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, and in his individual capacity,

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 FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

BY THE HONORABLE JAMES G. MARTIN, THE HONORABLE JAMES B. HUNT, JR., THE HONORABLE MICHAEL F. EASLEY, THE HONORABLE BEVERLY E. PERDUE, AND THE HONORABLE PATRICK L. MCCRORY

NOW COME the Honorable James G. Martin, the Honorable James B. Hunt, Jr., the Honorable Michael F. Easley, the Honorable Beverly E. Perdue, and the Honorable Patrick L. McCrory (collectively, the "Former Governors") and request leave to file an *amici curiae* brief in support of Plaintiff Governor Cooper's Motion for Temporary Restraining Order and Preliminary Injunction. The proposed brief is attached to this Motion. In support of this Motion, the Former Governors show the Court as follows:

1. The Former Governors seek permission to participate as *amici curiae* to present their unique perspective on this matter as the five living former Governors of the State of North Carolina.

2. Representing a broad coalition of political viewpoints and having served over a range of political eras, Former Governors stand united in their belief that separation of powers is a constitutional guiding principle to be cherished and championed.

3. The challenged ballot questions seek to destroy separation of powers by misleading voters and are therefore contrary to constitutional requirements and the interests of the Former Governors in preserving the power, status, and dignity of the Office of Governor and the executive branch of our State government.

4. If permitted to participate as *amici curiae*, the Former Governors will present arguments emphasizing the constitutional necessity for judicial intervention to prevent the ballot questions set forth in Session Laws 2018-117 and 2018-118 from appearing on the November 2018 ballot.

5. The undersigned counsel agreed to prepare this brief for the Former Governors pro bono publico and without compensation.

WHEREFORE, the Former Governors respectfully request that this Court:

a. Grant them leave to submit the accompanying *Amici Curiae* brief in support of Plaintiff Governor Cooper's Motion for Temporary Restraining Order and Preliminary Injunction;

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on this day a copy of the foregoing MOTION was served on the following parties via e-mail and U.S. Mail:

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This the 14th day of August, 2018.

BROOKS, PIERCE, McLENDON,
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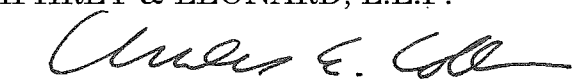
By: 

Charles E. Coble

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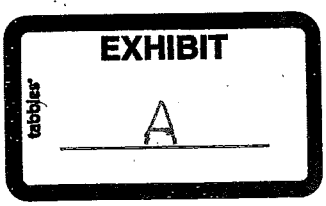
Defendants.

BRIEF OF THE HONORABLE JAMES G. MARTIN, THE HONORABLE JAMES B. HUNT, JR., THE HONORABLE MICHAEL F. EASLEY, THE HONORABLE BEVERLY E. PERDUE, AND THE HONORABLE PATRICK L. MCCRORY AS *AMICI CURIAE* SUPPORTING PLAINTIFF



ARGUMENT

The five living former Governors of the State of North Carolina join together as Amici to urge the Court to enjoin the ballot questions set forth in Session Laws 2018-117 and 2018-118 from appearing on the November 2018 ballot. They do so because the General Assembly's ballot questions mislead voters. As explained below, the descriptions of the proposed constitutional amendments contained in those ballot questions do not fairly capture the substance or effect of the amendments, particularly the dramatic transfer of executive power away from the Governor and to the General Assembly and the elimination of existing constitutional checks on legislative power. Put plainly, if the people of North Carolina are going to be asked to fundamentally alter the structure of their State government, the proposal before them should be fairly stated.

Although the Amici's political affiliation is bipartisan, with two Republican and three Democratic former Governors, the interest they advance in this Brief is decidedly *non*partisan. Amici are uniquely positioned because they understand through shared experience as our State's Chief Executive the critical role separation of powers plays in the organization and operation of our State government. Representing a broad coalition of political viewpoints and having served as the State's Chief Executives over the last five decades, Amici stand united in their belief that separation of powers and checks and balances are core constitutional principles to be cherished and championed.

During their terms of office, Amici saw successive General Assemblies seek to usurp—through statute—the Governor's authority to make appointments within the executive branch. These efforts marked every possible political configuration over the course of four decades: Democratic General Assembly and Democratic Governor, Democratic General Assembly and Republican Governor, Republican General Assembly and Republican Governor, and now Republican General Assembly and Democratic Governor. And, in each case, our Supreme Court struck down that legislative overreach as contrary to the separation of powers clause of the North Carolina Constitution. *See Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016); *State ex rel. Wallace v. Bone*, 304 N.C. 591, 607, 286 S.E.2d 79, 88 (1982).

