

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS _____

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

Plaintiff,

v.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY K.
MOORE, in his official capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; and THE
STATE OF NORTH CAROLINA.

Defendants.

VERIFIED COMPLAINT

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

INTRODUCTION

1. In 2016 and again in 2018, the Supreme Court of North Carolina reaffirmed the separation of powers as a foundational principle of our state government. *See State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016); *Cooper v. Berger* (“*Cooper I*”), 370 N.C. 392 (2018) (citations omitted). In so doing, the Court held that, in order to fulfill the Governor’s constitutional duties and conform with separation-of-

powers principles, the Governor must have sufficient control over administrative bodies that have final executive authority, such as the authority to enforce laws and promulgate rules and regulations, in order to ensure the laws are faithfully executed. *McCrorry*, 368 N.C. at 646 at 256; *Cooper I*, 370 N.C. at 418.

2. Showing flagrant disregard for these constitutional principles, the North Carolina General Assembly takes direct aim at established precedents and once again seeks to significantly interfere with the Governor's constitutionally assigned executive branch duty of election law enforcement and to take much of that power for itself.

3. Like Gollum reaching for the One Ring, Legislative Defendants are possessed by the power it brings. When it comes to seizing control of the enforcement of the State's election laws, neither the clear rulings of the Supreme Court, nor the overwhelming vote of the people, will deter them.

4. To be clear, nothing has changed since the last time Legislative Defendants tried—and failed—to cripple the State Board of Elections, except, of course, the composition of the Supreme Court. But Defendants Berger and Moore hope that is enough—that the new Court will discard the principle of *stare decisis* to give Legislative Defendants what they so desperately want.

5. On October 10, 2023, the General Assembly overrode the Governor's veto and enacted Session Law 2023-139, which attempts to make changes to the composition of the State Board of Elections that are more drastic and intrusive of the Governor's executive duties than those held to be unconstitutional in *Cooper I*.

6. Session Law 2023-139 unconstitutionally infringes on the Governor's executive powers in violation of the separation of powers. N.C. CONST. art. I, § 6; *id.* art. II, § 1; *id.* art. III, §§ 1, 5(4); *Cooper I*, 370 N.C. at 418-22.

7. It also fails to respect fundamental principles of representative government and the basic guarantees of the North Carolina Constitution, thus requiring the Governor to again secure the constitutional rights of his office and protect the constitutional powers allocated to the executive branch of state government by the people.

PARTIES AND JURISDICTION

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

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

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

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

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

13. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, Governor Cooper seeks judgment declaring unconstitutional and enjoining the effectiveness of Parts II, IV, and VIII of Session Law 2023-139.

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

15. Accordingly, this action is properly brought in the Superior Court Division of the General Court of Justice pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and 7A-245(a).

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

FACTS

I. SESSION LAW 2023-139 UNCONSTITUTIONALLY ALTERS THE STATE BOARD OF ELECTIONS

A. The State Board of Elections is an Executive Branch Agency that Exercises Executive Powers.

17. Many of the powers granted to the State Board of Elections under the current law are plainly executive in nature. For example, and without limitation, the State Board of Elections:

- a. has “general supervision over the primaries and elections in the State” with the “authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable so long as they do not conflict with any provisions of” Chapter 163. N.C. Gen. Stat. § 163-22(a);
- b. provides county boards with copies of all election laws and State Board of Elections rules and regulations. *See id.* § 163-22(b);

