

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.

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.”

*McCrorry 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 *McCrorry 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; *McCrorry 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 *McCrorry 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 *McCrorry 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,"

*McCrorry 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 *McCrorry 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.



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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 28<sup>th</sup> 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 28<sup>th</sup> 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."~~



law. **SECTION 3.** Except as otherwise provided, this act is effective when it becomes  
In the General Assembly read three times and ratified this the 24<sup>th</sup> 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 4<sup>th</sup> day  
of August, 2018.

s/ Sarah Lang Holland  
Senate Principal Clerk