With its prior statutory attempts to usurp executive authority having been defeated—or, in constitutional parlance, "checked" by separation of powers—the General Assembly now comes forward with an historic effort to circumvent that constitutional command through amendment. Moreover, the General Assembly proposes to eliminate and weaken longstanding checks on legislative power by enshrining constitutional language that could be read to eliminate the Governor's veto power and by increasing legislative control over the judiciary—the final bulwark against legislative excess.

Although the people of North Carolina are free to water down, weaken, or even erase separation of powers and checks and balances from their Constitution, they are constitutionally entitled to a fair representation of the grave decisions they face on

the ballot. If the General Assembly puts amendments to the voters that would drastically reorder—in its favor—the constitutional balance of our State government, it must faithfully present the proposed amendments as such in the ballot questions the people consider in the voting booth.

The General Assembly has not done so with respect to the ballot questions at issue here. Indeed, it has not even come close. These ballot questions, through legislative intent and omission, deceptively present the people with seemingly innocuous, "clarifying" and "nonpartisan" proposed constitutional amendments. The ballot questions therefore conceal the seismic shift the *actual* proposed amendments would bring about by giving unchecked power to the legislature at the expense of the coordinate branches. It is the motto of this State "to be rather than to seem." If the legislature wishes to exercise executive powers and eliminate constitutional checks and balances, it must present amendments to the people that reflect what they actually are.

The General Assembly brushes aside this basic constitutional deficiency in its ballot questions by arguing that opponents of the proposed amendments may simply "counter any alleged misleading language through their own political speech." (Defs. Br. at 30). That position appears to draw from the hallowed First Amendment principle that the appropriate response to false political speech is more speech. *See, e.g.*, *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not

enforced silence."). In so arguing, the General Assembly fundamentally misapprehends that the ballot—unlike the airwaves and editorial pages—must be free of partisan spin as a constitutional matter. The General Assembly must speak in the plainest terms, not politically, when it seeks the consent of the governed to amend our organic law.

In sum, because the ballot questions at issue mislead voters as to the consequence of voting for the proposed constitutional amendments, the remedy is not more political speech, but rather an order barring those questions from appearing on the November ballot. Amici therefore fully support entry of the injunctive relief Governor Cooper and the Bipartisan State Board of Elections and Ethics Enforcement seek in this action.

I. The ballot questions strip the Governor of constitutionally granted powers, yet nowhere mention the Governor or the fundamental rebalancing of executive and legislative power.

The North Carolina Constitution, to recognize and establish "the great, general, and essential principles of liberty and free government," declares in no uncertain terms 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. preamble; *id.* art. I, § 2 (emphases added).

This constitutional language reflects the foundational principle of this State and Nation, that "governments are instituted among men, deriving their just powers

from the consent of the governed. . . ." United States Declaration of Independence ¶ 2 (1776) (emphasis added). As our Supreme Court has aptly explained:

> Our government is founded on the consent of the governed. *A free ballot* and a fair count *must be held inviolable* to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746, 747 (1937) (emphases added); *see also, e.g., Jenkins v. State Bd. of Elections of N. Carolina*, 180 N.C. 169, 104 S.E. 346, 350 (1920) (Clark, C. J., concurring) ("In a country like ours, whose government is based avowedly upon the 'consent of the governed,' *a full and free declaration of that will*, and its return as cast, is of the utmost importance." (emphasis added)).

The two proposed amendments at issue here seek the consent of the governed, but mandate ballot questions that do not tell the people what their consent—what a vote "for" the amendments—would authorize. In short, the actual amendments would strip powers from the Governor, transfer those powers to the legislature, and eliminate checks and balances on legislative power. But the ballot questions for those amendments ***completely fail to mention the Governor at all.*** *See* Session Law 2018-117, § 5; Session Law 2018-118, § 6.

The only mention of executive power is in the Separation of Powers Ballot Question and implies that legislators would now be prohibited from "exercising executive or judicial authority"—something that the separation-of-powers clause already prevents. *See State ex rel. Wallace v. Bone*, 304 N.C. 591, 607, 286 S.E.2d 79, 88 (1982). (As explained below, the effect of the proposed amendments would render this prohibition meaningless, as they would transfer core executive authority—

including the power to appoint the members of executive boards and commissions—to the legislature.) The Separation of Powers Amendments would:

- Overrule our Supreme Court's opinions in *Cooper* and *McCrory*;
- Eliminate the Governor's power to appoint executive officers and transfer that power to the legislature;
- Empower the legislature to mandate particular judicial appointments;
- Empower legislative appointment of the entire board of elections; and
- Enshrine a two-party system for appointment of the board of elections (even if more than two political parties later arise in the future).

