIFICATE OF SERVICE

Pursuant to N.C. R. App. P. 26(c), I have served a copy of the foregoing document by email on the following:

WOMBLE BOND DICKINSON (US) LLP
Matthew Tilley
Matthew.Tilley@wbd-us.com
Russ Ferguson
Russ.Ferguson@wbd-us.com
Mike Ingersoll
Mike.Ingersoll@wbd-us.com
Sean E. Andrussier
Sean.Andrussier@wbd-us.com
Emmett Whelan
Emmett.Whelan@wbd-us.com
Attorneys for Legislative Defendants

NC DEPARTMENT OF JUSTICE
Stephanie Brennan
Sbrennan@ncdoj.gov
Amar Majmundar
amajmundar@ncdoj.gov
Attorneys for The State of North Carolina

Phillip T. Reynolds
preynolds@ncdoj.gov *Attorney for EMC Defendants*

BROOKS, PIERCE, MCLENDON, HUMPHREY& LEONARD, L.L.P.
Amanda S. Hawkins
ahawkins@brookspierce.com
Jim W. Phillips, Jr.
jphillips@brookspierce.com Eric M. David edavid@brookspierce.com
Daniel F. E. Smith
dsmith@brookspierce.com
Attorneys for Plaintiff Roy Cooper, Governor of the State of North Carolina

SOUTHERN ENVIRONMENTAL LAW CENTER
Kimberley Hunter
kmeyer@selcnc.org
Brooks Rainey Pearson
bpearson@selcnc.org
Blakely E. Hildebrand
bhildebrand@selcnc.org
Attorneys for Amici Curiae Cape Fear River Watch and Haw River Assembly

POYNER SPRUILL LLP
Edwin M. Speas, Jr.
espeas@poynerspruill.com
Caroline P. Mackie
cmackie@poynerspruill.com
N. Cosmo Zinkow
nzinkow@poynerspruill.com
Attorneys for Amici Curiae Former Governors

Respectfully submitted the 21st day of November, 2024.

/s/ Jeanette K. Doran
2012 Timber Drive
Raleigh, NC 27604
919.332.2319
N.C. Bar No. 29127
jeanette.doran@ncicl.org
Counsel for Amici