- c. distributes to the public materials explaining primary and election laws and procedures. *Id.*;
- d. may “remove from office any member of a county board of elections for incompetency, neglect or failure to perform duties, fraud, or for any other satisfactory cause.” *Id.*;
- e. determines “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 elections.” *Id.* § 163-22(e);
- f. prepares, prints, and distributes ballots to county boards. *See id.* § 163-22(f);
- g. certifies to “county boards of elections the names of candidates for district offices who have filed notice of candidacy with the Board and whose names are required to be printed on county ballots.” *Id.* § 163-22(g);
- h. “tabulate[s] the primary and election returns,” “declare[s] the results,” and “prepare[s] abstracts of the votes cast in each county.” *Id.* § 163-22(h);
- i. provides training and screening for poll workers and test voting machines. *See id.* § 163-22(n);
- j. may assist county boards in litigation. *See id.* § 163-25;
- k. The executive director of the State Board of Elections “may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted.” *Id.* § 163-27.1;
- l. creates guidelines “to administer the statewide voter registration system established by [Article 7A of Chapter 163].” *Id.* § 163-82.12;
- m. approves county voter registration plans. *See id.* § 163-82.22(b);
- n. may “modify the general election law time schedule with regard to ascertaining, declaring, and reporting results” for primary elections. *Id.* § 163-104;
- o. certifies to the Secretary of State candidates for office. *See id.* § 163-108(a);

- p. approves county plans addressing elderly or disabled voters. *See id.* § 163-130;
- q. “shall certify the official ballots and voter instructions to be used in every election.” *Id.* § 163-165.3(a);
- r. “shall ensure that official ballots throughout the State” have the required characteristics. *Id.* § 163-165.4;
- s. may extend voting hours if the polls are delayed in opening *See id.* § 163-166.01;
- t. certifies election results. *See id.* § 163-182.15; and
- u. has significant duties with respect to campaign finance regulations. *See id.* § 163-278.22.

18. The State’s 100 county boards of elections also undertake executive functions, including the primary duty of administering elections on the county level.

Among other duties, county boards are authorized:

- a. “To advertise and contract for the printing of ballots and other supplies used in registration and elections; and to provide for the delivery of ballots, pollbooks, and other required papers and materials to the voting places.” N.C. Gen. Stat. § 163-33(6);
- b. “To provide for the purchase, preservation, and maintenance of voting booths, ballot boxes, registration and pollbooks . . . , and equipment used in registration, nominations, and elections; and to cause the voting places to be suitably provided with voting booths and other supplies required by law.” *Id.* § 163-33(7);
- c. “To provide for the issuance of all notices, advertisements, and publications concerning elections required by law.” *Id.* § 163-33(8);
- d. “To receive the returns of primaries and elections, canvass the returns . . . , and to issue certificates of election to county officers and members of the General Assembly except those elected in districts composed of more than one county.” *Id.* § 163-33(9);

- e. “To appoint and remove the board’s clerk, assistant clerks, and other employees.” *Id.* § 163-33(10); and
- f. “To prepare and submit to the proper appropriating officers a budget estimating the cost of elections for the ensuing fiscal year.” *Id.* § 163-33(11).

19. The North Carolina Supreme Court has held that these powers are clearly executive. *Cooper I*, 370 N.C. at 415. (“The Bipartisan State Board established by Session Law 2017-6, which has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, clearly performs primarily executive, rather than legislative or judicial, functions.”); *see also id.* at 421.

B. Session Law 2023-139 Deprives the Governor of Any Control of the State Board of Elections.

20. Before it was amended by Session Law 2023-139, Section 163-19 provided that the State Board of Elections shall consist of five members, no more than three of whom may be from the same political party. Those five members were all appointed by the Governor from a total of eight nominees, with four names submitted by each state party chair of the two largest political parties in the State.

21. A five-member State Board of Elections ensures that, barring a recusal or absence, the State Board of Elections will not be deadlocked and unable to act when it needs to execute the laws.

22. Prior to enactment of Session Law 2023-139, Section 163-19(c) provided that the Governor would fill any vacancy occurring on the State Board of Elections from a list of three nominees submitted by the State party chair of the political party that nominated the vacating member.

23. Section 2.1 of Session Law 2023-139 amends Section 163-19 by increasing the total members of the State Board of Elections from five to eight.

24. Under Section 163-19, as amended, the Governor has no appointment powers with respect to the State Board of Elections. Instead, all eight members are “appointed by an act of the General Assembly as follows:

- (1) Two members appointed by the President Pro Tempore of the Senate.
- (2) Two members appointed by the Speaker of the House of Representatives.
- (3) Two members appointed by the minority leader of the Senate.
- (4) Two members appointed by the minority leader of the House of Representatives.”