See Session Law 2018-117, §§ 1–4. But the Separation of Powers Ballot Question does not indicate, suggest, hint, or even imply that *any* of these fundamental changes would take place if the voters approve the question. While a ballot question does not require excessive detail or a reprinting of the entire constitutional text, at the very least a clear and fair statement of the gist of the amendment must be presented to the voters.

Similarly, the Judicial Vacancies Amendment and its associated ballot question fail to fairly present constitutional changes to the people. For example, in the section establishing new legislative authority to recommend and appoint judges and justices, the proposed new constitutional language is notable *for what it omits*:

> SECTION 5. Subsection (5) of Section 22 of Article II of the North Carolina Constitution reads as rewritten:
>
> "(5) Other exceptions [to the Governor's veto power]. 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."

Session Law 2018-118, § 5 (bold, italics emphasis added; strikethrough and underline original). Because the proposed new constitutional language fails to include the prohibition on "other matter," legislative acts to recommend or appoint nominees to judicial office may include "other matter" and thus be fully available to sidestep the Governor's veto. Nowhere, however, does the Judicial Vacancies Ballot Question explain that it empowers the legislature to enact substantive laws that are not subject to the Governor's veto. Likewise, the Judicial Vacancies Ballot Question fails to explain that it deletes existing constitutional language and eliminates the Governor's

constitutional power to appoint vacancies to judicial offices. *See* Session Law 2018-118, § 4 ("Section 19 of Article IV of the North Carolina Constitution is repealed").

Fundamentally, the consent of the governed is meaningless if that consent is secured through false information from the government. If these two ballot questions go to the people, they will be told that a vote "for" those amendments will authorize a new elections board, clarify legislative and judicial appointment authority, prohibit legislators from exercising powers of the other branches, and establish a nonpartisan merit-based system for electing judges. *See* Session Law 2018-117, § 5; Session Law 2018-118, § 6. The actual amendments, however, do none of those things. Instead, they fundamentally shift executive power from the Governor to the legislature, effectively establishing a form of parliamentary government in North Carolina.

Our Supreme Court has recognized that it is the "distinctive purpose" of the executive branch of State government to ensure that the laws are faithfully executed. *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250. That was the primary task of each of the Governors who appear as Amici here. Although the proposed amendments would not, on their face, repeal the Governor's duty to faithfully execute the laws, they would severely impair the Governor's ability to fulfill that duty. Our people elect one Governor. Nearly all he or she can accomplish is accomplished through those the Governor appoints to carry out policies he or she previewed when running for Governor. Appointees to executive branch boards and commissions are in *many* instances the people charged with the authority to execute and enforce the laws. They make rules, levy fines, permit and license activity, and make the numerous

discretionary decisions necessary to implement substantive law. Just like cabinet secretaries and executive branch employees, appointees are a critical mechanism through which the Governor fulfills the executive branch's distinctive purpose. Transferring to the legislature the power to appoint executive officers—the clear objective of the Separation of Powers Amendment—fundamentally impairs the people's Constitutional vision for the Governor.

With such fundamental corrosion of the constitutional separation of the three branches of government, how will the Governor, Council of State, and executive branch fulfill their governmental roles? If the Governor remains duty-bound to execute the laws but lacks the constitutional power to do so, who will be accountable to the people—the Governor who no longer controls executive boards and commissions, or the legislature, who does (but has no corresponding duty of faithful execution)?

"The accumulation of all powers Legislative, Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). The proposed amendments are an attempt by the legislature to accumulate both executive and judicial power in its own hands, with no explanation on the official ballot of that fundamental change in governance to the people.

The constitutional amendments are unmistakably intended to eliminate checks and balances on legislative power and hollow out the core of the Governor's

executive power. Before the people authorize such a drastic and fundamental re-balancing of the powers within our State's government, they must be asked to do so in frank, fair, and plain language. The ballot questions fail to do so by a wide margin, intentionally obscuring the truth about the consequences of the proposed amendments and misleading the voters into the unwitting destruction of foundational principles of North Carolina government. The legislatively-sponsored deception embodied in the ballot questions at issue should not proceed. This Court should enjoin it forthwith.

II. Our State's government consists of three distinct, separate branches. The Governor and the courts have a duty to check the legislature when it abuses the mouthpiece of the State to speak solely on its own behalf.

Legislative Defendants[1] assert in their opposition brief that Governor Cooper "and the Board Defendants seek a mandatory injunction that would *prevent the State* from referring to North Carolina voters lawfully adopted and ratified constitutional amendments and the accompanying ballot questions. . . ." Leg. Defs. Br. p. 12 (emphasis added). Legislative Defendants attempt, repeatedly, to treat the legislature alone as "the State." The legislature is not the State of North Carolina. *Cf.* THE FEDERALIST No. 71 (Alexander Hamilton) ("The representatives of the people, in a popular assembly, seem sometimes to fancy that that they are the people themselves, and betray strong impatience and disgust at the least sign of opposition

[1] For ease of reference, this brief uses "Legislative Defendants" to refer to 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 of the Speaker of the North Carolina House of Representatives.

from any other quarter. . . ."). Instead, the State consists of the people and their three co-equal and coordinate branches of government. When the legislature oversteps its authority, it is incumbent upon both the Governor and the judiciary to respond by protecting and enforcing constitutional guarantees.

Legislative Defendants acknowledge that the North Carolina Constitution does not "condone misleading, unfair, or inaccurate language on the ballot." Leg. Def. Br. p. 14. In the face of this acknowledgment, however, Legislative Defendants defend ballot questions that seek to deceive the people by placing the imprimatur of *the State* on a sham originating solely with *the legislature*. This Court should not permit such deception of the people by their government.

The State has no political affiliation; it represents the very heart of the democratic republic that the people have vested with the powers of government. When the State speaks through information presented to the people on the ballots they will consider in the voting booth, its speech must be unbiased, accurate, and credible. If allowed to stand, the ballot questions themselves—clothed with the appearance of that credibility—will be the last thing each voter would see before casting a vote for or against each constitutional amendment. But the questions asked do not begin to present what a vote of approval would authorize. The General Assembly's attempt to commandeer the mouthpiece of the State to increase legislative power through deception must not stand.

Separation and distribution of governmental powers require the judiciary to "interpret[] the laws and, through its power of judicial review, determine[] whether

they comply with the constitution." *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250. Amici believe that application of the agreed constitutional standard of fairness, forthrightness, and accuracy (*see* Leg. Def. Br. p. 14) requires this Court to enjoin the proposed ballot questions to preserve the integrity of the State's official speech. Consistent with that interpretation and recognizing the constitutional requirement that ballot questions be "readily understandable" and "fair and nondiscriminatory", prior General Assemblies have statutorily required the constitutional principles of fairness, evenhandedness, and governmental integrity to be reflected in the ballot. *See* N.C. Gen. Stat. § 163A-1108. Truly, the North Carolina Constitution "should be interpreted so as to carry out the general principles of the government and not defeat them." *Jenkins v. State Bd. of Elections of N. Carolina*, 180 N.C. 169, 104 S.E. 346, 349 (1920).

Before Amici entered into the duties of the Office of Governor, each of them took an oath to support and maintain "the Constitution and laws of the United States, and the Constitution and laws of North Carolina." *See* N.C. CONST. art. III, § 4; art. VI, § 7. Each of the members of this Court took a similar oath when joining the bar, and again when entering judicial office. *E.g.* N.C. CONST. art. VI, § 7; N.C. Gen. Stat. § 84-24. And each member of the legislature took the same oath. *See* N.C. Gen. Stat. § 11-7.

The ballot questions that the legislature seeks to submit to the people betray these solemn oaths. It is, therefore, incumbent upon the other two branches of government to check that legislative excess. Indeed, the Board of Elections has

independently upheld its oath by requesting the same injunctive relief as that sought by the Governor, to avoid "participat[ing] in violating article XIII and article I of the North Carolina Constitution." Answer and Crossclaims p. 19. Governor Cooper and the Board of Elections are entitled to the injunctive relief sought in this action.

CONCLUSION

Since 1776, the people of North Carolina have chosen to allocate governmental power and authority among three branches. On the day *before* the people adopted their first constitution, they enshrined separation of powers in the Declaration of Rights. *See, e.g., Corum v. Univ. of N. Carolina through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289–90 (1992). The people constructed their three branches of government upon the foundation of separation of powers to keep governmental powers "forever separate and distinct" and ensure that no one branch could arrogate power to itself and impose its unchecked agenda on the people.

Although the General Assembly is able to propose new forms of government to the people, such fundamental, startling changes as those proposed here must be fully and clearly stated. These ballot questions do not approach that statement; on the contrary, these ballot questions mislead the voters.

Accordingly, this Court should enjoin the Bipartisan State Board of Elections and Ethics Enforcement from including the Separation of Powers Ballot Question and the Judicial Vacancies Ballot Question on the ballot for the November 2018 general election.

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

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This the 14th day of August, 2018.

BROOKS, PIERCE, McLENDON,
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By: _____
Daniel F. E. Smith