N.C. Gen. Stat. § 163-19(b) (as amended by Session Law 2023-139 § 1.2).

25. Section 2.1 of Session Law 2023-139 also amends Section 163-19(c) to remove the Governor’s ability to fill vacancies on the State Board of Elections. Instead, it provides that the General Assembly shall fill the vacancy upon recommendation of the initial appointing authority.” N.C. Gen. Stat. § 163-19(c) (as amended by Session Law 2023-139 § 2.1).

26. Section 2.1 of Session Law 2023-139 amends Section 163-19(e) by permitting either the President Pro Tempore of the Senate or the Speaker of the House of Representatives (depending on the year) to appoint the chair of the Board of Elections if “for any reason”—including deadlock—its members do not select a chair within 30 days after taking the prescribed oath (or within 30 days of a vacancy).

27. Section 8.1 of Session Law 2023-139 permits the President Pro Tempore of the Senate to appoint a chair if one is not selected by January 10, 2024.

28. Session Law 2023-139 amends Section 163-27(b) by requiring the State Board of Elections to fill the position of the Executive Director of the State Board of Elections within 30 days after new appointees take the prescribed oath or after a vacancy occurs. “If for any reason”—including deadlock—“the position of Executive Director is not filled within 30 days . . . the position may be filled by legislative appointment.” N.C. Gen. Stat. § 163-27(b) (as amended by Session Law 2023-139 § 2.5).

29. If an Executive Director is not selected by January 10, 2024, Section 8.3 of Session Law 2023-139 permits the President Pro Tempore of the Senate to make the appointment.

30. Session Law 2023-139 also interferes with the Governor’s ability to ensure that the State’s election-related laws are faithfully executed through the State’s 100 county boards of election.

31. Prior to amendment, Section 163-30 created county board of elections consisting of five members—four appointed by the State Board of Elections (two each from the two political parties having the highest number of registered voters) and one member appointed to be the chair by the Governor.

32. Section 4.1 of Session Law 2023-139 amends Section 163-30(a) to reduce the membership of county boards of election to only four members—one each appointed by President Pro Tempore of the Senate, the Speaker of the House of Representatives, the minority leader of the Senate, and the minority leader of the House of Representatives.

33. Section 4.1 of Session Law 2023-139 also adds Section 163-30(c1), which calls for the evenly-split county boards of elections to select a chair. If no chair is elected within 15 days after the first meeting in July or within 30 days of a vacancy, the position of chair may be filled by either the President Pro Tempore of the Senate or the Speaker of the House of Representatives, depending on the year.

34. Section 8.2 of Session Law 2023-139 permits the President Pro Tempore of the Senate to fill the office of the chair of any county board of election that does not select a chair by January 10, 2024.

C. Session Law 2023-139 Prevents the Governor from Exercising His Constitutional Duty to Ensure that North Carolina's Laws are Faithfully Executed.

35. The North Carolina Supreme Court has already rejected the General Assembly's attempts to deprive the Governor of the ability to appoint a majority of the members of the State Board of Elections as an unconstitutional interference with the Governor's duty to ensure that the laws are faithfully executed. *Cooper I*, 370 N.C. at 418.

36. In *Cooper I*, the General Assembly enacted Session Law 2017-6, which created the Bipartisan State Board of Elections. Session Law 2017-6 provided for the appointment of eight members to the Board by the Governor—four recommended by the party chair with the highest number of registered voters and four recommended by the party chair with the second-highest number of registered voters.

37. The Court invalidated Session Law 2017-6, holding that the Governor must have enough control over an executive agency to ensure that he can

“affirmatively implement the policy decisions” that have been delegated to him. In short, the Governor must at least be able to appoint a working majority of the board members. *Cooper I*, 370 N.C. at 415.

38. After *Cooper I* was decided, recognizing that it could not legislatively override the judicial branch’s interpretation of the North Carolina Constitution, the General Assembly enacted Session Law 2018-133, which submitted a proposed constitutional amendment to North Carolina voters. Session Law 2018-133 sought to add provisions to the State Constitution creating a “Bipartisan State Board of Ethics and Elections Enforcement” with eight members appointed by the Governor:

(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.

S.L. 2018-133 § 1.

39. The proposed constitutional amendment was rejected by 61.60% of North Carolina voters in the November 2018 election.

40. What the General Assembly in 2018 acknowledged would require a constitutional amendment, it now purports to do by statute.

41. Disregarding the North Carolina Supreme Court (strike one) and the people of North Carolina (strike two), the General Assembly has once again swung

and missed in its attempt to exert unconstitutional control over the execution of the laws relating to elections. Defendants' third strike should be their last.

42. Under the Supreme Court's holdings in *McCrorry* and *Cooper I*, Sections II, IV, and VIII of Session Law 2023-139 violate the Separation of Powers and Faithful Execution clauses because they deprive the Governor of the ability to control the policy views and priorities of the executive agency charged with implementing the State's election and campaign finance laws. Despite the Board being an executive agency that exercises final executive power—the State's Chief Executive does not have constitutionally sufficient control over the State Board of Elections.

43. The constitutional violation is even more stark here than in *McCrorry* and *Cooper I*, where the Governor had the ability to appoint at least some members of the commissions at issue. Here, the Governor has no ability to appoint any members of the State Board of Elections.

44. "The relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner." *Cooper I*, 370 N.C. at 417. Here, the Governor has no statutory ability to appoint, supervise, or remove any member of the State Board of Elections.

45. Indeed, as former Chief Justice Martin pointed out in his dissent in *Cooper I*, "*McCrorry* therefore clarified that the Governor must have 'enough control' over a body with final executive authority, such as by an appropriate combination of

appointment and removal powers, to ensure that the laws are faithfully executed.” *Id.* at 423 (Martin, C.J., dissenting) (emphasis added).

46. The Governor is also deprived of the power to appoint members in the event of a vacancy.

47. In addition, the statute is silent as to who may dismiss members, a power the Supreme Court has held must belong to the Governor. *McCrorry*, 368 N.C. at 647.

48. Even if the Governor may remove State Board of Election members for cause or misfeasance, malfeasance, or nonfeasance pursuant to N.C. Gen. Stat. § 143B-13 or his inherent constitutional authority that power would not provide the Governor with sufficient control of the policy views and priorities of the Board of Elections. *Id.* at 646 (“[T]he challenged legislation sharply constrains the Governor’s power to remove members of any of the three commissions, allowing him to do so only for cause.”).

49. Without the authority to appoint or remove a majority of the members of the State Board of Elections, the Governor is unable to adequately supervise the State Board of Elections’ work to ensure faithful execution of the laws. *See McCrorry*, 368 N.C. at 647.

50. The General Assembly has even insulated the State Board of Elections from the Governor’s supervision with respect to litigation. Section 2.4 of Session Law 2023-139 amends Section 163-25 regarding the State Board of Election’s ability to employ private counsel upon the Attorney General’s recommendation. Prior to amendment, Section 163-25 permitted the employment of private counsel “with the

approval of the Governor.” As amended, Section 163-25 now requires approval of the General Assembly before the State Board of Elections may employ private counsel.

51. Because the Governor has no ability to appoint a majority of members of the State Board of Elections or any county board of elections, and—at most—a constrained ability to remove them, Session Law 2023-139 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

52. Session Law 2023-139 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints, allowing the General Assembly—not the Governor—to “exert most of the control over the executive policy that is implemented” by the State Board of Elections. *See McCrory*, 368 N.C. at 647.

53. Taken individually, the provisions of Parts II, IV, and VIII of Session Law 2023-139 violate the faithful execution and separation of powers clauses by:

- a. Eliminating the Governor’s power to appoint or remove a majority of members of the Board of Elections and instead providing to legislators all appointments to that critical body;
- b. Eliminating the ability of a majority of the members of the Board of Elections, selected by the Governor, to elect a chair;
- c. Enabling the Speaker of the House or the President Pro Tempore of the Senate to select the chair in the event that the evenly split Board does not do so;

- d. Eliminating the Governor's ability to appoint the members of the Board of Elections who, in turn, select the members of each county board of elections and instead providing to legislators all appointments to county boards of elections;
- e. Eliminating the ability of a majority of the members of the Board of Elections, selected by the Governor, to select an Executive Director of the Board of Elections; and
- f. Empowering the Speaker of the House or the President Pro Tempore of the Senate to select the Executive Director of the Board of Elections in the event that the evenly split Board does not do so.

54. Taken as a whole, Sections 163-19, -25, -27 and -30 as amended by Session Law 2023-139, prevent the Governor from performing his core function under the North Carolina Constitution to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4).

55. Taken as a whole, the General Assembly's seizure of control over the execution of the laws from the Governor by enactment of Parts II, VI, and VIII of Session Law 2023-139 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

56. Other provisions amended or enacted by Session Law 2023-139 reflecting or implementing the unconstitutional changes made by Parts II, VI, and VIII of Session Law 2023-139 must also be stricken. *See, e.g.*, S.L. 2023-139 §§ 5.2 & 5.5 (changing the votes needed to order a new election or nominate a presidential primary

candidate from four to five); *id.* § 2.2 (amending the number of members required to call a meeting under Section 163-20).

COUNT 1: DECLARATORY JUDGMENT (FACIAL CHALLENGE)
Parts II, IV, and VIII of Session Law 2023-139 Restructuring the Board of Elections Facially Violate the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution

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

58. A present and real controversy exists between the parties as to the constitutionality of Parts II, IV, and VIII of Session Law 2023-139.

59. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 163-19, -25, -27, and -30 in Parts II, IV, and VIII of Session Law 2023-139 unconstitutionally violate the Separate of Powers Clause that is “a cornerstone of our state and federal governments.” *Wallace*, 304 N.C. at 601.

60. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 163-19, -25, -27, and -30 in Parts II, IV, and VIII of Session Law 2023-139 prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he Separation of Powers Clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

61. Accordingly, individually, and as whole, Parts II, IV, and VIII of Session Law 2023-139 facially violate the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

62. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. §§ 163-19, -25, -27, and -30 in Parts II, IV, and VIII of Session Law 2023-139 and other amendments or additions reflecting changes made to those provisions are unconstitutional and are therefore void and of no effect.

PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows:

1. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that Parts II, IV, and VIII of Session Law 2023-139 are unconstitutional and therefore void and of no effect; and
2. That the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 17th day of October, 2023

/s/ Eric M. David

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VERIFICATION

I, Kristi Jones, being first duly sworn, depose and say:

I am chief of staff to the Governor of the State of North Carolina, Roy A. Cooper, III, and I have the authority to execute this verification on behalf of the Governor, acting in his official capacity.

I have read the Complaint filed in this matter on behalf of Governor Cooper, acting in his official capacity, and can verify based on personal knowledge to the factual contents thereof, and that the same is true to the best of my knowledge or are believed by me to be true based upon reasonable inquiry.

Kristi Jones

KRISTI JONES
Chief of Staff
Office of the Governor of the
State of North Carolina

Wake County, North Carolina

I certify that the following person personally appeared before me this day, acknowledging to me that she signed the foregoing document: **Kristi Jones**

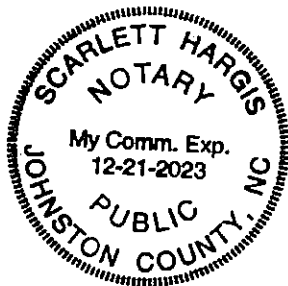
Date: Oct. 17, 2023

Scarlett Hargis

[Official Signature of Notary]

[Official Seal]

Scarlett Hargis, Notary Public
[Notary's printed or typed name]



My Commission Expires: Dec. 21, 2023